

A PATH FORWARD ON ENERGY POLICY

October 27, 2015

CLE Materials

PARTISANSHIP AND ENERGY POLICY

South Carolina Republican Bob Inglis served six terms in the House and, after two trips to Antarctica to meet with climate scientists, became a vocal proponent of carbon pricing, a rarity in his party. After losing the 2010 primary to a Tea Party challenger, Inglis founded the Energy & Enterprise Initiative at George Mason University, which promotes “conservative solutions to America’s energy and climate challenges.” In conversation with Wall Street Journal reporter, Amy Harder, Inglis will provide a unique perspective on how to craft sensible energy policy in a time of bitter partisanship.

1. Energy Partisanship
2. Interest Groups and Environmental Policy: Inconsistent Positions and Missed Opportunities
3. Bob Inglis: Climate Change and the Republican Party
4. This Man Is America’s Best Hope for Near-Term Climate Action

ENERGY PARTISANSHIP

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Whether the topic is greenhouse gas emissions from power plants, the Keystone XL Pipeline, hydraulic fracturing, offshore drilling, or renewable energy, much of the U.S. policy dialogue about energy and climate change is deeply partisan. Republicans and Democrats debate individual issues in vitriolic sound bites that indicate minimal common ground. For example, those favoring robust action on climate change are charged with engaging in a “War on Coal.” Those opposed are labeled “members of the Flat Earth Society.” Set against these dysfunctional climate and energy politics, how can progress be made? For those that accept the science of climate change, this has become a critical question. An emerging body of psychological research indicates that strategies attempting to persuade those with opposing views with additional scientific evidence have limited effectiveness. Providing more information does not change minds because (1) it does not take moral and cultural worldview differences into account and/or (2) it is presented in ways that do not adequately acknowledge how people’s perceptions of the reliability and trustworthiness of communicators shape their acceptance of that information.

This Article provides a novel analysis of how to make progress on energy and climate change issues by translating this emerging psychological research into a framework for action. It proposes two interconnected strategies – substantive and structural – for moving past imbedded

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partisanship and political dysfunction. Substantively, the Article argues for refocusing regulatory efforts on areas where a greater degree of consensus may be possible, such as economic development and disaster resilience. Structurally, it proposes a shift to arenas that are less gridlocked by energy partisanship than the legislative branch of the federal government, such as other branches of the federal government, state and local levels, and corporate and private sector actors. By drawing on case studies and empirical data, including interviews with key stakeholders, this Article illustrates possibilities for progress under this framework.

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INTRODUCTION

In January 2015, during the lengthy debate over the Keystone XL pipeline legislation that President Obama had promised to and ultimately did veto, the U.S. Senate passed a “landmark” resolution.¹

¹ The Keystone XL Pipeline is a proposed 1,179 mile oil pipeline project that would run from Alberta Canada to Nebraska. See TransCanada, Keystone XL Pipeline, About, <http://keystone-xl.com/about/the-keystone-xl-oil-pipeline-project/>. There is a substantial partisan divide in Congressional support for this project. See *All 45 Republican Senators Call on Obama to Approve Keystone XL Pipeline*, HUFFINGTON POST, Feb. 11, 2014, http://www.huffingtonpost.com/2014/02/11/republican-senators-keystone-xl_n_4769703.html; Pew Research Center for the People and the Press, *Keystone XL Pipeline Divides Democrats*, Mar. 19, 2014, <http://www.people-press.org/2014/03/19/keystone-xl-pipeline-divides-democrats/>. For a discussion of the Senate’s failure to override President Obama’s veto, see Coral Davenport, *Senate Fails to Override Obama’s Keystone Pipeline Veto*, N.Y. TIMES, Mar. 4, 2015, http://www.nytimes.com/2015/03/05/us/senate-fails-to-override-obamas-keystone-pipeline-veto.html?_r=0.

Senators agreed, with only one “no” vote, that “climate change is real and is not a hoax.”² However, Republican Senators then proceeded to block two other measures linking climate change to human activity.³ Senator Inhofe explained his contrasting votes by stating that: “Climate is changing, ... has always changed, and always will.... The hoax is that there are some people that are so arrogant to think that they are so powerful that they can change climate. Man can’t change climate.”⁴

Apparently to prove his point, a few weeks later Senator Inhofe tossed a large snowball on the Senate floor: “You know what this is? It’s a snowball, just from outside here. So it’s very, very cold out. Very unseasonal. So, Mr. President, catch this!”⁵ Media reaction was divided. Fox News applauded the Senator’s snowballing of President Obama while other media outlets labeled it an “embarrassment” for the nation and the Republican Party.⁶ Jon Stewart lampooned the incident on the *Daily Show* in a segment headlined *Grumpy Cold Men*. “You think global warming is a hoax because you — in February — were able to collect *one* ball’s worth of snow?” Stewart asked. “Clearly, if global warming was a problem,” Stewart said, mocking the Senator’s voice, “I would only be able to grab lava balls.”⁷

Senator Inhofe’s snowball stunt may provide plenty of fodder for comedians, but it only underlines a far more serious problem. Whether the topic is greenhouse gas emissions from power plants, the Keystone XL Pipeline, hydraulic fracturing, offshore drilling, or renewable energy, much of the U.S. policy dialogue about energy and climate change is deeply partisan.⁸ Republicans and Democrats debate

² Jeffrey Kluger, *The Senate Discovers Climate Change!*, TIME, Jan. 23, 2015, <http://time.com/3680447/senate-climate-change/>; Frank Thorp & Carrie Dann, *Senate Votes 98-1 That ‘Climate Change is Not a Hoax’*, NBC NEWS, Jan. 21, 2015, <http://www.nbcnews.com/politics/congress/senate-votes-98-1-climate-change-not-hoax-n290831>.

³ Thorp & Dann, *supra* note 2.

⁴ *Id.*

⁵ ABC News, Sen. Jim Inhofe Throws Snowball on Senate Floor in Attempt to Debunk Climate Change, Feb 26, 2015, <http://abcnews.go.com/Politics/sen-jim-ihofe-throws-snowball-senate-floor-attempt/story?id=29255635>.

⁶ *Compare Lawmaker Tosses Snowball on Floor to Disprove Global Warming*, FOX NEWS INSIDER, Feb 28, 2015, <http://insider.foxnews.com/2015/02/28/sen-jim-ihofe-tosses-snowball-senate-floor-disprove-global-warming> with Editorial Board, *Sen. Jim Inhofe Embarrasses the GOP and the US*, WASH. POST, Mar. 1, 2015, http://www.washingtonpost.com/opinions/a-snowballs-chance/2015/03/01/46e9e00e-bec8-11e4-bdfa-b8e8f594e6ee_story.html.

⁷ *The Daily Show with Jon Stewart*, Mar. 2, 2015, <http://thedailyshow.cc.com/videos/2i8i0f/grumpy-cold-men>.

⁸ For examples of partisan exchanges over support for renewable energy technologies like solar and wind power, see, e.g., David Horsey, *Koch Brothers and Big Utilities Campaign to Unplug Solar Power*, LA TIMES, Apr. 23, 2014, at <http://touch.latimes.com/#section/-1/article/p2p->

individual issues in vitriolic sound bites that indicate minimal common ground.⁹ For instance, when the Obama Administration announced its Clean Power Plan for cutting carbon pollution from the power sector in June 2014, Republicans were quick to condemn the new standards as a “war on coal.”¹⁰ Senator Chris Murphy (D-CT) responded that: “This is not a war on coal. This is a war on ignorance and negligence.”¹¹ Secretary of State John Kerry went a step further, mocking “the critics and the naysayers and the members of the Flat Earth Society.”¹²

Numerous polls and studies reinforce that these exchanges form part of a broader pattern: The country has become more split along partisan lines in recent years, particularly with respect to environmental protection and climate action.¹³ The “persistent gap” in views of Republicans and Democrats on the issue of climate change suggests that it “has joined a short list of issues like gun control or taxes that define what it means to be a Republican or

[79989053](#); Dina Cappiello & Matthew Daly, *Republicans, Democrats at Odds on Energy Issues*, ASSOC. PRESS-NORC CENTER FOR PUBLIC AFFAIRS RESEARCH, June 14, 2012, <http://www.apnorc.org/news-media/Pages/News+Media/republicans-democrats-at-odds-on-energy-issues.aspx>; Juliet Eilperin & Jon Cohen, *Support for Federal Backing of Renewables Slips, Driven by GOP Skepticism*, WASHINGTON POST, Nov. 10, 2011. *But see* Grace Wyler, *A War over Solar Power is Raging Within the GOP*, NEW REPUBLIC, Nov. 21, 2013, <http://www.newrepublic.com/article/115582/solar-power-fight-raging-gop>. On divisions over the need for environmental regulation of hydraulic fracturing (fracking) and deepwater drilling for oil and gas, *see* PEW RESEARCH CENTER, ENERGY: KEY DATA POINTS, Jan. 27, 2014 (finding “Nearly eight in-ten Republicans (79%) – and 90% of Republicans and Republican leaners who agree with the Tea Party – support allowing more offshore oil and gas drilling, compared with 44% of Democrats”); Ben Geman, *Senate Republicans Take Aim at Obama’s Gas ‘Fracking’ Regulations*, THE HILL, Mar. 29, 2012, at <http://thehill.com/policy/energy-environment/218969-senate-republicans-take-aim-at-federal-gas-fracking-rules>; *cf* David B. Spence, *Responsible Shale Gas Production: Moral Outrage v. Cool Analysis*, 25 FORDHAM ENVTL. L. REV. 141 (2013) (exploring how to produce shale gas responsibly in a polarized environment). On the desirability of energy efficiency measures such as smart grids and smart meters, *see, e.g.*, Felicity Barringer, *New Electricity Meters Stir Fears*, N.Y. TIMES, Jan. 30, 2011, <http://www.nytimes.com/2011/01/31/science/earth/31meters.html?pagewanted=all>.

⁹ While these issues do not always divide neatly along party lines – for example, Democrats from coal-dependent states often oppose the new power plant standards – partisan politics play an important role in the debates. *See infra* Part I.

¹⁰ Edward Felker, *Lawmakers Take Partisan Swipes Over EPA Carbon Rule*, ENERGY GUARDIAN, July 30, 2014. Republicans also made it clear that they planned to introduce legislation to block the regulations. Subsequently, lawsuits were filed against the EPA regulations by a suite of coal-dependent states and mining companies. Neela Banerjee, *12 States Sue the EPA Over Proposed Power Plant Regulations*, L.A. TIMES, Aug. 4, 2014, <http://www.latimes.com/business/la-fi-epa-lawsuit-20140805-story.html>.

¹¹ Felker, *id.*

¹² Patrick Goodenough, *Kerry Mocks Climate Skeptics: ‘Flat Earth Society’*, CNSNews.com, May 19, 2014, <http://cnsnews.com/news/article/patrick-goodenough/kerry-mocks-climate-skeptics-flat-earth-society>. Secretary of State Kerry then went on to assert that addressing climate change “is not a matter of politics or partisanship: it’s a matter of science and stewardship.” *Id.*

¹³ *See infra* Part I.

Democrat.”¹⁴ These partisan disagreements constrain possibilities for legislative action¹⁵ and for U.S. leadership in international negotiations,¹⁶ a major problem if one accepts consensus climate change science on the urgency of action.¹⁷ Moreover, an emerging body of psychological research indicates that these differences cannot be overcome simply by presenting politicians and the public with more and better scientific data; strongly divided partisan views are

¹⁴ Matthew C. Nisbet, *Communicating Climate Change: Why Frames Matter for Public Engagement*, ENVIRONMENT (Mar.-Apr., 2009).

¹⁵ The early years of the Obama Administration offered the most favorable political conditions in two decades for passing climate legislation. Even so, legislation to establish a nationwide cap-and-trade program for greenhouse gas emissions was roundly defeated in Congress, and there has been no hint of equivalent climate legislation emerging from the federal legislature since. For the defeated legislation, see The American Clean Energy and Security Act of 2009 (Waxman-Markey Bill), H.R. 2454 of the 111th Congress. Close observers of the U.S. political process note that cap and trade “are going to be fairly dirty words for a while,” Telephone interview, participant 9 (Dec. 3, 2012), and that “[a]lthough there’s always a little buzz about carbon tax, deficits etc, fiscal cliff, I don’t think a carbon tax is going to be a palatable option anytime soon.” In person interview, participant 5 (Nov. 14, 2012). The 2014 midterm elections merely solidified the improbability of such legislation during the remainder of the Obama Administration’s time in office. This legislative impasse has left executive action by the Obama Administration as the primary way in which climate change is being addressed at a federal level in the United States, with regional, tribal, state, local, and private action as an important complement. See *infra* Section C.B.2.

¹⁶ The agreement at the December 2014 climate change negotiations, the Lima Call for Action, calls upon all parties to nominate emissions reduction commitments prior to the meeting that will take place in Paris in December 2015. The Paris meeting is intended to conclude negotiations on a new, comprehensive climate agreement that will require emissions cuts from developed countries like the United States and developing countries like China. However, these voluntary commitments likely will still fall substantially short of what scientists say are needed. See Lima Call for Action, Decision -/CP.20, Dec. 14, 2014, http://unfccc.int/files/meetings/lima_dec_2014/application/pdf/auv_cop20_lima_call_for_climate_action.pdf; Coral Davenport, *A Climate Accord Based on Global Peer Pressure*, N.Y. TIMES, Dec. 14, 2014, http://www.nytimes.com/2014/12/15/world/americas/lima-climate-deal.html?emc=edit_na_20141214&nlid=52930963&_r=0; Lavanya Rajamani, *The Warsaw Climate Negotiations: Emerging Understandings and Battle Lines on the Road to the 2015 Climate Agreement*, 63 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 721 (2014). Some commentators argue that the international climate negotiations, aiming at a comprehensive agreement, have little chance of success and that a better approach would be to separate the problem into more manageable parts dealt with in a variety of fora. See Ruth Greenspan Bell, *Climate Policy Through the Rear View Mirror*, 27 GEORGETOWN INT’L L. REV. 91 (2015).

¹⁷ The Article takes the position that, if one accepts consensus climate change science, now is a critical time for action on energy transition and climate change. The most recent report of the Intergovernmental Panel on Climate Change stresses the urgency of action by major energy users such as the United States to limit greenhouse gas emissions in forestalling the most serious climate change impacts. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2013: THE PHYSICAL SCIENCE BASIS - SUMMARY FOR POLICYMAKERS (2013, IPCC, Geneva); See also IPCC WORKING GROUP II, SUMMARY FOR POLICYMAKERS - FINAL DRAFT, CLIMATE CHANGE 2014 - IMPACTS, ADAPTATION, AND VULNERABILITY (2014, IPCC, Geneva); U.S. EPA, CLIMATE CHANGE INDICATORS IN THE UNITED STATES (3rd edition) (2014), <http://www.epa.gov/climatechange/science/indicators/download.html>, NATIONAL RESEARCH COUNCIL, ABRUPT IMPACTS OF CLIMATE CHANGE: ANTICIPATING SURPRISES (2013); RISKY BUSINESS PROJECT, AMERICAN CLIMATE PROSPECTUS: ECONOMIC RISKS IN THE UNITED STATES, June 2014; U.S. GLOBAL CHANGE RESEARCH PROGRAM, THIRD NATIONAL CLIMATE ASSESSMENT, April 2014.

difficult to shift and not responsive to change in the face of expert opinion.¹⁸

This Article is the first to draw from this psychological research to provide a systematic plan for advancing energy and climate change policy despite partisan divides.¹⁹ The Article uses our original empirical research, including interviews we have conducted with key participants in energy and climate change policy,²⁰ and case studies to propose substantive and structural strategies for progress. Its innovative conceptual framing and new empirical work make

¹⁸ Indeed, some of those who oppose greenhouse gas regulation of the energy industry have skeptical views of climate change undergirded by deeply held moral beliefs and cultural worldviews. Their position may prove impervious to scientific information, even as the evidence about the devastating risks and effects of climate change continues to mount. Dan Kahan, *Why We Are Poles Apart on Climate Change*, (2012) 488 NATURE 255 (Aug., 16, 2012). This resistance to information that goes against existing beliefs may in fact be greater among those considered “experts” in their specialist field, e.g., political pundits, economists, specialist professors. Philip Tetlock’s study of expert political judgment, for example, showed that the accuracy of an expert’s prediction has an inverse relationship to his or her self-confidence, renown and depth of knowledge. Moreover, Tetlock found experts were not good at learning from their mistakes and tended to dismiss information that did not fit with what they already believed. In this respect, experts applied a double standard: They were much tougher in assessing the validity of information that undercut their theories than in crediting information which supported it. See PHILIP TETLOCK, EXPERT POLITICAL JUDGMENT: HOW GOOD IS IT? HOW CAN WE KNOW? (2005). Part I, *supra*, explores these issues in depth. This skepticism about science is not confined to energy and climate change debates, but mirrored in many other important policy areas, as the recent controversy over vaccination and the measles outbreak illustrates. See Chris Mooney, *POLL: Tea Party Members Really, Really Don’t Trust Scientists*, MOTHER JONES, May 20, 2014; Carrie Dann, *By the Numbers: Republicans, Democrats and the Vaccination Debate*, NBC NEWS, Feb. 2, 2015, <http://www.nbcnews.com/politics/first-read/numbers-republicans-democrats-vaccination-debate-n298606>.

¹⁹ This psychological research, such as that of the Cultural Cognition Project at Yale Law School, focuses on analyzing how people perceive risk, but does not translate that into a framework for legal strategies. For an example of these types of papers, see The Cultural Cognition Project at Yale Law School, Papers, <http://www.culturalcognition.net/browse-papers/>. Similarly, while a number of law review articles mention this psychological research in the context of climate change, none of them builds on it to produce a systematic framework. For instance, a Westlaw Search of all law review articles containing the phrase “cultural cognition” and then a search within them for “climate change” revealed 96 articles, none of which use this work to develop a systematic strategy for policy progress. See Westlaw Search, Law Reviews and Journals, Feb. 11, 2015 (searching “cultural cognition” and then “climate change” within that search). Most on point, an unpublished paper by Robert Verchick applies cultural cognition theory to strategies to address climate change adaptation, focusing on case studies of urban adaptation, but this is much narrower in scope and does not propose a comprehensive approach to energy partisanship. Robert R.M. Verchick, *Climate, Culture, and Cognition*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2516887. For a discussion of this paper in the broader context of this psychological research, see *infra* note 79 and accompanying text.

²⁰ We draw on case study and empirical research, including interviews, that we have conducted, jointly and independently, across a range of climate change and energy issues over the past decade to explore the promise of substantive and structural leverage points and ways they can be paired to maximize effectiveness. These real world examples illustrate how such strategies can be, and are being, used in practice. This empirical work was supported in part by a grant from the Australian Research Council to support our collaborative research on climate change litigation.

important and timely contributions to scholarship on energy, climate change, and partisanship.

The Article argues that maximizing constructive action in this context requires approaches that either allow for bipartisan agreement (“going together” strategies) or circumvent partisan divides (“going around” strategies). As illustrated by the opening example, media and public attention often focuses on conflict and “going around” strategies. However, both social science research and case examples indicate that Republicans and Democrats actually agree on some issues critical to addressing climate change and energy transition.²¹ By reframing problems around areas of agreement and focusing on fora where there is less conflict, leaders and advocates often can make needed progress.²² And when such agreement is not possible, “going around” action – as illustrated by the Obama Administration’s use of executive authority to regulate power plant greenhouse gas emissions – provides a crucial complement. The Article uses examples of what has worked to illustrate these strategies.

Substantively, instead of confronting political and public views that resist action, the Article suggests that those seeking regulatory change should frame issues in alternative ways that resonate with a broader range of moral beliefs and cultural values. Specifically, framing climate change and energy transition as a matter of economic development (as has been possible with respect to some energy efficiency and renewable energy projects) or disaster resilience (in the aftermath of high profile events like Superstorm Sandy) are two promising avenues for “going together.”²³ To be effective, though, this approach must be more than mere “spin”; it should involve a genuine effort to identify areas of common ground and shared values that can be the foundation for real and tangible action.²⁴ Moreover, in such reframing, how climate change issues are discussed, including the tone, relatability and perceived trustworthiness of communicators, affects cooperativeness significantly. The Article argues for the importance of trusted individuals, referred to in the social science literature as “vouchers,” in helping to bridge partisan gaps.²⁵

Structurally, we suggest options for pursuing action in spheres that are less polarized on climate change or where partisan blocks are less substantial than is often the case in the federal Congressional setting. Structural shifts may involve (1) scaling down actions to the local or state government level; (2) shifting across to another branch

²¹ See *infra* Parts I & II.

²² See *infra* Parts II & III.

²³ See *id.*

²⁴ See *id.*

²⁵ See *id.*

of government whether via litigation to force executive action or the use of executive authority to bypass Congressional inaction; or (3) incentivizing private sector action to address energy issues.

Often, substantive and structural strategies interact to promote “going together,” with the suggested substantive reframing strategies offering particularly good chances of being effective at state and local levels, in other branches, and with corporate and other private actors. However, unlike substantive reframing, some of these structural strategies, particularly litigation and executive action, involving “going around” partisan roadblocks.

Part I of the Article begins by exploring the partisan politics surrounding climate change and energy transition in the United States, and current interdisciplinary understandings of how they interact with possibilities for policy progress. Parts II and III build upon that research to propose substantive and structural leverage points for fostering more constructive policy dialogue and action. The Article concludes by acknowledging that despite these positive examples, the strategies proposed may not, on their own, be enough to achieve adequate policy action. However, with a fast narrowing window for avoiding the worst impacts of climate change, thinking systematically about how to overcome the barriers of partisanship is worthwhile despite potential limitations. Beyond their direct policy potential, these strategies may make an incremental difference in changing the quality of the dialogue about energy and climate change, which could contribute constructively to longer-term efforts to mount a more coordinated and comprehensive response.

I. PARTISAN POLITICS ON CLIMATE AND ENERGY

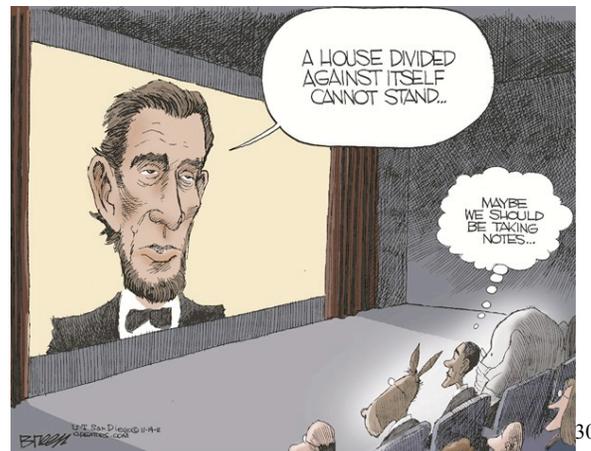
This Part examines how increasing partisanship and polarization of Congress and the U.S. public is inhibiting policy progress on climate and energy issues. It pairs (1) analysis of partisanship’s role in shaping energy policy with (2) a discussion of the interdisciplinary academic literature on cognitive psychology, cultural cognition, and public risk perception that helps to explain why this partisanship is apparently so intractable. A key message from this body of scholarship is that partisan divides and polarized public attitudes are rarely amenable to change simply through the presentation of reasoned argument, information, and expert knowledge.²⁶ Instead,

²⁶ Indeed, and somewhat counterintuitively, studies find that exposure to more scientific “facts” about climate change that undercut a person’s strongly held anti-climate action views can serve to further harden those views. P. Sol Hart and Eric Nisbet describe this as the “boomerang effect” in which scientific information that runs counter to entrenched views produces the opposite result to that intended by amplifying partisan differences and deepening people’s

central to circumventing partisanship on politically controversial issues like climate change and energy transition are strategies that target areas of common ground where polarization is reduced and some form of consensus is possible.

In investigating the relationship between partisanship and energy policy in this Part, our intention is not to assert that partisanship is the only barrier to progress in this area. Biased or inaccurate media reporting of the issues, the strong ties of some regional economies to fossil fuels, and the large part that private donors and super-PACs play in electoral politics – particularly post-*Citizens United v. Federal Election Commission*²⁷ – all play a role.²⁸ Nonetheless partisanship is frequently the conduit used to give voice and effect to a range of political and public divisions over energy and other policy issues.²⁹ In other words, partisanship is a key element of climate policy dysfunction in the United States even if it is not the sole explanation.

A. “A House divided”



existing attitudes. See P. Sol Hart and Eric C. Nisbet, *Boomerang Effects in Science Communication: How Motivated Reasoning and Identity Cues Amplify Opinion Polarization about Climate Mitigation Policies*, 39 COMMUNICATION RESEARCH 701 (2012). Interestingly, Hart and Nisbet find this effect is greatest where climate change campaigns focus on risks to people in other countries or even other regions of the United States. By contrast, locally focused campaigns that highlight risks to fellow residents of a state or city are less likely to activate strong partisan differences. This research reinforces the utility of a structural reframing strategy focused on local action. See further III.A *infra*.

²⁷ *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

²⁸ For a discussion, for example, of political donations since *Citizens United v. Federal Election Commission*, see *infra* note 358 and accompanying text.

²⁹ CHRISTOPHER D. JOHNSTON, HOWARD LAVINE & CHRISTOPHER M. FEDERICO, PERSONALITY, PARTIES AND THE FOUNDATIONS OF ECONOMIC OPINION (forthcoming 2015) (copy on file with authors) (describing partisanship as “a prime determinant and organizer of political attitudes”).

³⁰ http://media.cagle.com/124/2012/11/14/122400_600.jpg.

Partisanship is by no means a new feature of politics in the United States. Indeed, it was in recognition of the potential “mischiefs of faction” that the founders of this country’s political system devised a series of constitutional checks and balances in order to maintain the status quo in the absence of broad bipartisan support for policy change.³¹ However, over the last two decades, partisanship in the United States has been getting worse.³²

In a study released in 2012, the Pew Research Center for the People and the Press found that while the core beliefs and principles of the nation have remained relatively stable over the past 25 years, increasingly these beliefs are being sorted along partisan lines.³³ The most “pointed” area of polarization identified in the 2012 study was views on the importance of environmental protection. Whereas twenty years ago, there was virtually no disagreement across party lines on this issue, by 2003, a gap of 13 points had opened up, and by 2012, this had tripled to 39 points, one of the largest value gaps recorded in the study.³⁴

³¹ James Madison, Federalist No. 10, *The Utility of the Union as a Safeguard Against Domestic Faction and Insurrection (continued)*, Daily Advertiser, November 22, 1787.

³² Chris Cillizza, *Partisanship doesn’t seem worse. It is worse*, WASH. POST, Jun., 4, 2012, http://www.washingtonpost.com/blogs/the-fix/post/partisanship-doesnt-seem-worse-it-is-worse/2012/06/04/gJQAJIuzDV_blog.html. There is broad scholarly consensus that U.S. politics are more polarized than at any time in the recent past. See NOLAN MCCARTY, KEITH T. POOLE AND HOWARD ROSENTHAL, *POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES* (MIT, Cambridge, 2006); Nolan McCarty, *What we know and don’t know about our polarized politics*, WASH. POST, Jan. 8, 2014, <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/01/08/what-we-know-and-dont-know-about-our-polarized-politics/>.

³³ While other social divides such as race, gender, ethnicity, class, and religion have remained much the same – neither growing nor receding significantly – partisan polarization has starkly increased. PEW RESEARCH CENTER FOR THE PEOPLE AND PRESS, *PARTISAN POLARIZATION SURGES IN BUSH, OBAMA YEARS: TRENDS IN AMERICAN VALUES 1987-2012*, <http://www.people-press.org/2012/06/04/section-1-understanding-the-partisan-divide-over-american-values/>. See also Johnston et al, *supra* note 29 (identifying how partisanship has become strongly linked to liberal-conservative self-identification and a range of policy issues on social, cultural and racial issues). Another, more recent, large-scale survey conducted by the Pew Research Center confirms these partisan trends. The 2014 study, which surveyed over 10,000 U.S. adults, found the overall share of respondents who expressed either consistently conservative or consistently liberal opinions doubled between 1994 and 2014 from 10 to 21 percent. It also found that ideological thinking is more closely aligned with political partisanship than was the case in the past: “Today, 92% of Republicans are to the right of the median Democrat, and 94% of Democrats are to the left of the median Republican.” PEW RESEARCH CENTER FOR THE PEOPLE AND PRESS, *POLITICAL POLARIZATION IN THE AMERICAN PUBLIC*, Jun. 12, 2014, <http://www.people-press.org/2014/06/12/political-polarization-in-the-american-public/>.

³⁴ See PEW RESEARCH CENTER FOR THE PEOPLE AND PRESS, *PARTISAN POLARIZATION SURGES IN BUSH, OBAMA YEARS*, *supra* note 33. Views on environmental regulation were identified as a key area of divergence in the 2014 study as well. In 1994, there was a relatively narrow 10-point partisan gap on this issue – a gap that had extended to 35 points by 2014. PEW RESEARCH CENTER FOR THE PEOPLE AND PRESS, *POLITICAL POLARIZATION IN THE AMERICAN PUBLIC*, *supra* note 33.

Political scientists offer a variety of explanations for worsening partisanship in U.S. politics.³⁵ Some point to external factors such as increasing voter polarization, political realignment of the Southern States from largely Democrat to largely Republican, the emergence of the Tea Party faction shifting the Republican Party strongly to the right, gerrymandering through electoral redistricting, polarization of the primary elections process, increasing economic inequality, private campaign financing, and the emergence of a more partisan media. Others emphasize internal factors such as Congressional rule changes that facilitate the addition of amendments to Bills, the growing role of the speaker and majority leaders in controlling party votes, increasing levels of competition between the parties, and the breakdown of bipartisan norms.³⁶ While explanations for partisanship diverge, however, broader agreement exists regarding its consequences. As Thomas Mann and Normal Ornstein put it in their 2012 book, *It's Even Worse than it Looks: How the American Constitutional System Collided with the New Politics of Extremism*, vehemently adversarial parties in the setting of a separation-of-powers government “are a formula for willful obstruction and policy irresolution.”³⁷

Studies of partisanship in the U.S. population uniformly find that polarization is greatest among political elites, such as members of Congress, who tend to hold more extreme partisan views than the public at large.³⁸ Even so, public views on controversial social matters appear to be influenced by the framings of issues used in the political debate. Opinion polls on climate change reveal partisan divisions between Republicans – who tend to question the validity of climate science and dismiss the urgency of the problem – and Democrats – who accept the science and express concern about the issue.³⁹

³⁵ See Michael Barber & Nolan McCarty, *Causes and Consequences of Polarization*, in NEGOTIATING AGREEMENT IN POLITICS 19 (Jane Mansbridge and Cathie Jo Martin, eds.) (2013) (American Political Science Association, Washington DC) for a good overview of the contribution of the social science in the researching causes of polarization.

³⁶ See *id.* Jacob Hacker and Paul Pierson argue, for example, that Republican strategies have played a key role in this transition. JACOB S. HACKER & PAUL PIERSON, OFF CENTER: THE REPUBLICAN REVOLUTION AND THE EROSION OF AMERICAN DEMOCRACY (2006).

³⁷ THOMAS MANN & NORMAL ORNSTEIN, *IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM* xiii (2012, Basic Books, NY).

³⁸ PEW RESEARCH CENTER FOR THE PEOPLE AND PRESS, POLITICAL POLARIZATION IN THE AMERICAN PUBLIC, *supra* note **Error! Bookmark not defined.**. See also JOHNSTON ET AL, *supra* note 29 (finding cultural images of the parties have become the most salient aspects of partisan branding among politically engaged citizens).

³⁹ Marjorie Connelly, *Global Warming Concerns Grow*, NEW YORK TIMES, Sep. 22, 2014, http://www.nytimes.com/2014/09/23/science/global-warming-concerns-grow.html?emc=edit_tnt_20140922&nlid=52930963&ntemail0=y (18% Republicans did not think global warming was real; only 3% of Democrats agreed. 61% of Democrats said global warming was causing an impact now, compared with only 26% of Republicans).

Public support for action on climate change and clean energy in particular has waxed and waned over the last decade. It peaked in 2007; Gallup recorded its highest levels of public concern about climate change in March 2007 with 41 percent of those surveyed worrying “a great deal.”⁴⁰ These levels of public concern have since declined, paralleling the failures of comprehensive climate legislative proposals in the Congress and weak outcomes in climate negotiations at the international level. During 2011 and 2012, climate change and clean energy had become so politically unpalatable that the terms were barely uttered by the President. According to Richard Lazarus, it was as if “[c]limate change had become the political equivalent of Harry Potter’s Lord Voldemort: the crisis that dared not be named.”⁴¹

When Superstorm Sandy hit the East Coast in late 2012, political and public attitudes to climate change in the United States shifted once more. Successive polls of the U.S. public since then have showed gradually increasing levels of public concern about climate change⁴² There also appears to be growing support among the U.S. public for mitigation measures to reduce carbon emissions, even if such measures would add to energy costs.⁴³ Nevertheless, the political environment for making progress on climate change and energy transition remains a difficult one. In 2014, the Pew Research Center found that dealing with global warming was ranked by the public second to last in a list of 20 priorities for presidential and Congressional action. In addition, substantial partisan divides were evident. Whereas 42 percent of Democrats cited dealing with climate change as a top priority, only 14 percent of Republicans and 27 percent of Independents shared this view.⁴⁴ These splits are particularly significant because citizens showed their overall dissatisfaction with the direction of the country by shifting Congress back to Republican hands in fall 2014, intensifying the divide in federal government (as often occurs in midterm elections).

⁴⁰ CLIMATE CHANGE: AMERICANS’ VIEWS IN 2014, *supra* note 50.

⁴¹ Richard J. Lazarus, *Presidential Combat Against Climate Change: Commentary*, 126 HARV. L. REV. F. 152, Mar. 20, 2014 <http://harvardlawreview.org/2013/03/presidential-combat-against-climate-change/>.

⁴² Frank Newport, *Americans’ Worries About Global Warming Up Slightly*, GALLUP, 30 March 2012, <http://www.gallup.com/poll/153653/americans-worries-global-warming-slightly.aspx>; Lydia Saad, *Americans’ Concerns About Global Warming on the Rise*, GALLUP, 8 April 2013, <http://www.gallup.com/poll/161645/americans-concerns-global-warming-rise.aspx>; Lydia Saad, *Republican Skepticism Toward Global Warming Eases*, GALLUP, 9 April 2013, at <http://www.gallup.com/poll/161714/republican-skepticism-global-warming-eases.aspx>.

⁴³ Lisa Lerer, *Americans by 2 to 1 would pay more to curb climate change*, BLOOMBERG NEWS, June 11, 2014. *See also* New York Times-Stanford-RFF poll, *supra* note 45.

⁴⁴ PEW RESEARCH CENTER, CLIMATE CHANGE: KEY DATA POINTS FROM PEW RESEARCH, Jan. 27, 2014, <http://www.pewresearch.org/key-data-points/climate-change-key-data-points-from-pew-research/>.

There is some recent evidence that members of the public who identify as Republican are becoming more favorably disposed to climate change action. For example, a New York Times-Stanford University-Resources for the Future 2015 poll found that 78 percent of the U.S. public – including 60 percent of Republicans – support “the federal government limit[ing] the amount of greenhouse gases that U.S. businesses put out.”⁴⁵ Among Republican respondents, 48 percent said they were more likely to vote for a candidate who supports dealing with climate change.⁴⁶

However, even with this shift, significant differences remain among those who identify as Democrats, Republicans, and Independents. Among Democrats, 63 percent said global warming was very or extremely important to them personally; only 18 percent of Republicans felt the same. In addition, Republicans expressed more concern over the economic consequences of climate change policies, with 47 percent worried that measures to curb global warming would harm the economy.⁴⁷ Republicans are also more likely to vote for those who deny climate change science or do not view themselves as qualified to evaluate the science, and are less likely to support policy measures to address climate change.⁴⁸

Moreover, despite the growing concern with climate change in recent polls,⁴⁹ people in the United States continue to disassociate themselves from the problem.⁵⁰ For example, in the January 2015

⁴⁵ *Global Warming: What Should Be Done*, <http://www.nytimes.com/interactive/2015/01/29/us/global-warming-poll.html>. For a discussion of the poll, see Coral Davenport and Marjorie Connelly, *Most Republicans Say They Back Climate Action, Poll Finds*, NEW YORK TIMES, Jan. 30, 2015, http://www.nytimes.com/2015/01/31/us/politics/most-americans-support-government-action-on-climate-change-poll-finds.html?emc=edit_na_20150130&nid=52930963&r=0.

⁴⁶ *Id.*

⁴⁷ Coral Davenport and Marjorie Connelly, *Most Republicans Say They Back Climate Action, Poll Finds*, NEW YORK TIMES, Jan. 30, 2015, http://www.nytimes.com/2015/01/31/us/politics/most-americans-support-government-action-on-climate-change-poll-finds.html?_r=0.

⁴⁸ *Id.*

⁴⁹ The New York Times-Stanford-RFF poll in January 2015 may signal the emergence of higher levels of public concern on the issue. For instance, a majority of respondents in the poll thought climate change poses a critical future threat. New York Times, Stanford University and Resources for the Future poll, *Global Warming: What Should be Done?*, NEW YORK TIMES, Jan. 29, 2015, http://www.nytimes.com/interactive/2015/01/29/us/global-warming-poll.html?emc=edit_tnt_20150130&nid=52930963&ntemail0=y.

⁵⁰ Compared with the citizens of many other developed nations, particularly Europeans, people in the United States have tended to exhibit fairly low levels of concern about climate change as a threat and a greater ambivalence about climate change science. Irene Lorenzoni and Nick F. Pidgeon, *Public Views on Climate Change: European and USA Perspectives* 77 CLIMATIC CHANGE 73 (2006) (providing a perspective from almost a decade ago). Gallup’s 2014 poll measuring how much the U.S. public worries about climate change compared with other environmental problems found only 34 percent worried “a great deal,” essentially the same number as in 1989. Frank Newport, *Americans show low levels of concern on global warming*, CLIMATE CHANGE: AMERICANS’ VIEWS IN 2014, Apr. 4, 2014, Gallup Politics, at

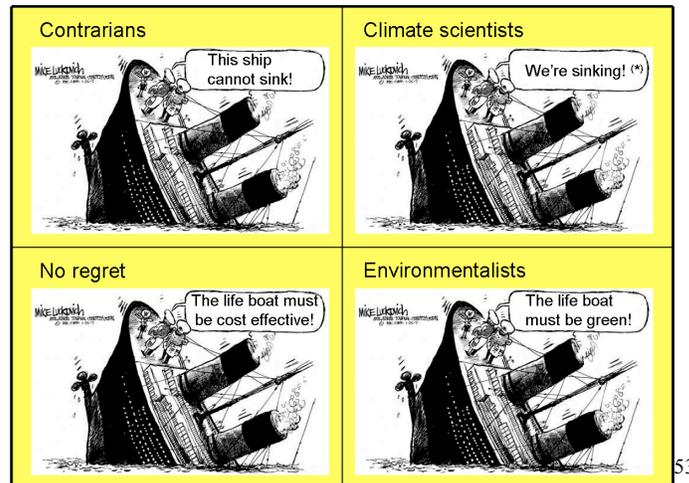
New York Times-Stanford University-Resources for the Future poll, respondents still tended to view climate change as something threatening to “others,” and having impacts that happen “away” rather than affecting them “at home.”⁵¹ Asked how much they thought global warming had hurt them personally or would do in the future, most believed “a little” or “not at all.”⁵² This disassociation against the backdrop of partisanship makes it hard to galvanize needed action.

<http://www.gallup.com/poll/168236/americans-show-low-levels-concern-global-warming.aspx>. With respect to skepticism about climate change, in a September 2014 New York Times/CBS News Poll only 54 percent agreed global warming was caused by human behavior, with 31 percent considering warming a natural phenomenon, and 10 percent rejecting that global warming existed at all. Connelly, *Global Warming Concerns Grow*, *supra* note 39. This figure of 54% agreeing that climate change is real was hailed as significant as it was the first time that polling had recorded that this belief was shared by a majority of the U.S. public. Partisan divergence was evident in levels of concern in this poll, with 18 percent of Republicans saying global warming was not real compared with only 3 percent of Democrats. About half of the Republicans surveyed considered the economy more important than the environment. *Id.* See also Anthony Leiserowitz et al., *Climate Change in the American Mind: Americans’ Global Warming Beliefs and Attitudes in November 2013* (2014, Yale Project on Climate Change Communication and George Mason University Center for Climate Change Communication, New Haven, Connecticut), available at <http://environment.yale.edu/climate-communication/files/Climate-Beliefs-November-2013.pdf>; Julie Ray and Anita Pugliese, *Worldwide, Blame for Climate Change Falls on Humans: Americans among least likely to attribute to human causes*, GALLUP, 22 April 2011; Allison Kopicki, *Is Global Warming Real? Most Americans Say Yes*, N.Y. TIMES, June 1, 2014, The Upshot. How the poll question is phrased can be influential; for example, people in the U.S. tend to see “global warming” as more of a concern (because of the association with extreme weather events) than “climate change” (which suggests more climate variability): see Allison Kopicki, *Americans more worried about “warming” than “climate change”*, N.Y. TIMES, May 29, 2014, at http://www.nytimes.com/2014/05/30/upshot/climate-change-or-global-warming-tough-choice-for-pollsters.html?emc=edit_tnt_20140529&nid=52930963&tntemail0=y&r=0.

⁵¹ *Id.* See also Cass R Sunstein, *On the Divergent American Reactions to Terrorism and Climate Change*, 107 COLUMBIA LAW REVIEW 503 (2007).

⁵² New York Times, Stanford, RFF poll, *supra* note 49. See also Connelly, *supra* note 39..

B. “Can we all get along?”



For those who believe strongly in the necessity of a U.S. clean energy transition and robust climate change measures, it is tempting to think that the solution to partisan divisions and polarized political views lies simply in providing those opposed with better information. Within the scientific community, for example, there exists an impressive level of consensus about the reality and causes of climate change.⁵⁴ Scientists’ calls for action to address anthropogenic greenhouse gas emissions are increasingly urgent and their warnings about the consequences of climate change are ever more dire.⁵⁵ On one view then, the key to policy progress lies in getting better about how we communicate the science of climate change and the need for energy transition to politicians and the general public. Such communication efforts have focused on increasing the amount of quality news coverage of climate science. The underlying assumption of this information “deficit” model is that, once presented, the scientific facts will speak for themselves, leading the wider public to view climate change with the same urgency scientists do.⁵⁶ However, the reality – as successive opinion polls demonstrate – is that many

⁵³ <https://ourchangingclimate.files.wordpress.com/2011/05/political-opinions-sinking-boat-along-two-axes1.png>

⁵⁴ W. R. L. Anderegg, *Expert Credibility in Climate Change*, 107 PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES 12107-12109 (June 21, 2010) (DOI: 10.1073/pnas.1003187107); P. T. Doran & M. K. Zimmerman, *Examining the Scientific Consensus on Climate Change*, 90 EOS TRANSACTIONS AMERICAN GEOPHYSICAL UNION 22; (DOI: 10.1029/2009EO030002); N. Oreskes, *Beyond the Ivory Tower: The Scientific Consensus on Climate Change*, 306 SCIENCE 1686 (Dec. 3, 2004) (DOI: 10.1126/science.1103618).

⁵⁵ IPCC, CLIMATE CHANGE 2014: SYNTHESIS REPORT (IPCC, Geneva, 2014); Global Carbon Project, *Carbon Budget 2014*, Sep. 21, 2014, <http://www.globalcarbonproject.org/carbonbudget/index.htm>.

⁵⁶ Nisbet, *supra* note 14.

ignore the coverage, distrust those providing the information, or reinterpret scientific claims through a partisan lens.⁵⁷

Partisan political realities also place significant limits on the capacity to achieve prescriptions for clean energy technological innovation and legal reform offered by engineers, economists, and lawyers. In an influential article published in 2004, for instance, Princeton academics Stephen Pacala and Robert Socolow proposed a “wedge approach” to “solve” the climate change problem for the next 50 years using existing technologies. The authors conceptualized the necessary emissions reductions to 2054 as a “stabilization triangle,” which could be divided up into wedges, with each wedge allocated to an existing low carbon or renewable technology.⁵⁸ Seven years on, however, and with emissions growing largely unchecked,⁵⁹ Robert Socolow acknowledged:

Over the past seven years, I wish we had been more forthcoming with three messages: We should have conceded, prominently, that the news about climate change is unwelcome, that today’s climate science is incomplete, and that every “solution” carries risk. I don’t know for sure that such candor would have produced a less polarized public discourse. But I bet it would have.⁶⁰

Legal academics have also been guilty, at times, of ignoring or at least underestimating partisan barriers in putting forward legal “solutions” to the international climate negotiations impasse or the absence of comprehensive climate change legislation in the United States. For example, law review articles and academic conferences continue to debate the ideal form of comprehensive climate change legislation even as the political prospects for it look dim.⁶¹ While it is important to understand the dimensions of ideal legal frameworks for addressing the climate change and clean energy challenge, such discussions would benefit from a more explicit acknowledgement and assessment of the political possibilities.

With the growing recognition that a “data deficit” is not to blame for political inertia, scholars have increasingly explored the

⁵⁷ See also Hart and Nisbet, *supra* note 26, and accompanying text.

⁵⁸ S. Pacala and R. Socolow, *Stabilization Wedges: Solving the Climate Problem for the Next 50 Years with Current Technologies*, 305 *SCIENCE* 968 (Aug. 13, 2004). In 2011 Socolow published an updated version of the wedges approach advocating 9 rather than 7 wedges. R. Socolow, *Wedges Reaffirmed*, *BULLETIN OF THE ATOMIC SCIENTISTS*, <http://thebulletin.org/wedges-reaffirmed>.

⁵⁹ Global Carbon Project, *Carbon Budget 2014*, Sep. 21, 2014, <http://www.globalcarbonproject.org/carbonbudget/index.htm>.

⁶⁰ R. Socolow, *supra* note 58.

⁶¹ For examples of the many law review articles analyzing climate change legislation since its latest failure in 2009, see Westlaw searches of “climate change legislation” and “cap and trade.”

psychological basis for people’s reluctance – and often outright hostility – around dealing with climate change. This Section explores recent psychological research that helps to explain both why the public at large does not view climate change as an urgent problem and also why once views become shaped along partisan lines, they are very difficult to shift. Understanding the nature of these barriers to policy progress is key to framing options for moving forward despite imbedded partisanship and public ambivalence.

Polls and public opinion surveys, such as those discussed above, give important clues as to what underlies the general lack of public concern over climate change and motivates more strongly partisan views resisting policy change. For instance, polls of U.S. public attitudes often record that the majority of the public views climate change as a threat in the distant future, happening to others, and lower in the hierarchy of environmental concerns than other more imminent and perceptible threats.⁶² Harvard psychologist Dan Gilbert argues that it is these features of perceived climate change risk that make it a hard problem to get the public and politicians excited about. Gilbert’s research suggests climate change does not trigger our brains’ most fundamental alarm systems because it lacks four key traits that our brains have evolved to respond to as threatening. These traits are that a threat is the result of actions that are intentional, immoral, imminent and instantaneous. Gilbert quipped in 2006 – before the current societal shifts around gay marriage that perhaps give some hope in the context – that if climate change was *trying* to kill us, or was caused by gay sex, we would be much more likely as a society to leap into action. Climate change is an extremely dangerous threat, argues Gilbert, precisely because “it fails to trip the brain’s alarm, leaving us soundly asleep in a burning bed.”⁶³

Other psychological research suggests that people’s general inability to grasp climate change as a threat is only one of many mental barriers we face in confronting the problem.⁶⁴ For instance, environmental psychologist Robert Gifford identifies several categories of psychological barriers to mitigation behaviors that he labels “dragons of inaction.” For some people a key dragon may be a lack of perceived behavioral control (what can I as an individual do that will make a difference?); for others it may be ideological or worldviews that prevent action. An effective policy response to

⁶² See *infra* Section I.A.

⁶³ Daniel Gilbert, Op Ed, *If Only Gay Sex Caused Global Warming*, L.A. TIMES, July 2, 2006, <http://www.wjh.harvard.edu/~dtg/Los%20Angeles%20Times.htm>

⁶⁴ Kharunya Paramaguru, *The Battle Over Global Warming is All in Your Head*, *Time*, Aug. 19, 2013, <http://science.time.com/2013/08/19/in-denial-about-the-climate-the-psychological-battle-over-global-warming/>.

climate change, Gifford argues, depends upon understanding which segments of the population need help in dealing with which dragons.⁶⁵

Getting the general public interested in climate change and energy transition is hard enough; it is even harder to persuade partisans – on both sides – to evolve in their views in ways needed to achieve consensus, or at least compromise. Again, interdisciplinary research gives us insight into why that is the case. For example, David Hume’s well-known philosophical maxim that “Reason is, and ought only to be the slave of the passions”⁶⁶ is well-supported by evidence from psychology studies into the key moral precepts all humans have from birth.⁶⁷ Work by social psychologist Jonathan Haidt and others identifies five cross-culturally significant intuitions or emotions that guide our behavior and understandings of morality. These are preventing harm/caring for others; fairness/reciprocity (justice); group loyalty; authority/respect; and purity/sanctity.⁶⁸ Haidt’s work also demonstrates that, though we share these emotions in common, people pay more or less attention to each depending upon whether they are liberal or conservative. Liberals tend to pay more attention to issues and arguments that engage the moral foundations of harm/care and fairness/reciprocity. Conservatives support these values too, but also emphasize the other aspects of morality associated with loyalty, authority and purity. Both groups – conservatives and liberals – reason from their own moral perspectives and believe their conclusions are right.⁶⁹ Adherence to a particular set of moral tenets may thus blind each group to the “truth.”

Another strand of psychological research that underscores the difficulties of attempting to change partisan views around climate change and energy transition through persuasive argument is cultural cognition theory. This conceptual approach analyzes how people view risks in an effort to explain why the public often perceives some risks as very concerning, e.g., terrorism, despite the low statistical probability of their occurrence. The foundation of the theory is that an individual’s attitude to risk is shaped by the social structures in which the individual is embedded and the “cultural bias” that he or she

⁶⁵ Robert Gifford, *The Dragons of Inaction: Psychological Barriers that Limit Climate Change Mitigation and Adaptation* (2011) 66(4) AM PSYCHOL. 290.

⁶⁶ DAVID HUME, A TREATISE OF HUMAN NATURE 414 (1738).

⁶⁷ See Joshua Knobe, *Person as Scientist, Person as Moralist*, 33 BEHAVIORAL AND BRAIN SCIENCES 315 (2010).

⁶⁸ JONATHAN HAIDT, *THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION* (2012).

⁶⁹ JOHNSTON ET AL., *supra* note 29 (drawing on Haidt’s work and other literature discussing predictors of political orientations and policy preferences, which characterizes the left-right conflict as representing a clash over the potential risks associated with change).

favors.⁷⁰ Hence, what risks people worry about reflects their particular cultural worldviews: “whatever objective dangers exist in the world social organizations will emphasize those that reinforce the moral, political or religious order that hold the group together.”⁷¹ These effects are not necessarily overcome with higher levels of education. Indeed, in one study of climate change attitudes, researchers found a high correlation between respondents’ cultural worldviews and their opinions on climate change but little correspondence between these opinions and respondents’ scientific literacy and numeracy scores; in fact, those with higher scores tended to have decreased concern about climate change.⁷²

Cultural cognition theory also stresses the importance of “vouchers” in risk communication. Vouchers are knowledgeable and trusted members of a person’s cultural group who can help to build acceptance of a particular issue through “vouching” for information and showing how it fits with the group’s pre-existing worldview.⁷³ Such vouchers can play an important role in breaking through otherwise entrenched understandings of the issues to suggest novel approaches that will be acceptable to their social group.⁷⁴ As explored in depth in Part II, vouchers from the two parties play an important role in whether the problem is framed in a way that exacerbates partisan divides or helps people “go together.”⁷⁵

Although academics debate the validity of cultural cognition theory,⁷⁶ a growing body of empirical psychological research supports its central findings, especially for highly politicized risks like climate change.⁷⁷ A leading proponent, Dan Kahan, explains the reason we are “poles apart” on issues of climate change and energy transition is not public irrationality in the face of overwhelming scientific evidence. Rather, being right or wrong about climate change science is less important to people than the consequences of a taking a

⁷⁰ MARY DOUGLAS & AARON WILDAVSKY, *RISK AND CULTURE: AN ESSAY ON THE SELECTION OF TECHNICAL AND ENVIRONMENTAL DANGERS* (1982). See also JOHNSTON ET AL., *supra* note 29 (remarking that “the pronounced party tribalism now prevalent in American society appears to be rooted in the salience of *cultural* conflict. These disagreements are ... about *who we are* in a deeper moral sense” (emphasis in original)).

⁷¹ S. Rayner, *Cultural Theory and Risk Analysis*, in *SOCIAL THEORIES OF RISK* 83 (S. Krinsky & D. Golding, eds.) (1992).

⁷² Donald Braman, Dan M. Kahan, Ellen Peters, Maggie Wittlin & Paul Slovic, *The Polarizing Impact of Science Literacy and Numeracy on Perceived Climate Change Risks*, 2 *NATURE CLIMATE CHANGE* 732 (2012).

⁷³ Dan Kahan, *Fixing the Communications Failure*, 463 *NATURE* 296 (2010).

⁷⁴ Discussions among like-minded people, on the other hand, often tend to have the opposite effect, further hardening views towards a more extreme result. See Cass R. Sunstein, *Deliberative Trouble: Why Groups Go to Extremes*, 110 *YALE L.J.* 71 (2000).

⁷⁵ See *infra* Part II.

⁷⁶ See, e.g., Cass R. Sunstein, *Misfearing: A Reply* 119 *Harv. L. Rev.* 110 (2006).

⁷⁷ Dan Kahan, *Fixing the Communications Failure*, 463 *NATURE* 296 (2010).

position on the issue that conflicts with that of their cultural group. Moreover, people acquire their scientific knowledge of climate change from sources and people they trust. A person who identifies (strongly) as a conservative, therefore, is likely to take her cues about what to believe about climate change from like-minded members and leaders of her community, and conservative segments of the media. Kahan argues that in a situation where the science communication environment is “polluted” with “toxic partisan meanings – ones that effectively announce that ‘if you are one of us you believe this; otherwise we’ll know you are one of them,’” people will favor the risk perceptions that accord with those of their social group.⁷⁸ These risk attitudes are highly resistant to change because of the detrimental social consequences for any person of taking a stand on an issue that is at odds with their cultural group.

Robert Verchick has built on Kahan’s work to explore how an understanding of cultural cognition theory might affect strategies for addressing climate change. Using case studies in the context of adaptation – which he regards as an easier avenue than mitigation – he argues for the possibilities for multi-level networks to serve as vehicles for reframing information and building trust.⁷⁹

The role of group dynamics in shaping climate attitudes and cementing partisan differences is also a theme of recent behavioral studies examining the views of strong proponents and opponents of climate action. This research finds that US climate change skeptics have some characteristics of a social movement associated with a shared social identity and competition with believers.⁸⁰ A similar “us” versus “them” attitude is also evident among climate action proponents.⁸¹ The researchers find that resolving differences between the conflicting skeptic and believer social movements on climate change must go beyond attempts to persuade, educate or improve the public’s understanding of climate science. Instead, they should incorporate strategies aimed at improving intergroup relations.⁸²

Overall, these different strands of psychological work on climate change highlight both the difficulties and possibilities for making progress in the current partisan environment that helps to undergird

⁷⁸ *Id.*

⁷⁹ Verchick, *Climate, Culture, and Cognition*, *supra* note 19.

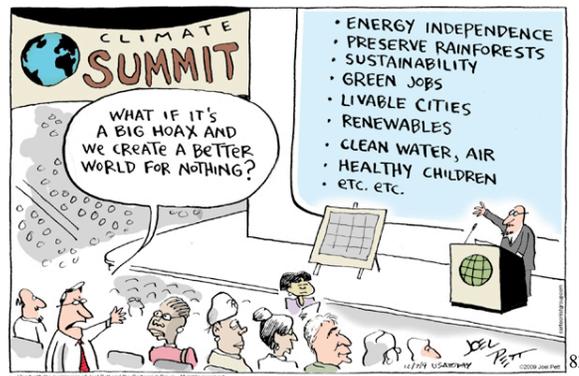
⁸⁰ Tom Postmes, *Climate Change and Group Dynamics*, (2015) NATURE CLIMATE CHANGE, published online Feb. 2, 2015, doi:10.1038/nclimate2537.

⁸¹ Ana-Maria Biluc et al, *Public Division about Climate Change Rooted in Conflicting Socio-Political Identities*, (2015) NATURE CLIMATE CHANGE, published online Feb. 2, 2015, doi:10.1038/nclimate2507.

⁸² Ana-Maria Biluc and Craig McGarty, *Overcoming the Social Barriers to Climate Consensus*, THE CONVERSATION, Feb. 2, 2015, <http://theconversation.com/overcoming-the-social-barriers-to-climate-consensus-36889>.

this Article’s approach. Namely, we need strategies that take how people form their views into account. Efforts to decrease energy partisanship need to focus on not just on *what* the messages about the benefits of climate action and energy transition are, but *who* the messengers are and *how* they deliver their messages. The next section considers how to translate this theory into strategies suited to this partisan context.

C. “Don’t let the perfect be the enemy of the good”



The research highlighted in the previous section suggests that trying to argue the case for energy transition or for addressing climate change in circumstances where those arguments do not resonate with the socio-political identity, cultural worldviews or deeply held moral beliefs of the audience is unlikely to work. That does not mean, however, that partisanship is an insurmountable obstacle to policy progress on climate change. Rather it requires looking for areas of common ground where progress can be made. Perfect agreement may not be possible on the deep moral questions that motivate different worldviews or group identities but greater options for consensus may be found in the “shallows,” through options that allow incremental steps forward.

This approach has some synergies with the theories of John Rawls on “overlapping consensus,”⁸⁴ and the more practically oriented writings of Cass Sunstein on “incompletely theorized agreements” as a way of resolving legal disputes in a highly politicized context.⁸⁵ Both approaches recognize the difficulties of getting agreement on issues of moral principle in a pluralist society. However, agreement

⁸³ http://i190.photobucket.com/albums/z205/JekyllnHyde_photos/August%202014/Climate-Cartoon.jpg

⁸⁴ JOHN RAWLS, *POLITICAL LIBERALISM* (1993).

⁸⁵ Cass R. Sunstein, *An Incompletely Theorized Conviction*, 108 HARVARD L. REV. 1733 (1999).

may still be possible about a given outcome or result based on relatively low-level or narrow explanations for it that do not engage fundamental principles that remain in dispute.⁸⁶ Taking this view, areas of common ground can be reached, but with different groups rationalizing this agreement in different ways that accord with their own principles or moral views. Discussion needs to shift from the differences between group positions to similarities and broader goals that both groups share.⁸⁷ Often it will be necessary for proponents of climate action to shed the “science says” argument in favor of focusing on pragmatic climate policies that serve a range of ends.⁸⁸

Translating these insights to the context of overcoming energy partisanship requires thinking about two questions. First, are there things people will agree on, perhaps which engage social values that are more broadly shared? For instance, “conservatives” may find off-putting some portrayals of climate change, particularly those that call for radical lifestyle changes or which blame businesses for the problem. Nonetheless, they might agree with “liberals” on more general motivations for climate action such as saving money, creating jobs or doing things that are good for the economy; protecting homes, families, and children; or solidarity with local community. Such areas of common ground can provide a foundation for thinking about different ways of framing issues of climate change and energy transition that will resonate with a broader range of people and across party lines.⁸⁹

Second, are there avenues for getting things done on climate change and energy issues where polarization of views is less evident or poses less of a barrier? For example, polarization and partisanship may feature less at the local level where people have strong community ties and often do not even know the partisan affiliation of their elected officials.⁹⁰ Courts offer a forum in which interested citizens and groups are able to advocate for regulatory action and arguments and evidence on either side of the issue can be aired and deliberated; their rulings, as discussed in Section III.B, have formed

⁸⁶ *Id.*

⁸⁷ Ana-Maria Biluc and Craig McGarty, *supra* note 82.

⁸⁸ Mathis Hampel, *Want to Convince People that Climate Change is Real? Stop Talking about the Science of It*, THE WASHINGTON POST, Jan. 22, 2015, <http://www.washingtonpost.com/posteverything/wp/2015/01/22/want-to-convince-people-that-climate-change-is-real-stop-talking-about-the-science-of-it/>.

⁸⁹ These values are widely shared across society as a whole. In the 2014 survey conducted by the Pew Research Center about the public’s priorities for government action that recorded global warming in nineteenth place, first and second ranked were the economy and job creation, whereas mid-ranking issues included dealing with the problems of the poor and needy, protecting the environment, and dealing with the nation’s energy problem. Nisbet, *supra* note 14.

⁹⁰ See *infra* Section III.A.

an important basis for policy action.⁹¹ Partisan obstacles in Congress can also be bypassed more directly through the President’s use of executive authority to forward federal action on climate change.⁹² In business settings, partisan views may be less influential than the overall goal of improving corporate economic performance and shareholder returns. If climate and energy policy are gridlocked in Congress, it may be that these forums provide alternative sites where action can be taken and progress made.

In the next two parts, we explore these strategies as interlinked substantive and structural leverage points for moving forward on climate and energy issues in a polarized political environment. We focus on reframing the dialogue when possible around issues about which people largely agree and on pairing this substantive shift with relocating policy efforts to less partisan spaces.

II. SUBSTANTIVE LEVERAGE POINTS FOR MAKING PROGRESS

Climate advocates have long recognized the benefits of a multi-pronged approach to tackling the massive problem of climate change.⁹³ Its wide-ranging and cumulative effects limit the scope for solving the problem “in one fell regulatory swoop.”⁹⁴ While most favor national legislation and international agreement as forming the core optimal approach, this has not prevented experimentation with multiple policy options, regulatory tools, and litigation strategies in an attempt to make progress on the issue. Moreover, as international negotiations and national efforts in major emitters have failed to make sufficient progress,⁹⁵ those who used to focus their energy on treaty solutions increasingly have come to embrace a more “polycentric” approach, in which many people and actors in multiple forums are part of a solution.⁹⁶

⁹¹ See *supra* Section III.B.

⁹² This is a “go-around” strategy which is often controversial and has the potential to exacerbate partisan divides, at least in the short-term. Other substantive and structural strategies offer more scope for cooperative or “go-together” approaches. See *infra* Parts II & III; see also Hari M. Osofsky & Jacqueline Peel, *Partisanship, Congressional Dysfunction, and Executive Action: “Go-Around” and “Go-Together” Climate Change Federalism*, ___ CHICAGO KENT L. REV. ___ (forthcoming 2015) (part of symposium issue on Congressional dysfunction and executive power).

⁹³ J.B. Ruhl & James Salzman, *Climate Change, Dead Zones, and Massive Problems in the Administrative State: A Guide for Whittling Away*, 98 CAL. L. REV. 59 (2010).

⁹⁴ *Massachusetts v. EPA*, 549 U.S. 497 (2007).

⁹⁵ UNEP Gap report 2014.

⁹⁶ See Elinor Ostrom, *A Polycentric Approach for Coping with Climate Change* (World Bank, Policy Research Working Paper No. 5095, 2009), available at <http://wdronline.worldbank.org/worldbank/a/nonwdrdetail/162>; see also Daniel H. Cole, *From Global to Polycentric Climate Governance*, (European Univ. Inst. Robert Schuman Ctr. for Advanced Studies, Working Paper No. 2011/30, 2011), available at <http://cadmus.eui.eu/handle/1814/17757>.

This Part and the next focus on operationalizing polycentric strategies that concentrate on issues and contexts where partisanship serves as less of a barrier. However, in so doing, our intention here is not to “teach grandma how to suck eggs.”⁹⁷ We are aware that many may feel that the practical, the possible, and the realistic are what they are already doing. As one interviewee put it to us in discussing his approach to forwarding energy transition:

Even if at the end of the day we don’t change and our society just continues on this suicidal approach of burning fossil fuels, I think we have to do what we can now, with the tools we have, to try and protect the future.⁹⁸

Our sense, though, from our years of research on climate and energy issues and many discussions and interviews with colleagues, practitioners, environmental advocates, agency officials, judges and politicians is that these strategies are often pursued opportunistically and that those in the trenches rarely have time to step back to examine the big picture across the myriad of relevant players. Moreover, a common theme that comes through, even among the most innovative advocates, is exhaustion and sometimes perplexity from their extensive on-the-ground experiments about what can work – what can make a difference – in the face of often deeply divided political views and hostile public opinion.

In this Part and the one that follows, we take that step back. We draw from own experience and findings, and those of people on the frontline who have varying perspectives, to explore areas where progress can be made. We focus first in this Part on the role of framing in communicating climate change risk and motivating policy action, along with examples of where substantive reframing of climate and energy issues – either in terms of economic development or as a strategy for disaster resilience – has been effective in bringing people on board to tackle issues in a cooperative way.

In Part III, we turn to instances of structural reframing – essentially options for shifting climate action to other, less polarized forums. We examine examples of how state and local government, judicial, executive branch, and business settings may provide practical options for moving forward on climate and energy concerns. In many cases, the effectiveness of the two sets of strategies can be enhanced by combining them. For instance, using an economic development or disaster resilience framing to promote local government action or shift

⁹⁷ This saying refers to people giving advice to someone who already knows about the subject, perhaps more than the advice giver.

⁹⁸ Skype interview, participant 17 (Mar. 20, 2013).

private sector behavior. These Parts thus explore these synergies as part of a systematic strategy for progress in a partisan environment.

A. “The question is not what you look at, but what you see”



One of the great insights offered by social science research about public communication of risks like climate change is that “frames matter.”¹⁰⁰ Frames are “cognitive shortcuts” that help us interpret and represent the world around us. They are like selective filters that emphasize some aspects of what is observed or heard while discounting other aspects that appear irrelevant or counter-intuitive.¹⁰¹ In essence, it is not what you say but what people “hear” that is crucial in communicating information about risks.

To make sense of policy debates people often use frames provided by others (the media, policymakers, experts). However, these supplied frames are integrated with their pre-existing interpretations forged through personal experience, social identity, conversations with others, partisanship, or ideology.¹⁰² Where people employ mutually incompatible frames – climate change regulation is imperative to avoid environmental catastrophe versus climate change regulation is “a war on coal” – this can contribute significantly to the intractability of an issue.¹⁰³ Furthermore, people are only likely to accept an alternative way of framing “if it is relevant – or applicable – to the audience’s preexisting interpretations.”¹⁰⁴

⁹⁹ <http://www.cagle.com/2013/09/global-warming-alarmists/>.

¹⁰⁰ Nisbet, *supra* note 14.

¹⁰¹ Sanda Kaufman, M. Elliott & D. Shmueli, *Frames, Framing and Reframing* (Hewlett Foundation 2004), http://works.bepress.com/sanda_kaufman/18 (entry to the web-based Intractable Conflict Knowledge Base).

¹⁰² Nisbet, *supra* note 14.

¹⁰³ Kaufman, *supra* note 101.

¹⁰⁴ Nisbet, *supra* note 14.

In U.S. public debates over climate change and energy transition, two mutually incompatible frames have tended to dominate. The first – often employed by Republican politicians and the conservative media – has emphasized themes of scientific uncertainty, dire economic consequences associated with climate action, and the unfairness of U.S. citizens being required to take action if other countries such as China and India do not.¹⁰⁵ The second, epitomized by Al Gore’s documentary, *An Inconvenient Truth*, represents climate change as a terrifying environmental catastrophe.¹⁰⁶ Reactions to these frames have often perpetuated and exacerbated partisan divides. Dramatization of potential climate change impacts has bolstered skeptic commentators’ allegations of liberal “alarmism.”¹⁰⁷ In response, Democrats, during the George W. Bush Administration, accused the administration of being climate change “deniers” conducting a “war on science.”¹⁰⁸

Frames can be used not only as an aid in interpreting information or events, but also in a strategic fashion to reach out to a broader audience, build coalitions, and shape personal behavior.¹⁰⁹ In an effort to break policy gridlock on climate change, various new framings of climate change and clean energy have been proposed which have enjoyed varying levels of success. Some have sought to cast safeguarding the planet from climate change as a matter of morality and ethics.¹¹⁰ This frame has especially targeted evangelical Christians and their belief in the religious duty to be “stewards” of God’s creation.¹¹¹ It can also be a strong framing for conservatives in discussing climate change. For instance, as observed by former Navy Rear Admiral Titley – once a “hard core climate skeptic” but later a leader of the U.S. Navy’s Climate Change Taskforce:

A lot of people who doubt climate change got co-opted by a libertarian agenda that tried to convince the public the science was uncertain—you know, the Merchants of Doubt.

¹⁰⁵ See Howard Burkeman, *Memo Exposes Bush’s New Green Strategy*, *The Guardian* (Mar. 3, 2003), <http://www.theguardian.com/environment/2003/mar/04/usnews.climatechange> (discussing Republican strategist, Frank Luntz’s memo on party strategy for dealing with the global warming issue).

¹⁰⁶ See *Global Warming: Be Worried, Be VERY Worried*, *TIME* (Apr. 3, 2006) (cover).

¹⁰⁷ Andrew C. Revkin, *In Climate Debate, Exaggeration is a Pitfall*, *N.Y. TIMES*, Feb. 4, 2009, http://www.nytimes.com/2009/02/25/science/earth/25hype.html?_r=0.

¹⁰⁸ Union of Concerned Scientists, *FEDERAL SCIENCE AND THE PUBLIC GOOD* (2009), available at http://www.ucsusa.org/scientific_integrity/solutions/big_picture_solutions/federal-science-and-the.html#.VGoZ-I4Qg20. See also CHRIS MOONEY, *THE REPUBLICAN WAR ON SCIENCE* (2005).

¹⁰⁹ Kaufman, *supra* note 101.

¹¹⁰ EDWARD O. WILSON, *THE CREATION: AN APPEAL TO SAVE LIFE ON EARTH* (2010).

¹¹¹ Kate Galbraith, *Churches Go Green by Shedding Fossil Fuel Holdings*, *THE NEW YORK TIMES*, Oct. 18, 2014, http://www.nytimes.com/2014/10/16/business/international/churches-go-green-by-shedding-holdings-of-carbon-emitters.html?_r=0.

Unfortunately, there's a lot of people in high places who understand the science but don't like where the policy leads them: too much government control. Where are the free-market, conservative ideas? The science is settled. Instead, we should have a legitimate policy debate between the center-right and the center-left on what to do about climate change. If you're a conservative—half of America—why would you take yourself out of the debate? C'mon, don't be stupid. Conservative people want to conserve things. Preserving the climate should be high on that list.¹¹²

Another example of substantive reframing is the increasing emphasis on climate change as a public health problem.¹¹³ For instance, EPA Administrator Gina McCarthy often describes the EPA's mission as centered on protecting public health and new climate change regulation as advancing that goal.¹¹⁴ Similarly, in his book, *Overheated: The Human Cost of Climate Change*, Berkeley law professor Andrew Guzman discusses the many ways that “climate change is bad for your health” in issuing a call to arms on climate and energy transition.¹¹⁵ This health framing may be useful in building support for adaptation measures that respond to climate change-related risks such as heatwaves. However, its use in a mitigation context, as part of a public relations campaign around restrictions on coal plant emissions, so far appears to have had more mixed results,¹¹⁶ notwithstanding scientific evidence highlighting the potential health benefits of these regulations.¹¹⁷

To be effective, efforts at “reframing” the issue of climate change must be more than just “spin.” Instead, reaching those with varying viewpoints often requires taking on new perspectives and searching

¹¹² Eric Holthaus, “Climate Change War” Is Not a Metaphor, SLATE, Apr. 18, 2014, http://www.slate.com/articles/technology/future_tense/2014/04/david_titley_climate_change_war_an_interview_with_the_retired_rear_admiral.html.

¹¹³ See e.g., World Health Organization, *Climate Change and Public Health*, <http://www.who.int/globalchange/en/>; National Institute of Health, *Climate Change and Human Health*, <http://www.niehs.nih.gov/research/programs/geh/climatechange/>.

¹¹⁴ Cheryl K. Chumley, *EPA's Gina McCarthy: Climate Change “Biggest Public Health Challenge We Face”*, WASHINGTON TIMES, Apr. 22, 2014, <http://www.washingtontimes.com/news/2014/apr/22/epas-gina-mccarthy-climate-change-biggest-public-h/>.

¹¹⁵ Andrew T. Guzman, *OVERHEATED: THE HUMAN COST OF CLIMATE CHANGE* (2013).

¹¹⁶ Umair Ifran, *Most Americans Fail to Link Health Impacts to Climate Change, Polls Shows*, CLIMATEWIRE, Jun. 12, 2014, http://www.climatechangecommunication.org/sites/default/files/reports/Irfan_climatewire.pdf.

¹¹⁷ Joel Schwartz et al, *Health Co-Benefits of Carbon Standards for Existing Power Plants*, Part 2 of the Co-Benefits of Carbon Standards Study, Sep. 2014, Harvard School of Public Health, <http://www.chgharvard.org/resource/health-co-benefits-carbon-standards-existing-power-plants>.

for common ground around a smaller set of issues.¹¹⁸ Equally important is the manner in which information is communicated. In line with the insights from cultural cognition theory, social scientists working on climate change communication are increasingly finding that factors like whether communicators use a friendly tone, display respect for and openness to different views, and work to establish trust are key to effective communication of climate risks.¹¹⁹ Or as Verchick has put it, we need to focus on both frames and “vouchers,” those who build trust in a community and so are able to vouch for the validity of information.¹²⁰

For those in the policy and legal spheres – interested in action and not just risk communication – there is also a need to match new ways of talking with practical on-the-ground strategies. In the following sections, we focus on two examples of substantive reframing around economic development and disaster resilience that, in our experience, have been particularly successful in circumventing partisan divides to move forward on climate and energy issues. Discussion of these two “going together” frames is paired with real world case examples of where their use has been effective in aiding needed policy change.

B. “It’s the economy, stupid”



During then-Governor Bill Clinton’s successful 1992 presidential bid against sitting president George Bush, campaign strategist James

¹¹⁸ Kaufman, *supra* note 101.

¹¹⁹ Research being undertaken on climate change communication at the University of Exeter in the UK by Thomas Morton and Heba Haddad is particularly relevant. See <http://www.exeter.ac.uk/slt/ourresearch/communicatingclimatechange/>.

¹²⁰ Verchick, *supra* note 79.

¹²¹ <http://4.bp.blogspot.com/-LKeWkojK5-8/Uktrq7H8XFI/AAAAAAAAADOI/LgGuN0jMtZw/s1600/Climate+change+cartoon.jpg>

Carville wrote the following “Rules” on a whiteboard in campaign headquarters:

- Change vs. More of the Same
- The Economy, Stupid
- Don't Forget Health Care

That second rule became a key campaign slogan and has since been popularized in many variations, including often the addition of “It’s.”¹²²

Part of the popular appeal of Carville’s approach was that it spoke to a key truth of U.S. politics (and politics around the world). People, regardless of partisan affiliation, care deeply about the economy and their job prospects. As mentioned above, in a survey conducted by the Pew Research Center for the People and the Press in 2014, the top two policy priorities for the President and Congress were “[s]trengthening the U.S. economy” (supported by 80%) and “[i]mproving the job situation” (supported by 74%).¹²³ These priorities have altered little in the last five years. The same survey conducted in 2009 also had the economy and jobs as the two top priorities (supported by 85% and 82% respectively).¹²⁴

Along similar lines, economists have long analyzed the extent of political business cycles, in which politicians make decisions based on short-term election results rather than the long-term interest.¹²⁵ They largely agree that economic conditions influence election outcomes, with some disputes over the extent of political manipulation and the role of partisanship.¹²⁶ For the purposes of this

¹²² Michael Kelly, *The 1992 Campaign: The Democrats -- Clinton and Bush Compete to Be Champion of Change; Democrat Fights Perceptions of Bush Gain*, N.Y. TIMES, Oct. 31, 1992, <http://www.nytimes.com/1992/10/31/us/1992-campaign-democrats-clinton-bush-compete-be-champion-change-democrat-fights.html>.

¹²³ Pew Research Center for the People and the Press, Deficit Reduction Declines as Policy Priority, Jan. 24, 2014, http://www.people-press.org/2014/01/27/deficit-reduction-declines-as-policy-priority/1-25-2014_01/.

¹²⁴ See also Connelly, *supra* note 39 (“Economic issues continue to top the list of most important problems and only 1 percent of those surveyed ... offered the environment as a top concern for the country”).

¹²⁵ As economist William Nordhaus defined the concept of political business cycles in his classic 1975 article, *The Political Business Cycle*:

The general conclusion was that a perfect democracy with retrospective evaluation of parties will make decisions biased against future generations. Moreover, within an incumbent's term in office there is a predictable pattern of policy, starting with relative austerity in early years and ending with the potlatch right before elections.

William D. Nordhaus, *The Political Business Cycle*, 42 THE REVIEW OF ECONOMIC STUDIES 169, 187 (Apr. 1975).

¹²⁶ Allan Drazen provided an assessment of the political business cycle work over its first twenty-five years, reaching the conclusion that:

Although there is wide (but not universal) agreement that aggregate economic conditions affect election outcomes in the United States, there is significant disagreement about whether there is opportunistic manipulation that can be observed in the macro data. There is a clear partisan effect in the United States (as

Article, we do not need to resolve these economics debates. The key point here – which comports with that of the economics literature – is that politicians and the electorate are highly influenced by perceptions (and at times the reality) of economics.

As a consequence, climate change and energy transition debates are often framed in economic terms by both sides. Those opposing energy transition or action on climate change claim that the economic costs are too high; they argue that energy costs will rise, making electricity or fuel more expensive, or that the impact on companies will hurt the economy.¹²⁷ This concern is heightened in hard economic times. Responding to a 2014 New York Times/CBS News Poll, Steven Swoboda, 36, from Victorville, California remarked: “Because our economy is so bad we need to focus on it and on jobs and not worry so much about global warming.”¹²⁸

To counter such views, those pushing for transition work to demonstrate the economic win-wins that can emerge, whether in terms of green jobs or savings from energy efficiency initiatives.¹²⁹ For example, Administrator McCarthy, directly attacked the position that dealing with climate change hurts the economy in her September 2014 remarks. “When it comes to the American economy,” said McCarthy, “cutting pollution doesn’t dull our competitive edge, it sharpens it.”¹³⁰ She also took aim at critics who “hide behind the word ‘economy’ to protect their own special interests; when the truth is, climate action is in everyone’s best interests ... Simply put: the economy isn’t a reason to fear action, it’s a reason to take it.”¹³¹ She then highlighted specific studies showing that climate action could propel economic growth and “that U.S. states that are still skeptical, like Arkansas, Louisiana, Oklahoma and Texas, would actually see an

well as in some other countries), with economic activity being lower in the first part of Republican than Democratic administrations, but still disagreement about the underlying driving mechanisms.

Allan Drazen, *The Political Business Cycle After 25 Years*, in 15 NBER MACROECONOMICS ANNUAL 2000, at 75 (Ben S. Bernanke & Kenneth Rogoff, eds, 2001), <http://www.nber.org/chapters/c11055.pdf>. For an additional analysis of voter focus on the state of their pocketbooks close to election time, see Christopher H. Achen & Larry M. Bartels, *Musical Chairs: Pocketbook Voting and the Limits of Democratic Accountability* (Presented at the Annual Meeting of the American Political Science Association, Chicago, September 2004), <https://my.vanderbilt.edu/larrybartels/files/2011/12/musical-chairs.pdf>.

¹²⁷ See, e.g., Felker, *supra* note 10 (describing reactions to the new EPA rules affecting coal fired powerplants).

¹²⁸ Connelly, *supra* note 39; Marjorie Connelly, *Global Warming Concerns Grow*, NEW YORK TIMES, Sep. 22, 2014, http://www.nytimes.com/2014/09/23/science/global-warming-concerns-grow.html?emc=edit_tnt_20140922&nlid=52930963&tntemail0=y.

¹²⁹ Michael Shellenberger and Ted Nordhaus, *BREAK THROUGH: FROM THE DEATH OF ENVIRONMENTALISM TO THE POLITICS OF POSSIBILITY* (2007, Houghton Mifflin, New York).

¹³⁰ Remarks by EPA Administrator Gina McCarthy at Resources for the Future, Sept. 25, 2014, <http://yosemite.epa.gov/opa/admpress.nsf/0/20AE16F3DF46A9A185257D5E004F6059>.

¹³¹ *Id.*

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annual net economic benefit of up to about \$16 billion dollars. That’s billion with a ‘b.’”¹³²

Administrator McCarthy’s description of the economic benefits of climate action is just one among many put forward over the last several years by the Obama Administration and others pushing for energy transition. While there is no shortage of politicians on both sides making economic arguments, the important question from a substantive reframing perspective is when economic development framings are most appropriate. In other words, (1) when and how does energy transition actually help the overall economy and people’s individual budgets and job opportunities?, and (2) in what contexts are economic arguments about energy transition most effective?

Numerous sets of economic experts have worked to answer the first question. For instance, at a global scale, the Global Commission on the Economy and Climate – a group comprised of former heads of government and finance ministers, as well as other leaders in the fields of economics, business, and finance advised by an expert group of economists – produced a September 2014 report assessing how to address climate change while supporting economic growth and development.¹³³

The report’s conclusion is that countries at all levels of income now have the opportunity to build lasting economic growth at the same time as reducing the immense risks of climate change. This is made possible by structural and technological changes unfolding in the global economy and opportunities for greater economic efficiency. The capital for the necessary investments is available, and the potential for innovation is vast. What is needed is strong political leadership and credible, consistent policies.

The next 15 years will be critical, as the global economy undergoes a deep structural transformation. It will not be “business as usual”. The global economy will grow by more than half, a billion more people will come to live in cities, and rapid technological advance will continue to change businesses and lives. Around US\$90 trillion is likely to be invested in infrastructure in the world’s urban, land use and energy systems. How these changes are managed will shape

¹³² *Id.* Louisiana is a good case study of the complex dynamics relating to economic development, oil and gas exploitation and climate change impacts. *See further* Zoe Carpenter, *The Invisible Oil in Louisiana’s Senate Race*, THE NATION, Oct. 20, 2014, <http://www.thenation.com/article/181832/well-oiled-race?page=0,1>.

¹³³ THE GLOBAL COMMISSION ON ECONOMY AND CLIMATE, BETTER GROWTH BETTER CLIMATE: THE NEW CLIMATE ECONOMY REPORT, THE SYNTHESIS REPORT (September 2014).

future patterns of growth, productivity and living standards.¹³⁴

The report goes on to detail more specifically strategies for cities, land use, and energy with an emphasis on three “drivers for change”: raising resource efficiency, investing in infrastructure, and stimulating innovation.¹³⁵ Another October 2014 report by the International Energy Agency (IEA) finds that the global market for energy efficiency investments had grown to between \$310 and \$360 billion in 2011, with 60% lower final consumption in IEA countries as a result.¹³⁶

Other reports have focused more specifically on the U.S. context. For example, the Metropolitan Policy Program at Brookings did a 2011 study of where and how the “clean economy”¹³⁷ has been producing jobs around the United States by examining data from every county from 2003 to 2010.¹³⁸ It found that the clean economy employs 2.7 million workers across numerous sectors, with the most growth in major metropolitan areas (64% overall and 75% of newer jobs) and the greatest regional concentration in the South.¹³⁹ These “green” jobs are manufacturing and export intensive and pay comparatively well for those without a high school diploma; almost half of these jobs are held by such workers (as compared to 37.2% in the economy as a whole), and “[a]pproximately 28.1 percent of all occupations in the clean economy are strong-wage (paying above the U.S. median) and low-skill (the percentage of workers with a high school diploma or less is higher than the national average) compared to 13.3 percent in the national economy.”¹⁴⁰ The report maps the different types of jobs being created in specific metros around the country, and links to a more detailed database.¹⁴¹ Together, these

¹³⁴ *Id.* at 8.

¹³⁵ *Id.*

¹³⁶ INTERNATIONAL ENERGY AGENCY, ENERGY EFFICIENCY MARKET REPORT 2014, http://www.iea.org/W/bookshop/463-Energy_Efficiency_Market_Report_2014.

¹³⁷ The study defines the “clean economy” as: “economic activity—measured in terms of establishments and the jobs associated with them—that produces goods and services with an environmental benefit or adds value to such products using skills or technologies that are uniquely applied to those products.” Metropolitan Policy Program at Brookings, *Sizing the Clean Economy: A National and Regional Green Jobs Assessment* 13–14 (2011), http://www.brookings.edu/~media/Series/resources/0713_clean_economy.pdf. It looks specifically at a number of job categories in agricultural and natural resources conservation; education and compliance; energy and resource efficiency; greenhouse gas reduction, environmental management, and recycling; and renewable energy using the Brookings-Batelle Clean Economy Database. *Id.* at 20.

¹³⁸ *Id.*

¹³⁹ *Id.* at 4.

¹⁴⁰ *Id.* at 23–24.

¹⁴¹ *Id.* at 25–30.

studies and others provide helpful insights into how economic development can be and is being paired with energy transition,

In this Article, however, we are particularly concerned with addressing the second question – when this pairing can help bridge partisan divides. The rest of the section focuses on specific examples of when this has occurred. An examination of “successes” – situations in which bipartisan support exists for energy transition on economic development grounds – reveals three common attributes. First, the economic benefits are real, tangible, and significant. Second, the transitional steps are cost-effective and easy to implement. Third, an established or growing industry sees a profit opportunity that aligns with goals of the environmental and labor coalitions.

Instances of Republican leaders’ support for renewable energy development and other clean energy technologies provide helpful examples of these attributes in action. In Michigan, for example, the wind industry expanded massively from 2.4 megawatts (MW) in capacity in 2007 to 287 MW in 2011.¹⁴² This transition was likely aided by Michigan’s October 2008 renewable portfolio standard, which requires utilities to generate at least 10% of the energy from renewable sources by 2015 and allows them to trade to meet this goal.¹⁴³ Sixty nine of Michigan’s seventy two utilities were on track to meet this goal.¹⁴⁴ The Natural Resources Defense Council reported that the state currently has 121 companies that supply wind components and that these companies employ 4,000 workers.¹⁴⁵

Michigan’s solar industry also expanded over a similar time period. It expanded at a rate of 15.8 percent a year between 2003 and 2010, making it one of the fastest growing areas of Michigan’s economy.¹⁴⁶ As with the wind industry, this growth has translated into jobs; 121 companies that manufacture components for the solar industry employ 6,300 workers.¹⁴⁷ Michigan had 1,041 KW of installed solar photovoltaic systems by the end of 2009, with an estimated 3,500 GW capacity in the longer term.¹⁴⁸

The growth of the renewable energy industry and its jobs has helped to provide a basis for bipartisan support. Republican Governor Rick Snyder gave a December 2013 speech in which he outlined a vision for energy transition that involved decreasing coal

¹⁴² Natural Resources Defense Council, Renewable Energy for America, Michigan, <http://www.nrdc.org/energy/renewables/michigan.asp>.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

consumption, increasing renewable energy targets, and simultaneously maintaining affordability, reliability, and environmental protection. A former political director for the Michigan Republican Party explained this support for energy transition in economic terms: “Renewable energy is an important piece of the economic puzzle, with Michigan’s manufacturing tradition and the sheer number of engineers we produce from state colleges and universities. We are very well positioned to be a major player in the clean energy manufacturing sector.”¹⁴⁹ The combination of an economy in transition with considerable Midwestern wind resources seems to be making support for energy transition politically palatable across party lines.

However, even with this broad bipartisan support for the industry, the partisan politics around energy in Michigan remain complex. Battles over the form that laws should take persist. On the one hand, Governor Snyder announced in March 2015 that he would like Michigan to meet thirty to forty percent of its energy needs through a combination of renewable energy and energy efficiency measures.¹⁵⁰ This goal is significantly above the legally required ten percent. On the other hand, Republicans in the Michigan legislature put forward a July 2015 energy policy proposal that would repeal the renewable portfolio standard and move towards a more flexible approach.¹⁵¹ State Senator John Proos explains that the new policy will focus on carbon emissions, price and reliability, in order to give Michigan maximum flexibility to comply with the new federal rules on power plant greenhouse gas emissions discussed in depth in Section III.B.2.¹⁵² Democrats in contrast proposed a bill, which has not gotten out of committee, that would raise the mandate to 20% by 2022.¹⁵³

A similar phenomenon of greater bipartisan agreement over renewable energy paired with partisan conflict over the laws that support the industry occurs in other states with abundant renewable

¹⁴⁹ Ben Adler, *Why Michigan’s Republican Governor Supports Clean Energy — Or Does He?*, GRIST, Jan. 3, 2014, <http://grist.org/politics/why-michigans-republican-governor-supports-clean-energy-or-does-he/>; see also Melissa Anders, *Gov. Rick Snyder Outlines Broad Vision For Michigan’s Energy Policy*, MLive, Dec. 19, 2013, http://www.mlive.com/business/index.ssf/2013/12/michigan_snyder_renewable_ener.html.

¹⁵⁰ Emily Lawler, *Michigan Gov. Rick Snyder Wants up to 40 percent Clean Energy by 2025*, MLive, Mar. 13, 2015, http://www.mlive.com/lansing-news/index.ssf/2015/03/michigan_gov_rick_snyder_wants.html.

¹⁵¹ Lindsey Smith, *New Energy Policy Would Get Rid of Michigan’s Renewable Energy Mandate*, MICHIGAN RADIO, July 2, 2015, <http://michiganradio.org/post/new-energy-policy-would-get-rid-michigan-s-renewable-energy-mandate#stream/0>.

¹⁵² *Id.* See *supra* Section III.B.2.

¹⁵³ Smith, *New Energy Policy Would Get Rid of Michigan’s Renewable Energy Mandate*, *supra* note 150.

energy resources.¹⁵⁴ For example, in Texas, the largest U.S. wind-producing state, the politics are quite nuanced. Republican Senator Fraser co-sponsored the bill that created the state's RPS in 1999. The Republican comptroller has explained the important economic role of its Renewable Portfolio Standard (RPS): "After the RPS was implemented, Texas wind corporations and utilities invested \$1 billion in wind power, creating jobs...and increasing the rural tax base."¹⁵⁵

However, Senator Fraser led a 2015 effort to repeal the RPS, which passed in the Senate and then died in the House.¹⁵⁶ His publicly stated reasons for wanting to repeal the law, though, were economically based and he maintained his supportiveness of the renewable energy industry.¹⁵⁷ Senator Fraiser explained that Texas met its renewables mandate in 2005 due to the rapid growth of the wind industry, and that federal production tax credits and the availability of transmission currently drive the market rather than state renewable energy credits.¹⁵⁸ Those opposing the repeal also make economic markets about the effect it would have on the price of renewable energy credits.¹⁵⁹ While some argue that Senator Fraser's effort may form part of the broader national campaign by the American Legislative Exchange Council (ALEC) to repeal renewable energy laws (discussed in more depth in Part III), Senator Fraser claims to have had no communication with ALEC in years and simply be trying to make better policy.¹⁶⁰ Regardless of what motivates Senator Fraser, the key point for purposes of this Article is that the

¹⁵⁴ Beyond Michigan and Texas, for example, in the "red" state of Kansas, 73% of Republicans, 82% of Democrats, and 75% of Independents support the state's 2009 renewable energy law. Two-thirds of those polled supported augmenting the state's renewable energy law, even if energy bills increased. Jim Marston, *Fossil Fuel Industry's Tired Battle Against Clean Energy Is Also A Losing One*, FORBES, Apr. 12, 2014, <http://www.forbes.com/sites/edfenergyexchange/2014/04/12/fossil-fuel-industrys-tired-battle-against-clean-energy-is-also-a-losing-one/>. Kansas's renewable energy laws have also come under attack, along with those of other states. See Maria Gallucci, *Renewable Energy: Kansas Gov Brownback Pushes Plan To Weaken State Mandate; Texas, North Carolina Advance Similar Bills*, INT'L BUS TIMES, May 6, 2015, <http://www.ibtimes.com/renewable-energy-kansas-gov-brownback-pushes-plan-weaken-state-mandate-texas-north-1911052>.

¹⁵⁵ *Id.*

¹⁵⁶ See Jim Malewitz, *Senate Votes to End Renewable Energy Programs*, TEXAS TRIBUNE, Apr. 14, 2015, <http://www.texastribune.org/2015/04/14/senate-votes-end-renewable-energy-programs/>; Herman K. Trabish, *Texas Renewables Mandate Repeal Bill Flounders in State House*, UTILITYDIVE, June 1, 2015, <http://www.utilitydive.com/news/texas-renewables-mandate-repeal-bill-flounders-in-state-house/399984/>.

¹⁵⁷ Herman K. Trabish, *'Mission accomplished?': Inside the Battle over Texas Renewable Energy Incentives*, UTILITYDIVE, Apr. 22, 2015, <http://www.utilitydive.com/news/mission-accomplished-inside-the-battle-over-texas-renewable-energy-incen/389444/>.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

existence of a strong wind industry has helped shift the debate from the value of renewables to how law should interact with them.

As the Michigan and Texas examples illustrate, meaningful economic success, rather than just lipservice to “green jobs,” seems to help build support for programs that support energy transition and reduce emissions, often without using the words “climate change.” Although this support is not immune to partisan battles, and even disagreements within parties, the economic alignment helps build broader support. As discussed in more depth in Section III.A, these kinds of alignments can be particularly effective at local scales. Within Texas, for example, one city chose to go 100% renewable because it was the cheapest form of energy available. Interim City Manager Jim Briggs explained, “I’m probably the furthest thing from an Al Gore clone you could find. We didn’t do this to save the world – we did this to get a competitive rate and reduce the risk for our consumers.”¹⁶¹

The potential for economic opportunity to create greater partisan alignment is not simply in individual states and their cities. Interactions with “green” companies show a similar pattern. The shift in the last decade of Republican public portrayal of electric car company Tesla, for example, further reinforces the ways in which economic success and benefits can dampen partisanship.

Tesla has experienced radical shifts in how Republican leaders have portrayed it over time as it has become more economically successful. Although Tesla received support from moderate Republican Governor Arnold Schwarzenegger as early as 2003, it became a target for Republican politicians after receiving a \$465 million Advanced Technology Vehicle Manufacturing loan from the Department of Energy in 2010.¹⁶² Following the bankruptcy of Solyndra, which also received such a loan, Governor Romney described Tesla as a “loser,”¹⁶³ a sentiment Governor Palin echoed.¹⁶⁴ Governor Palin went on in a Facebook post to portray the company’s

¹⁶¹ Tom Dart, *Texas City Opts for 100% Renewable Energy – To Save Cash, Not the Planet*, THE GUARDIAN, Mar. 29, 2015, <http://www.theguardian.com/environment/2015/mar/28/georgetown-texas-renewable-green-energy>.

¹⁶² See Ashlee Vance, *Tesla Pays Off Its \$465 Million ‘Loser’ Loan*, BLOOMBERG BUSINESS, May 22, 2013, <http://www.bloomberg.com/bw/articles/2013-05-22/tesla-pays-off-its-465-million-loser-loan>.

¹⁶³ See, e.g., Nia-Malika Henderson, *Mitt Romney Visits Solyndra Headquarters, Knocks President Obama*, WASHINGTON POST, May 31, 2012, http://www.washingtonpost.com/politics/mitt-romney-visits-solyndra-headquarters-knocks-president-obama/2012/05/31/gJQAAnge5U_story.html; Betsy Isaacson, *Mitt Romney’s Tesla Diss Triggers Fierce Reactions*, HUFFINGTON POST, Oct. 4, 2012, http://www.huffingtonpost.com/2012/10/04/mitt-romney-tesla_n_1939531.html.

¹⁶⁴ Sarah Palin, Facebook post, Apr. 5, 2013, <https://www.facebook.com/sarahpalin/posts/10151547784498588>.

product as: the “Obama-subsidized Tesla that turns into a “brick” when the battery completely discharges and then costs \$40,000 to repair.”¹⁶⁵

However, in 2013, Tesla paid back its loan with interest nine years early even as Detroit’s traditional car companies continued to owe the federal government money from their bail out.¹⁶⁶ It then developed plans to invest in a lucrative battery factory. As a result, Republican Governor Perry and Senator Rubio began to support repealing state laws that prevent Tesla from selling through traditional franchises agreements.¹⁶⁷ Even conservative commentator, Bill O’Reilly, said on his show in March 2014 that “[e]verybody on the planet should be rooting for Tesla.”¹⁶⁸ Mark Muro, a senior fellow at the Brookings Institution, explicitly connected Tesla’s economic success with partisan dampening. He noted: “This could be, for either party, a pillar for a very appealing story on economic change.”¹⁶⁹

This Republican support for Tesla is likely driven by multiple factors – such as Governor Perry wanting Tesla to site its lucrative new battery factory in Texas, Governor Perry and Senator Rubio wanting to distance themselves from Governor Christie, and a support for free markets. Moreover, the story of why San Antonio ultimately lost out in its bid for the factory includes Nevada offering financial state support that Texas did not (although San Antonio claims its package was still bigger). As San Antonio Economic Development Foundation head Mario Hernandez put it: “Our package didn’t have any state incentives. It was San Antonio vs. Nevada, the entire state.”¹⁷⁰ But these nuances do not undermine the core idea running

¹⁶⁵ *Id.*

¹⁶⁶ Tesla noted: “Following this payment, Tesla will be the *only* American car company to have fully repaid the government.” Vance, *Tesla Pays Off Its \$465 Million ‘Loser’ Loan*, *supra* note 162.

¹⁶⁷ David R. Baker, *Republicans Who Once Reviled Tesla, Now Praise It*, SFGATE, Apr. 14, 2014, <http://www.sfgate.com/politics/article/Republicans-who-once-reviled-Tesla-now-praise-it-5399733.php>. For discussion of battles over these laws in the above-discussed states of Texas and Michigan in particular, see Maxell Tani, *Tesla’s Empty Threat Against Texas*, BUSINESS INSIDER, June 1, 2015, <http://www.businessinsider.com/teslas-empty-threat-against-texas-2015-6>; Lauren Etter, *Texas Isn’t Open for Tesla’s Direct Auto Sales, Abbott Says*, BUSINESS INSIDER, July 14, 2015, <http://www.bloomberg.com/news/articles/2015-07-14/texas-isn-t-open-for-tesla-s-direct-sales-says-governor-abbott>; Michelle Maynard, *Michigan to Tesla Motors: You’re Not Welcome*, FORBES, Oct. 21, 2014, <http://www.forbes.com/sites/michelinemaynard/2014/10/21/michigan-to-tesla-motors-youre-not-welcome/>; Stephen Edelstein, *Tesla Is Intensifying Its Fight to Do Direct Sales in Michigan*, BUSINESS INSIDER, Aug. 6, 2015, <http://www.businessinsider.com/tesla-is-intensifying-its-fight-to-do-direct-sales-in-michigan-2015-8>.

¹⁶⁸ Baker, *Republicans Who Once Reviled Tesla, Now Praise It*, *supra* note 167.

¹⁶⁹ *Id.*

¹⁷⁰ Neal Morton, *Memo: S.A.’s Incentives for Tesla Topped Nevada’s*, SAN ANTONIO EXPRESS-NEWS, Sept. 9, 2014, <http://www.expressnews.com/business/local/article/Memo-S-A-s-incentives-for-Tesla-topped-Nevada-s-5744838.php>.

across these situations: when energy transition has tangible and demonstrable economic benefits, politicians on both sides of the aisle and the public who elect them are more willing to get on board.

Moreover, just as in the above-described conflicts in Michigan and Texas, the divides are not always along partisan lines. Republicans take different positions on the value of Tesla and renewable energy. Climate Desk’s Associate Producer Tim McDonnell explains:

The Republican-eat-Republican battle over Tesla mirrors another clean energy fight playing out nationwide. Conservatives aligned with large utility companies are squaring off with the solar power industry and libertarian-leaning Republicans over rules to allow homeowners with solar panels to sell excess power back to the grid, a policy known as net metering, which is allowed in more than 40 states.¹⁷¹

The battles thus become about competing economic interests rather than entrenched partisan differences.

Overall, these examples of wind energy and electric cars illustrate that once clean energy industries get a significant economic foothold, they can generate their own momentum and support for ramping up clean energy programs. They also often become advocates for energy transition against those who seek to block it. An interesting instance of such advocacy is clean energy firms, including power companies with significant investments in low carbon energy sources, increasingly intervening in opposition to lawsuits brought to block climate change regulation. These companies work to support the case of regulators seeking to expand clean energy programs. One lawyer, who works for a major power generator, explained that in the context of the company increasing its own clean energy-generating portfolio: “They’re generally interested from a financial perspective in anything that moves or requires moves towards cleaner generation.”¹⁷² Like in the above examples of Republican politicians, these companies see the bottom line benefits of supporting energy transition.

Moreover, these companies’ support for climate change or clean energy regulation does not simply influence what regulatory approaches are possible. It also helps to dampen the partisan quality of the debate by making these disputes among industry rather than environmentalists in opposition to industry. As one of the litigators in these cases explained:

¹⁷¹ Tim McDonnell, *GOP Lawmakers Scramble to Court Tesla*, MOTHER JONES, Mar. 27, 2014, <http://www.motherjones.com/blue-marble/2014/03/gop-lawmakers-scramble-green-energy-cash>.

¹⁷² In-person interview, participant 5 (Nov. 14, 2012).

...[I]t changes the discourse to have it not being industry versus government agencies and enviros. Changes the discourse dramatically when they can no longer say, well its power generators versus EPA; well, there's power generators on each side.¹⁷³

Clean energy initiatives that are cost-effective and economically beneficial to industry and communities thus can be a basis for building broader coalitions of interested stakeholders than an appeal to act on climate change would.

C. *“Every crisis is an opportunity”*



Just as meaningful linkages to economic development provide an opportunity to advance energy transition in ways that help to mitigate climate change, extreme weather can increase receptivity to adaptive action. People tend to connect extreme weather events to climate change, even though as a scientific matter, sea level rise or broader patterns of extreme events are easier to link than a particular disaster.¹⁷⁵ For example, the Yale Project on Climate Change Communication and George Mason University Center for Climate Change Communication found in a joint study that:

A large majority of Americans believe that global warming made several high profile extreme weather events worse, including the unusually warm winter of December 2011 and January 2012 (72%), record high summer temperatures in

¹⁷³ *Id.*

¹⁷⁴ http://www.psu.edu/dept/e-education/blogs/energy_policy/la-tot-cartoons-pg-obama-romney-climate-change-hurricane-sandy.png

¹⁷⁵ IPCC, SPECIAL REPORT ON MANAGING THE RISKS OF EXTREME EVENTS AND DISASTERS TO ADVANCE CLIMATE CHANGE ADAPTATION (2011, IPCC, Geneva).

the U.S. in 2011 (70%), the drought in Texas and Oklahoma in 2011 (69%), record snowfall in the U.S. in 2010 and 2011 (61%), the Mississippi River floods in the spring of 2011 (63%), and Hurricane Irene (59%).¹⁷⁶

However, like broader questions of climate change science, there is a partisan divide in how people view natural disaster and climate change, even following a severe weather event. The good news from the perspective of fostering action is that, even with partisan differences, a substantial majority of people – including almost half of Republicans – support governmental assistance for communities affected by natural disaster (80.1% of Democrats, 62.0% of Independents, and 48.2% of Republicans, which resulted in 64.3% overall).¹⁷⁷ However, the parties were far more sharply split on whether climate change is related to more frequent and severe natural disasters (71.6% of Democrats, 50.7% of Independents, and 24.8% of Republicans, which resulted in 51.2% overall).

This gap suggests that a key to adaptation planning may be to frame action in terms of disaster resilience and response rather than climate change itself.¹⁷⁸ This strategy appears to bear out in practice, as the examples we explore in this section illustrate. The section provides in-depth exploration of Superstorm Sandy, which because of its timing and location provides a particularly helpful example of the complex dynamics around disaster, climate change, and partisanship. We also highlight other examples that provide additional insights into the ways in which disaster can help shift framing and provide opportunities for bipartisan action.

When Superstorm Sandy ravaged the U.S. East Coast one week before the 2012 election, the disaster caused a major shift in the partisan dialogue about energy and climate change. In the intense presidential contest between President Obama and Governor Romney, climate change finally lost its “Lord Voldemort” status.¹⁷⁹ As Mike Tidwell of left-leaning magazine *The Nation* put it: “The presidential candidates decided not to speak about climate change, but climate change has decided to speak to them.”¹⁸⁰

¹⁷⁶ YALE PROJECT ON CLIMATE CHANGE COMMUNICATION & GEORGE MASON UNIVERSITY CENTER FOR CLIMATE CHANGE COMMUNICATION, *EXTREME WEATHER, CLIMATE & PREPAREDNESS IN THE AMERICAN MIND* (2012), [HTTP://ENVIRONMENT.YALE.EDU/CLIMATE-COMMUNICATION/FILES/EXTREME-WEATHER-CLIMATE-PREPAREDNESS.PDF](http://environment.yale.edu/climate-communication/files/extreme-weather-climate-preparedness.pdf).

¹⁷⁷ YouGov Omnibus Poll, Oct. 29-30, 2012, <http://big.assets.huffingtonpost.com/hurricaneclimatetabs.pdf>.

¹⁷⁸ See Verchick, *supra* note 79.

¹⁷⁹ See *supra* note 41 and accompanying text.

¹⁸⁰ Dan Merica, *Sandy Reminds Us of Climate Change and Other Forgotten Campaign Issues*, CNN POLITICS, Oct. 30, 2012, <http://www.cnn.com/2012/10/30/politics/forgotten-campaign-issues/>.

This shift in the public dialogue reinforces the ways in which disaster resiliency framing can not only support action, but also help to overcome the silencing effect that partisanship can have in this context¹⁸¹. Until this devastating storm, climate change had not been mentioned by either candidate since their statements to a science organization in September.¹⁸² Although the candidates did at times mention renewable energy, climate change had not come up either on the campaign trail or in presidential debates. The storm changed that in the last few days of the election campaign and, perhaps more importantly, for politicians and litigators – especially Democrats – in the months that followed. In effect, Superstorm Sandy made it acceptable for Democratic, and even some Republican, candidates to talk about climate change by giving it a new frame of reference. Climate change was not an abstract global pollution problem but rather something that, left unaddressed, could harm people, homes and families.¹⁸³

Perhaps the most dramatic moment in this political reaction took place a few days after the storm and just three days before the election. New York Mayor Bloomberg, a political independent, cited climate change as he endorsed President Obama in an article entitled *A Vote for a President to Lead on Climate Change*:

The devastation that Hurricane Sandy brought to New York City and much of the Northeast — in lost lives, lost homes and lost business — brought the stakes of next Tuesday’s presidential election into sharp relief.

Our climate is changing. And while the increase in extreme weather we have experienced in New York City and around the world may or may not be the result of it, the risk that it may be — given the devastation it is wreaking — should be enough to compel all elected leaders to take immediate action.¹⁸⁴

¹⁸¹ The political silencing of dialogue over climate change does not just occur in the election context. For example, a number of news outlets reported that Florida Department of Environmental Protection employees may have been forbidden to use the term “climate change” or “global warming” in their official communications. See Terrence McCoy, *Threatened by Climate Change, Florida Apparently Bans the Term Climate Change*, WASH. POST, Mar. 9, 2015. Spokespeople from the state and governor’s office deny this claim, however. *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* The fact that Democrats who believed in climate action did not feel comfortable talking about climate change in that election prior to the storm reinforces the kinds of differences between the parties and their strategies highlighted in Hacker and Pierson in *Off Center*. See HACKER & PIERSON, *OFF CENTER*, *supra* note 36.

¹⁸⁴ Michael R. Bloomberg, *A Vote for a President to Lead on Climate Change*, BLOOMBERG VIEW, Nov. 1, 2012, <http://www.bloombergview.com/articles/2012-11-01/a-vote-for-a-president-to-lead-on-climate-change>.

President Obama responded to Mayor Bloomberg's endorsement by also mentioning the issue directly for the first time in weeks: "Climate change is a threat to our children's future, and we owe it to them to do something about it."¹⁸⁵

The Mayor Bloomberg incident was not an isolated one, but rather epitomized a changed Democratic campaign. Leading Democratic campaign surrogates also started referencing climate change directly in the week after Superstorm Sandy. For example, President Clinton said at a Minnesota rally: "[Governor Romney] ridiculed the president for his efforts to fight global warming in economically beneficial ways. He said, 'Oh, you're going to turn back the seas.' In my part of America, we would like it if someone could've done that yesterday."¹⁸⁶ Vice President Gore made similar statements that week.¹⁸⁷ In addition, environmental advocacy groups made an attack ad highlighting Governor Romney's comments on sea level rise, which ended with: "Tell Mitt Romney: climate change isn't a joke."¹⁸⁸

President Obama's public and explicit focus on climate change continued following his reelection. For instance, he mentioned climate change as one of his three main priorities in his *Time* person of the year interview that December.¹⁸⁹ He also often continued to make links to natural disaster when he did so. In his second inaugural address, President Obama stated: "Some may still deny the overwhelming judgment of science, but none can avoid the devastating impact of raging fires and crippling drought and more powerful storms."¹⁹⁰ Throughout his second term, President Obama has continued to roll out new executive branch initiatives – at times quite controversial, like his efforts to regulate power plants – to advance both mitigation and adaptation, often using similar rhetoric.

However, this change in public behavior by Democratic politicians was not necessarily a harbinger of massively decreased

¹⁸⁵ Katherine Bagley, *Climate Science Makes an 11th Hour Comeback in 2012*, INSIDECLIMATENEWS, Dec. 28, 2012, <http://insideclimateneews.org/news/20121228/climate-change-science-global-warming-hurricane-sandy-obama-mayor-bloomberg-drought-wildfires-arctic-melt-ipcc>.

¹⁸⁶ Suzanne Goldenberg, *Sandy puts climate change back on the US election agenda*, THE GUARDIAN, Oct. 31, 2012, <http://www.theguardian.com/environment/2012/oct/31/sandy-climate-change-us-election>.

¹⁸⁷ *Id.*

¹⁸⁸ Elise Foley, *Mitt Romney Climate Change Brush-Off Highlighted In New Ad*, HUFFINGTON POST, Nov. 3, 2012, http://www.huffingtonpost.com/2012/11/03/mitt-romney-climate-change_n_2069003.html.

¹⁸⁹ *Id.*

¹⁹⁰ The White House, Office of the Press Secretary, Inaugural Address by President Barack Obama, Jan. 21, 2013, <http://www.whitehouse.gov/the-press-office/2013/01/21/inaugural-address-president-barack-obama>.

partisanship. The increasingly vocal focus on climate change and its link to disaster by Democrats did not generally change the ways in which many Republican politicians were referencing the problem during the election or since. Governor Romney, when pushed by someone in a crowd about whether he still thought climate change was a joke, said “As a matter of fact, if you'd like to, I know you're filming, if you'd like to see my view on global warming, I wrote a book, and there's a chapter on global warming and you'll see what I think we can do to deal with it.”¹⁹¹ That book acknowledged that climate change was happening and that human activity was a contributing factor, but queried the extent of the contribution by human activity versus factors out of our control.¹⁹²

Similarly, although New Jersey Governor Chris Christie praised President Obama's disaster response in the immediate aftermath of the storm and acknowledged anthropogenic climate change prior to the storm in 2011, he has largely avoided direct discussion of climate change since. Governor Christie did maintain in 2013 that there was no proof the climate change caused Superstorm Sandy; while this statement received a lot of press at the time, climate scientists largely agree that one cannot prove that climate change caused any particular storm, though it increases the risks in a variety of ways.¹⁹³ In the lead up to the 2016 elections, Governor Christie has continued to resist climate change mitigation measures such as New Jersey rejoining the region's cap-and-trade efforts.¹⁹⁴

But, even in this polarized environment, the response to Superstorm Sandy did change some politicians' views and allowed new bipartisan efforts to move forward. For instance, New York Republican Representative Michael Grimm, who represents a district hard-hit by Superstorm Sandy, has reversed his initial skepticism of climate science and publicly accepted the scientific consensus.¹⁹⁵ At a more macro level, New York's Community Risk and Resiliency Act – the first law in the nation to require that communities design projects

¹⁹¹ Elyse Siegal, *Mitt Romney Pressed On Climate Change: 'Do You Still Think The Rising Of The Seas Is Funny?'*, HUFFINGTON POST, Nov. 2, 2012, http://www.huffingtonpost.com/2012/11/02/mitt-romney-climate-change_n_2068608.html.

¹⁹² *Id.*

¹⁹³ Kate Zernicke, *One Result of Hurricane: Bipartisan Flows*, N.Y. TIMES, Oct. 31, 2012, <http://www.nytimes.com/2012/11/01/nyregion/in-stunning-about-face-chris-christie-heaps-praise-on-obama.html>; Adam Edelman, *N.J. Gov. Chris Christie: No proof Superstorm Sandy was caused by climate change*, May 21, 2013, <http://www.nydailynews.com/news/politics/chris-christie-reverses-stance-climate-change-article-1.1350260>.

¹⁹⁴ Coral Davenport, *With Eye on 2016, Christie Resists Climate Change Plan*, N.Y. TIMES, Sept. 18, 2014, <http://www.nytimes.com/2014/09/19/us/politics/with-eye-on-2016-christie-resists-climate-change-plan-for-new-jersey.html>.

¹⁹⁵ Sahil Kapur, *GOP Climate Change Skeptic Becomes A True Believer After Sandy*, TPM, Apr. 24, 2014, <http://talkingpointsmemo.com/dc/michael-grimm-climate-change-science>.

to incorporate climate impacts into project permitting and funding – passed with bipartisan support.¹⁹⁶

Public opinion polling reinforces both that Superstorm Sandy had some influence on public views of climate change – particularly in the immediate aftermath of the storm and in regions most affected by the storm – and that a partisan divide remains. With respect to the 2012 presidential election, although it is unclear how much Mayor Bloomberg’s eleventh hour endorsement helped President Obama, CBS News exit polling suggested that Superstorm Sandy mattered in the election. Not surprisingly, based on the discussion of the previous section, sixty percent of voters said the economy was the most important issue in their vote. Forty-two percent, though, said that President Obama’s response to Superstorm Sandy, which was viewed positively according to polls, was a factor as well. However, it is unclear how climate-specific those views were.¹⁹⁷

Beyond the 2012 election itself, polls suggest that at least in the aftermath of Sandy, people in both parties connected the storm to climate change, albeit with a partisan gap. For example, a Zolby Analytics poll in November 2012 highlighted:

the dramatic impact 2012’s extreme weather has had across party lines, with half of Republicans, 73 percent of independents and 82 percent of Democrats saying they’re worried about the growing cost and risks of extreme weather disasters fueled by climate change.

Pollster John Zogby noted that this represented “a major change from our December 2009 poll, which showed two-thirds of Republicans and nearly half of political independents saying they were ‘not at all concerned’ about global climate change and global warming.” He concluded: “The political climate has shifted and members of Congress need to catch up with their constituents.”¹⁹⁸ A poll by Siena Research Institute of New Yorkers in that time period found similar results: “In every region of New York, at least 63 percent of voters say that the extreme weather of 2011 and 2012 demonstrates that climate change in action. More than two thirds of independents and nearly half

¹⁹⁶ Katherine Bagley, *Climate Change Law in New York Bridges Partisan Divide*, INSIDER CLIMATE NEWS, Aug 5, 2014, <http://insideclimatenews.org/news/20140805/climate-change-law-new-york-bridges-partisan-divide>.

¹⁹⁷ Brian Montopoli, *Early Exit Poll: 60% Say Economy Top Issue*, CBS News, Nov. 6, 2012, <http://www.cbsnews.com/news/early-exit-poll-60-percent-say-economy-top-issue/>.

¹⁹⁸ Miles Grant, *New Poll: Sandy Fuels Widespread Concern on Climate Change*, National Wildlife Federation, Nov. 14, 2012, <https://www.nwf.org/News-and-Magazines/Media-Center/News-by-Topic/Global-Warming/2012/11-14-12-New-Poll-Sandy-Fuels-Widespread-Concern-on-Climate-Change.aspx>.

of Republicans also say that Superstorm Sandy was the result of climate change.”¹⁹⁹

However, these post-disaster shifts in opinion and focus on these issues may lack staying power. For example, a trends analysis done a year post-Sandy found that web searches and media references spiked in the aftermath of that storm and other climate-related events, but then declined again.²⁰⁰ Moreover, in April 2013 polling in New Jersey, just six months after Superstorm Sandy, a clear partisan divide existed in how people viewed the relationship between disasters and climate change. “More than 80 percent of Democrats see climate change causing recent disasters, as do 60 percent of independents. But only about 33 percent of Republicans agree, while 61 percent think the storms were not climate change driven.”²⁰¹

In essence, disaster may provide a short-term window for bipartisan action on climate change, with the effectiveness of this framing receding with the public memory of the event. A similar dynamic appears to be playing out with respect to other high-profile weather-related impacts, such as the ongoing drought in California.²⁰² The unprecedented nature of the drought and the severity of its effects has opened up space for discussions of law reform that would be too hard at other times. Not only has the state – led by the Governor Brown’s office – ramped up the drought response by casting it as an issue of emergency management,²⁰³ but lawmakers have also passed a suite of new water measures, in some cases with bipartisan support. In August 2014, Governor Brown signed bipartisan legislation (which passed the Senate 37-0 and the Assembly 77-2) that put a

¹⁹⁹ Whitney Allen, *Poll: Superstorm Sandy Linked To Climate Change By 69% Of New Yorkers, Including 73% Of Independents*, CLIMATEPROGRESS, Dec. 2, 2014, <http://thinkprogress.org/climate/2012/12/04/1275841/poll-69-percent-of-new-yorkers-link-superstorm-sandy-with-climate-change/>.

²⁰⁰ Brian Kahn, *Despite Policy Changes, Hurricane Sandy Hasn't Shifted Climate Change Narrative*, HUFFINGTON POST, Oct. 29, 2013, http://www.huffingtonpost.com/2013/10/29/hurricane-sandy-climate-narrative_n_4174921.html.

²⁰¹ Rutgers, Eagleton Center for Public Interest Polling, Press Release, *Sandy's Legacy: Climate Change Is Real For New Jerseyans, Rutgers-Eagleton Poll Finds*, Apr. 29, 2013, <http://eagletonpollblog.wordpress.com/2013/04/29/superstorm-sandy-and-global-climate-change-beliefs/>.

²⁰² Whether weather events like droughts that develop over a longer timeframe should be classed as a “disaster” beside events with a sudden or short-term impact like floods or hurricanes is a live question in the disaster law literature and practice. Like floods or hurricanes, droughts can cause enormous social, economic and environmental impacts, but the extent of those impacts – the severity of the drought – is not known until the rains come again and the event ends. See EPA, *Natural Disasters – Severe Drought*, <http://epa.gov/naturaldisasters/drought.html>; University of Florida, IFAS Section, “*Extreme Heat and Drought*”, THE DISASTER HANDBOOK, <http://disaster.ifas.ufl.edu/masterfr.htm>.

²⁰³ Governor Brown Declares Drought State of Emergency, California Drought, Jan. 17, 2014, <http://ca.gov/Drought/news/story-27.html>.

comprehensive water bond (later accepted) before voters at the November elections.

More controversially and over opposition from Republican legislators and farming groups,²⁰⁴ in September 2014, the state passed historic groundwater legislation that will overhaul California’s long-standing “pump-as-you-please” policy to require statewide regulation of underground water resources and impose requirements for sustainable use.²⁰⁵ Water policy advocates recognize that now is the time for action to achieve long-lasting policy changes that will improve both water and climate change resilience. As one put it: “In the world of public policy, a drought is a terrible thing to waste.”²⁰⁶ Public polling reinforces this view. In September 2014, 24 percent of Californians named dealing with the drought as the state’s top issue, a marked increase from the one percent who took this view in 2012 before the drought began.²⁰⁷

In addition to influencing policymakers and the public directly, disasters and other tangibly felt impacts can also open the door for litigation that can shift policy.²⁰⁸ For instance, in the aftermath of Superstorm Sandy, there was a flurry of cases in the United States focused on the extent to which public authorities must compensate landowners when undertaking protective coastal armoring measures;²⁰⁹ the scope for insurers to avoid coverage or impose “hurricane deductibles” for damage from the storm;²¹⁰ and claims in negligence against building owners who failed to take out adequate insurance to protect common property assets.²¹¹ Most of these cases did not raise climate change explicitly, but they influence the

²⁰⁴ Jim Nielsen, *California seeks to take farm water rights*, SFGATE, Aug. 27, 2014, <http://www.sfgate.com/default/article/California-seeks-to-take-farm-water-rights-5716603.php>.

²⁰⁵ AB-1739, SB-1168, SB-1319, Sustainable Groundwater Management Act 2014, http://opr.ca.gov/docs/2014_Sustainable_Groundwater_Management_Legislation_092914.pdf.

²⁰⁶ Ellen Hanak (Public Policy Institute of California), *California’s Drought: Lessons for Adaptation and Policy Reform*, IWREC Annual Meeting, Sep. 8, 2014, <http://www.worldbank.org/content/dam/Worldbank/Feature%20Story/SDN/Water/events/IWREC2014-Keynote-Ellen-Hanak-Sept8.pdf>.

²⁰⁷ Baldassare, M., D. Bonner, R. DeFever, L. Lopes & J. Shrestha, *Californians and their Government*, PPIC Statewide Survey, September 2014, http://www.ppic.org/content/pubs/survey/S_914MBS.pdf.

²⁰⁸ Jacqueline Peel & Hari M. Osofsky, *Sue to Adapt?* 99 MINNESOTA LAW REVIEW 2133 (2015).

²⁰⁹ *Borough of Harvey Cedars v. Karan*, 43 ELR 20149, No. A-120-11 (N.J., July 8, 2013).

²¹⁰ *See Superstorm Sandy Insurance Claims*, Napoli, Bern, Ripka, Shkolnik LLP, <http://www.napolibern.com/Superstorm-Sandy-Insurance-Claims.aspx?red...11%2f20%2fhurricane-sandy-considerations-for-climate-adaptation.html> (last visited March 13, 2014).

²¹¹ Barbara Ross, *Luxury Condo Building in Financial District Hit in \$35 million Hurricane Sandy Suit*, NEW YORK DAILY NEWS, November 19, 2012, <http://www.nydailynews.com/life-style/real-estate/luxury-condo-hit-35-million-sandy-suit-article-1.1204856> (last visited March 13, 2014).

measures that people will take in the future to prepare for severe storms. Given that climate change increases the likelihood of such storms and the vulnerability of coastal communities to them, such measures serve as a form of climate change adaptation.²¹²

Some of the post-Superstorm Sandy cases did focus on climate change more explicitly and form part of a broader body of emerging adaptation litigation that we have explored in our prior scholarship.²¹³ One of the most interesting, and potentially most influential, cases to emerge post-Sandy is the rates case involving power company, Consolidated Edison (ConEd), which was decided by the New York Public Services Commission (PSC) in early 2014. The case itself was preceded by a petition filed with the PSC by the Columbia University Center for Climate Change and a group of non-governmental organizations in the aftermath of Superstorm Sandy. The PSC serves as the primary regulator of New York's utilities, which provide power throughout the state. The petition asked the commission to "use its regulatory authority to require all utility companies within its jurisdiction to prepare and implement comprehensive natural hazard mitigation plans to address the anticipated effects of climate change."²¹⁴ The petition linked energy and environmental planning in its call for public utilities to plan for hazard mitigation and disaster response under conditions of increased risk from climate change.²¹⁵

The petition was only the first step in this case. When ConEd – the largest utility in the State of New York – filed a petition with the Commission in January 2013 for changes to its rates, the Columbia University Center for Climate Change and other NGOs formally intervened and subsequently participated in the adjudicatory hearings that followed. During the rate case litigation, a Storm Hardening and Resiliency Collaborative formed to negotiate terms of a settlement and to implement the settlement agreement. The Collaborative included four working groups addressing: (1) storm hardening design standards; (2) alternative resiliency strategies; (3) natural gas system resiliency; and (4) risk assessment/cost benefit analysis.

As a result of discussions in the Collaborative's working groups, ConEd in the settlement agreement approved by the PSC committed to several measures to improve the resiliency of its electricity and gas

²¹² See Peel and Osofsky, *Sue to Adapt?*, *supra* note 208

²¹³ *Id.*

²¹⁴ Letter from Anne R. Siders, Associate Director, Columbia University Center for Climate Change Law et al., to Jaelyn A. Brillling, Secretary to the New York State Public Service Commission (Dec. 12, 2012), *available at* http://web.law.columbia.edu/sites/default/files/microsites/climate-change/files/Publications/PSCPetitionNaturalHazardPlanning_0.pdf.

²¹⁵ *Id.*

systems. These included a new design standard for infrastructure in flood zones;²¹⁶ implementation of capital programs and projects to “storm harden” its electric, gas, and steam systems in the face of anticipated climate change and sea level rise;²¹⁷ and conduct of a climate change vulnerability study encompassing risks such as rising heat and more severe storms.²¹⁸

Already, the ConEd Rate Case decision is being hailed as “an historic decision that will serve as a nationwide model.”²¹⁹ Beyond its contribution to growing adaptation efforts in the United States, the case neatly illustrates how a high profile weather disaster can provide an opportunity for the emergence of a new dialogue around climate issues focused on issues of harm prevention, property and infrastructure protection, and resilience. Moreover, the infrastructure concerns that were the focus of the original 2012 petition and the subsequent rate case occur in many places around the United States. Summarizing a general sentiment, one interviewee in our climate litigation work, remarked of Superstorm Sandy, “it’s going to change things.” Not only did it have “a lot of elements of climate change to it,” but it also “impacted a huge number of people, and people are worried about the next one now.”²²⁰

This Section’s example of the Superstorm Sandy response illustrates the many ways in which disasters can create opportunities for politicians’ framing or reframing of issues. They can also open windows for policy action – either directly or through forcing litigation – by highlighting the very real and devastating effects on people’s homes, property, lives, and livelihoods that climate change is likely to bring about. Beyond just the Superstorm Sandy context, in the last few years, “building resilience” has become the focus of

²¹⁶ STATE OF N.Y. PUB. SERV. COMM’N, ORDER APPROVING ELECTRIC, GAS AND STEAM RATE PLANS IN ACCORD WITH JOINT PROPOSAL 63 (Feb. 21, 2014) [hereinafter ORDER], *available at*, <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={1714A09D-088F-4343-BF91-8DEA3685A614}>; CONSOLIDATED EDISON CO. OF N.Y., STORM HARDENING AND RESILIENCY COLLABORATIVE REPORT (Dec. 4, 2013), *available at* <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={E6D76530-61DB-4A71-AFE2-17737A49D124}>. In its Order the Commission noted that ongoing review of the standard is appropriate “in light of the rapid developments in climate science forecasts, and in federal, state and city policies.” ORDER, *supra* note 216, at 67.

²¹⁷ STATE OF N.Y. PUB. SERV. COMM’N, JOINT PROPOSAL (Dec. 31, 2013), *available at* <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={3881B193-8115-4BA0-A01A-B8D373D59726}>.

²¹⁸ This study is intended to provide a longer-range basis for ongoing review of design standards, such as the FEMA+3 floodproofing standard, and the Commission indicated that it “expect[ed] to revisit this issue.” ORDER, *supra* note 216, at 67.

²¹⁹ Ethan Strell, *Public Service Commission Approves Con Ed Rate Case and Climate Change Adaptation Settlement*, CLIMATE CHANGE BLOG (Feb. 21, 2014), *available at* <http://blogs.law.columbia.edu/climatechange/2014/02/21/public-service-commission-approves-con-ed-rate-case-and-climate-change-adaptation-settlement>.

²²⁰ In-person interview, participant 6 (Nov. 14, 2012).

numerous planning efforts; such efforts, even if they do not mention climate change directly, are often intimately linked to adaptation and, in some cases, also to mitigation.²²¹

Disasters can also see the emergence of new coalitions of actors that have a substantial stake in policy progress; for example, insurance companies and re-insurers are becoming major players in policy debates about disaster preparation and adaptation.²²² Moreover, the decisions of these actors can exert a very direct influence on behavior: “if insurance companies won’t write insurance for floodplains, you know, that changes policy.”²²³

Economic development and disaster resiliency are just two examples of ways in which substantive reframing could move discussions related to energy transition or climate change to areas of greater agreement. From our perspective, the key to progress is not whether or not people can agree on the problem of climate change or the need for energy transition, but that they take the steps needed to address it. Because there are things that people agree about that also serve mitigation and adaptation goals, reframing issues around those areas of agreement has been and will continue to be an important strategy for progress in the current partisan climate.

III. STRUCTURAL LEVERAGE POINTS FOR MAKING PROGRESS

The previous Part has focused on substantive reframing of actions that contribute to addressing climate change or advancing energy transition. It argued for the value of moving away from divisive frames that trigger partisan disputes to those where greater social consensus is possible. It is noteworthy, though, that in many of the examples discussed, the most progressive stances or actions are being taken outside of the federal Congressional setting; rather, it is states and their governors, local authorities, the federal executive branch, courts, and businesses that are often the actors taking a lead role. Opportunities for multi-scalar efforts of this kind are a function of the complexity of climate change and energy issues, which can be addressed at a variety of different governance levels by a range of different actors.²²⁴ Many of these forums may also be less prone to

²²¹ See *State and Local Adaptation Plans*, GEORGETOWN CLIMATE CTR., <http://www.georgetownclimate.org/node/3324> (last visited Mar. 5, 2014).

²²² See Part III.C *infra*

²²³ In-person interview, participant 6 (Nov. 14, 2012).

²²⁴ Hari M. Osofsky, *Multiscalar Governance and Climate Change: Reflections on the Role of States and Cities at Copenhagen*, 25 MARYLAND JOURNAL OF INTERNATIONAL LAW 64 (2010); Hari M. Osofsky, *Suburban Climate Change Efforts: Possibilities for Small and Nimble Cities Participating in State, Regional, National, and International Networks*, 22 CORNELL JOURNAL OF LAW AND PUBLIC POLICY 395 (2012).

partisanship than the federal Congressional context, or at least less prone to adopt partisan framings of issues. *Structural* reframing of climate and energy transition efforts – pursuing pathways “off the beaten track” that tap into different coalitions of stakeholders and institutions – may thus aid policy progress in conjunction with substantive reframing.

The notion of structural reframing is one familiar to the social science literature on organizations and organizational change. In that context, the seminal work by Lee Bolman and Terence Deal on *Reframing Organizations* attempts to simplify organizational complexities and diagnose problems by using a series of frames that allow an organizational observer to view the same situation from a variety of different perspectives. Bolman and Deal assert that “[t]he key to accomplishing something that requires concerted action with other people is to reframe your perception of the situation to take account of the divergent perspectives of the various players.”²²⁵ According to Bolman and Deal, one such frame that can be used in seeking to understand organizations is a structural frame. This frame emphasizes organizational architecture, rules, roles, policies, procedures, and lines of authority. Problems viewed through a structural frame are the result of misalignment. In this context, reframing becomes an exercise in determining what structures are necessary to get the job done.

In a similar way, we see structural reframing of climate and energy transition work as an attempt to utilize different sets of institutions, regulatory pathways, and coalitions of actors than the conventional top-down, national legislative pathway that faces substantial partisan roadblocks. Some structural reframing strategies focus on government actors, shifting the locus of climate action either vertically to a different level of government (e.g., from the federal government to state or local governments), or horizontally to a different branch of government (e.g., from the legislature to the executive branch or courts).²²⁶ Recognizing that the vast majority of emissions are not created by governments, but rather through the use of products created and sold by private actors such as corporations, other structural reframing strategies focus on non-governmental

²²⁵ LEE BOLMAN & TERENCE DEAL, *REFRAMING ORGANIZATIONS* (1997), 270.

²²⁶ Structural leverage points for encouraging regulatory action on energy transition can helpfully be considered by envisioning government on a spatial grid. A vertical axis ranges from the individual to the local to the state to the federal to the international, with interstitial regional levels. A horizontal axis captures the myriad of actors functioning at a particular governmental level; in the U.S. context of separation of powers and checks and balances, that axis includes three branches – executive, legislative, and judicial – and the many different individuals and entities functioning within each branch at a particular level.

actors. These strategies aim to influence those private actors directly, rather than just through the governments that regulate them.

The following sections discuss three potential structural leveraging strategies that hold particular promise: (1) scaling down to local levels, (2) shifting across to other branches (executive or judicial) to influence or go around partisan blocks in one branch, and (3) altering focus from policy change to directly changing the behavior of non-governmental actors such as corporations. The Article highlights these three pathways given the lower (though not non-existent) barriers that partisanship generally poses in these contexts, whether this is due to a greater focus on shared community values and needs, executive powers, conventions of judicial independence, or economic bottom-lines. We argue that pairing action in these forums with the kinds of substantive reframing strategies described in the previous part has and can help to promote needed energy transition.

These structural strategies have a more complex relationship to partisanship than the substantive ones do. While substantive reframing focuses on finding issues about which people actually agree, structural reframing includes “going together” and “going around” strategies that emerge in varying combinations over time. Branch shifting – to lawsuits and executive action – particularly exemplifies the mixed quality of structural reframing. Lawsuits often pit the two sides against one another, but sometimes result in moments of cooperation. For example, as discussed in depth below, the litigation helped spur the federal government, California, and automobile companies to come together around motor vehicle greenhouse gas regulations.²²⁷ Similarly, the Obama Administration’s use of executive authority consists of both the high profile actions that invoke partisan responses and other actions that are relatively uncontroversial.²²⁸ This Part explores these nuances in order to understand the role that structural reframing can play in advancing policy action in a partisan environment.

²²⁷ See *infra* Section III.B.1.

²²⁸ See *infra* Section III.B.2.

A. “Small is beautiful”



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This section focuses on vertical reframing, in which advocates shift their focus to a different level of government. In our earlier discussion of substantive reframing, we examined a number of successful bipartisan efforts at the state level; at that scale, action on renewable energy, energy efficiency, and disaster planning at times has been able to move forward even as the Congress remains deadlocked.²³⁰ This section augments that discussion by focusing even smaller, on local efforts at energy transition and climate action.

In examining possibilities at the local level, it is important to first note that, independent of structural reframing to address partisanship, local action serves as a crucial component of any holistic strategy to advance energy transition or to respond to climate change. Over half of the world’s population and over 82 percent of the U.S. population lives in cities.²³¹ NASA estimates that 70 percent of global carbon dioxide (CO₂) emissions come from cities.²³² Local planning decisions shape energy usage, emissions trajectories, and resiliency.

Moreover, as national action in the United States has often been stymied by partisan divides, many local governments (and states) have chosen to take steps to reduce their greenhouse gas emissions and participate in local, state, national, and international networks of cities working on climate change. For example, 1,060 U.S. mayors

²²⁹ http://www.sciencecartoonsplus.com/pages/global_warming.php

²³⁰ For a discussion of these federalism dynamics and partisanship, see Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077 (2014).

²³¹ See U.S. Central Intelligence Agency, World Factbook, <https://www.cia.gov/library/publications/the-world-factbook/fields/2212.html>.

²³² NASA Jet Propulsion Laboratory, California Institute of Technology, Megacities Project, <http://megacities.jpl.nasa.gov/portal/>.

have joined the U.S. Mayors Climate Protection Agreement (Mayors Agreement) – pledging to meet what would have been U.S. Kyoto Protocol commitments – representing about 28 percent of the total U.S. population (though only 5 percent of cities).²³³ Leader cities also have met during the last several international negotiations and formed their own agreements on both mitigation and adaptation. For example, at the September 2014 negotiations, the Compact of Mayors was launched:

Mayors from cities around the globe announced an expansion of their commitments to scale up climate resilience efforts, energy efficiency programmes and resilient financing mechanisms, including through an initiative to reduce greenhouse gas (GHG) emissions by 454 megatons by 2020. The Compact of Mayors is comprised of more than 2000 cities, including over 200 with targets and strategies in place to reduce emissions.²³⁴

However, most crucial for the partisanship concerns that are this Article’s focus, cities are not simply important places in which to address energy transition and climate change. They are also a scale at which partisanship is often less intense. Many cities across the United States do not include party affiliation on their election ballots, and local officials, especially in smaller towns, often do not publicly tout their party membership; a 2001 study found that 77 percent of responding cities held non-partisan elections, reinforcing the dominance of this trend.²³⁵ Scholarly studies of the impact of non-partisan elections have shown what makes sense intuitively: People rely less on party affiliation when the ballot does not indicate it.²³⁶ In addition, people often know each other personally in communities, which tends to lessen the destructive name-calling and create opportunities for a few motivated people to make a difference.²³⁷

²³³ As of Oct. 24, 2013, 1,060 mayors representing a total population of 88,962,982 citizens had joined the Mayors Agreement. Mayors Climate Protection Center, List of Participating Mayors, <http://usmayors.org/climateprotection/list.asp>. The Census Bureau estimated the total U.S. population at 316,938,793 on that date. U.S. and World Population Clock, <http://www.census.gov/popclock/> (last visited Oct. 24, 2013).

²³⁴ Compact of Mayors Launched at U.S. Summit, Sept. 23, 2014, <http://climate-liisd.org/news/compact-of-mayors-launched-at-un-climate-summit/>.

²³⁵ National League of Cities, Partisan vs. Nonpartisan Elections, <http://www.nlc.org/build-skills-and-networks/resources/cities-101/city-officials/partisan-vs-nonpartisan-elections>.

²³⁶ Brian F. Schaffner, Matthew Streb & Gerald Wright, *Teams Without Uniforms: The Nonpartisan Ballot in State and Local Elections*, 54 POLITICAL RESEARCH QUARTERLY (Mar. 2001).

²³⁷ The psychology literature often discusses this phenomenon in terms of social capital. See, e.g., D.D. Perkins & D. A. Long, *Neighborhood Sense of Community and Social Capital: A Multi-Level Analysis*, in PSYCHOLOGICAL SENSE OF COMMUNITY: RESEARCH, APPLICATIONS, AND IMPLICATIONS 291 (A. Fisher, C. Sonn, & B. Bishop, eds., 2002).

While these qualities of smaller scale governments and elections make it tempting to just say “small is beautiful,” the on-the-ground reality is more complex. First and perhaps most fundamentally, local governments are not islands. As geographer Kevin Cox has argued, each scale is comprised not only by interactions at that level, but also through a myriad of interactions with other levels; in other words, local is not just local, but also has individual, community, state, national, and international dimensions.²³⁸ Moreover, geographer Julie Cidell’s work makes clear that one of the key ways in which every scale is in fact multi-scalar is through the people involved.²³⁹ The same people voting in non-partisan local elections are also voting in the very partisan national elections, with greater turnout when they overlap. The people participating in the vitriolic national dialogue, whether directly in politics or through their *Facebook* chats, live in particular places.

The partisan divides particularly play out at the interface of the local with the national dialogue on climate change. For instance, the mayors that have committed to the Mayors Agreement come from cities that vote Democratic in national elections by a wide margin. Participation patterns in three major metropolitan regions – Atlanta, Chicago, and the Twin Cities – exemplify these trends. The five cities in the Atlanta area to join the agreement all lean Democratic. For participating cities for which there was sufficient data to determine partisan leaning in the Chicago area, 23 leaned Democratic and 5 leaned Republican. In the Twin Cities, 19 leaned Democratic and 3 leaned Republican, with one of the Democratic ones (Edina) more of a swing city.²⁴⁰ These patterns suggest that partisan divides influence which mayors are willing to commit explicitly to an agreement focused on climate change commitments.

²³⁸ Kevin R. Cox, *Spaces of Dependence, Spaces of Engagement and the Politics of Scale, Or: Looking for Local Politics*, 17 POL. GEOGRAPHY 1, 19-21 (1998).

²³⁹ Julie Cidell, *The Place of Individuals in the Politics of Scale*, 38 Area 196, 202 (2006).

In the literature on the politics of scale, the individual has largely been treated as a separate scale: the site of multiple and conflicting identities, a locus of struggle for political power and control, or an entry point into the sphere of social reproduction. However, jurisdictions and organizations at higher scales are themselves composed of individuals, and therefore consideration needs to be made of the role that individuals play within the politics of scale In multi-scalar conflicts . . . individuals *as* scales are not politically powerful Because individuals are themselves the sites of multiple scales, they can be torn between those scalar identities, sometimes expressed as keeping the professional separate from the personal Finally, there is the question of individuals *within* scales. The conflation of the identities of individuals with the identities of their jurisdiction is a common practice.

Id.

²⁴⁰ Hari M. Osofsky, *Rethinking the Geography of Local Climate Action: Multi-Level Network Participation in Metropolitan Regions*, 2015 UTAH L. REV. 173.

Second, and connected to the first point, the local itself is multiscalar, and includes cities, counties, and metropolitan regions that partially overlap. For the largest cities in the United States, the well-known center cities are actually part of metroregions, which have both population and emissions focused in the suburbs. For example, in the Twin Cities, the center cities of Minneapolis and Saint Paul contain only about a quarter of the overall population of the metroregion. In considering the possibilities for bipartisan local action on climate change, then, it is important to look beyond just individual cities, as Hari Osofsky has explored in her prior scholarship; in order for major metropolitan areas to reduce their emissions, their suburbs must participate.²⁴¹

State and metropolitan regional planning entities and multi-level networks of cities – climate focused and not – can play an important role in encouraging more cities to do more.²⁴² The bipartisan participation in Minnesota’s Greenstep Cities program illustrates the possibilities for practical, constructive action by suburban cities. Minnesota Greenstep Cities emerged from a 2008 legislative order directing the Minnesota Pollution Control Agency, Department of Energy Resources, and Minnesota Clean Energy Resource Teams’ to recommend voluntary actions that cities could take as part of a voluntary program to recognize “green star” sustainable cities.²⁴³ The program launched in June 2010 and provides cities with three “steps” that they can reach depending on how many of the 28 best practices participating cities take.²⁴⁴ The program is not simply governmentally based; a number of nongovernmental organizations are involved in the steering committee, and businesses and other organizations can sponsor GreenStep Cities Awards and receive public recognition for their role in the program.²⁴⁵ The program is growing rapidly, with 73 cities as of October 2014 and new cities continuing to join.²⁴⁶

From the start, the program has not had as heavy a Democratic participation bias as the Mayors Agreement, perhaps in part because the program is explicitly framed as a sustainability program rather than a climate change one. Of the first twelve cities to join GreenStep cities, four leaned Republican and one was a swing city, and all were suburbs in the Twin Cities metroregion. Moreover, some of those

²⁴¹ *Id.*; Osofsky, *Suburban Climate Change Efforts*, *supra* note 224.

²⁴² Osofsky, *Suburban Climate Change Efforts*, *supra* note 224.

²⁴³ Minn. Greenstep Cities, <http://greenstep.pca.state.mn.us/aboutProgram.cfm> (last visited Oct. 21, 2011).

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Greenstep Cities List*, MINN. GREENSTEP CITIES, <http://greenstep.pca.state.mn.us/allCities.cfm> (last visited Nov. 12, 2012).

Republican-leaning cities had a history of making explicit commitments on climate change and had even received national recognition for this work.²⁴⁷ Although the numbers have not stayed as equal as the program has grown, they still remain more balanced than metro area Mayors Agreement participation: 18 Democratic, 8 Republican, and 1 swing city in the Twin Cities as of August 2014.²⁴⁸

The local context also illustrates the ways in which substantive and structural reframing can be paired. While localities are taking a variety of steps within their authority relevant to energy transition and climate change, initiatives framed around economic development and disaster resiliency have a greater likelihood of being politically palatable across the political spectrum. Or, as a director of one network of cities confidentially put it, “[i]f you frame it as a purely environmental [thing], that’s the kiss of death.”²⁴⁹

However, as at larger scales, this framing must be grounded in reality. Measuring progress in some objective and tangible way is helpful. For example, a number of Minnesota cities are participating in the Regional Indicators Initiative (RII), which tracks community greenhouse gas emissions and the effectiveness of reduction measures. Falcon Heights Mayor, Peter Lindstrom explains the importance of such tracking:

I think the worst thing any city can do is greenwashing – to say you’re making a difference but then not really making a difference at all. So through the Regional Indicators Initiative, it’s going to tell us whether our programs are making a difference.²⁵⁰

One of the problems, of course, is that there are so many different measurement systems, and not enough consistency in which ones cities use right now. Hari Osofsky has explored elsewhere the need for multi-level networks of cities on climate change to harmonize – or at least coordinate – their toolkits and modeling more in order to increase their effectiveness.²⁵¹

However, measurement questions aside, what makes economic development framing particularly promising at a local level is that many energy efficiency, renewable energy, and land use efforts can pay off very quickly and then bring savings. Often, these economic and energy benefits come in small and not very glamorous forms. Yet

²⁴⁷ Osofsky, *Suburban Climate Change Efforts*, *supra* note 224.

²⁴⁸ Osofsky, *Rethinking the Geography of Local Climate Action*, *supra* note 240.

²⁴⁹ Confidential Discussion with Network Leader, Oct. 6, 2014 (notes on file with authors).

²⁵⁰ Elizabeth Dunbar, *Energy Use Data could Help Minnesota Cities Protect the Environment*, MPR NEWS, Jun. 16, 2014, <http://www.mprnews.org/story/2014/06/16/minnesota-environment-data>.

²⁵¹ Osofsky, *Rethinking the Geography of Local Climate Action*, *supra* note 240.

if they can be scaled up – so that many places do them – the savings, both in money and emissions, add up. For example, moderately Republican Twin Cities suburb Eden Prairie, a developed second ring job center,²⁵² was awarded an honorable mention at the 2011 U.S. Mayors Climate Protection Awards in the “small city” category for its “20-40-15” initiative.²⁵³ This initiative, which started in 2006, set the target of a 20 percent increase in city facility energy efficiency and a 40 percent increase in city vehicle fleet fuel efficiency by the year 2015.²⁵⁴

By June 2011, Eden Prairie had made measurable progress toward those goals, reporting that it had reduced city facility energy consumption by over 8 percent and increased city fleet fuel efficiency by 10 percent.²⁵⁵ The city’s energy efficiency initiatives have included motion sensor and LED lighting and stoplights, as well as a City Center energy management system.²⁵⁶ It has improved fuel efficiency by adding several fuel-efficient vehicles to its fleet.²⁵⁷ The city also participates in programs with Centerpoint and Xcel Energy that provide it with rebates.²⁵⁸

These kinds of efficiency measures taken by Eden Prairie have been adopted by many Democratic and Republican leaning cities simply because they make economic sense; when cities use less electricity and fuel, their bills go down. Many examples of this kind of low-hanging fruit exist across local government functions, at city, county, and metroregional scales. For instance, the Twin Cities

²⁵² “Developed job centers are not simply relatively affluent bedroom communities within commuting distance of central cities, but rather have become important players in their regional economies. They have comparatively large tax bases but support less of the social costs of poverty than their central cities.” Osofsky, *Suburban Climate Change Efforts*, *supra* note 224, at 423 (citing MYRON ORFIELD, *AMERICAN METROPOLITICS: THE NEW SUBURBAN REALITY* 44–46 (Brookings Institution Press 2002) & MYRON ORFIELD & THOMAS F. LUCE JR., *REGION: PLANNING THE FUTURE OF THE TWIN CITIES* 46 (2010)).

²⁵³ See MAYORS CLIMATE PROT. CTR., *TAKING LOCAL ACTION: MAYORS AND CLIMATE PROTECTION BEST PRACTICES* 13 (2011), available at <http://usmayors.org/79thAnnualMeeting/documents/BestPractices2011ClimateAwardWinners.pdf>; see also *20-40-15 Initiative*, EDEN PRAIRIE, <http://www.edenprairie.org/index.aspx?page=334> (last visited Oct. 6, 2011) (discussing implementation of the plan).

²⁵⁴ *20-40-15 Initiative*, *supra* note 169.

²⁵⁵ Press Release, Eden Prairie, Minn., Mayor Receives Honorable Mention for Eden Prairie Climate Protection Efforts (June 17, 2011), <http://www.edenprairie.org/modules/showdocument.aspx?documentid=1022>.

²⁵⁶ *City of Eden Prairie*, MINN. GREENSTEP CITIES, http://greenstep.pca.state.mn.us/cityInfo.cfm?ctu_code=2394614 (last visited Oct. 6, 2011).

²⁵⁷ See *id.*; *Life in the Prairie*, CITY OF EDEN PRAIRIE (July 2010), <http://www.edenprairie.org/modules/showdocument.aspx?documentid=816>.

²⁵⁸ *City of Eden Prairie*, *supra* note 256.

metropolitan region brought down its wastewater treatment costs enormously and saved energy in the process through implementing a new aeration approach.²⁵⁹

Similar opportunities exist with respect to disaster resilience at a local scale, and at times take the form of collaboration among federal, state, and local governments. President Obama's November 2013 Climate Action Plan established a State, Local, and Tribal Leaders Task Force on Climate Preparedness and Resilience.²⁶⁰ Republican Mayor James Brainard of Carmel, Indiana serves on the taskforce and has conveyed a bipartisan message about its focus: "We need to work on bipartisan solutions, and put politics aside. The climate is changing, and we need to be prepared for it."²⁶¹ He specifically has framed the need for this kind of planning by talking about the crippling drought that Midwestern farmers faced that year. He explained the local emphasis on addressing these kinds of problems rather than engaging in debates over climate change science: "A lot of people debate why the climate is changing. That's not important. Mayors are very practical people, so the real question is, what are we going to do about it?"²⁶²

Of course, these planning decisions at times become contentious, which only sometimes relates to partisan differences. For example, we have written elsewhere about emerging U.S. climate change adaptation litigation, most of which is focused at state or local levels.²⁶³ At times, the suits are brought by proregulatory individuals or entities that are trying to push for greater adaptation. In other instances, pro- or anti-regulatory advocates intervene in pending suits; one set of interveners in a broader lawsuit about sewage planning, for instance, argued that Miami-Dade county's approach violates the Clean Water Act because it fails to address sea level rise and other impacts of climate change.²⁶⁴ Others are brought by those impacted by the adaptation efforts, such as a takings suit brought by homeowners affected when the Borough of Harvey Cedars built a dune to serve as a barrier wall.²⁶⁵ The New Jersey Supreme Court in that case held

²⁵⁹ Notes from Pushing The Envelope On Sustainability And Energy Use Roundtable, Oct. 6, 2014 (on file with authors).

²⁶⁰ *Id.*

²⁶¹ Tim McDonnell, *Why This Red State Republican Mayor Backs Obama on Climate Change*, MOTHER JONES, Nov. 1, 2013, <http://www.motherjones.com/blue-marble/2013/11/what-you-need-know-about-obamas-new-climate-order>.

²⁶² *Id.*; see also <http://thinkprogress.org/climate/2013/12/12/3056661/local-impacts-climate-change-panel/>.

²⁶³ Peel & Osofsky, *Sue to Adapt?*, *supra* note 208.

²⁶⁴ Complaint in Intervention, *U.S. v. Miami-Dade County, Fla.*, No. 12-24400-FAM (S.D. Fla. June 25, 2013).

²⁶⁵ *Borough of Harvey Cedars v. Karan*, 43 ELR 20149, No. A-120-11 (N.J., July 8, 2013).

that the just compensation calculation should take the protective effects of the dune into account, which ultimately resulted in the plaintiffs receiving \$1 instead of \$375,000.²⁶⁶

Beyond the litigation context, there are partisan policy debates at state and local levels over the value of adaptation. One of the most prominent examples is when North Carolina banned the use of sea level rise data in coastal planning in 2012.²⁶⁷ But there are many other examples when localities, often in conjunction with statewide adaptation planning efforts, take steps to address impacts that they are experiencing, sometimes calling it climate change and at other times simply focusing on the impact itself.

The key point here is that the combination of the less partisan environment that many localities provide with the practical economic and resiliency benefits of mitigation and adaptation measures means that local governments can often be encouraged to take action in circumstances where partisan divides prevent larger scale progress. Of course, focusing on the local, and pairing it with substantive reframing, will not serve as a panacea to partisanship. People do sometimes fight in partisan terms about local land use planning decisions. But scaling down helps bring these issues into potentially less contentious fora, which in many instances helps to avoid the kind of partisan gridlock that Congress exhibits.

B. “Beauty is in the eye of the beholder”

While scaling down to focus on local governments both addresses a large segment of emissions and provides opportunities for bipartisan agreement, some aspects of climate change and energy transition need to be addressed at larger scales. One strategy for doing so despite imbedded partisanship has been to shift branches. In the years of the George W. Bush administration when executive action on climate change was not forthcoming, many environmental advocates sought to use the courts to force regulatory progress or to create independent action. More recently, under the Obama Administration, the president has supported action, but faced a Congress in which climate change legislation did not pass. President Obama’s use of executive authority to advance mitigation and adaptation measures, at times relying on court decisions for justification, includes both branch shifting to get around a gridlocked Congress and less controversial measures about

²⁶⁶ *Id.*

²⁶⁷ Alon Harish, *New Law in North Carolina Bans Latest Scientific Predictions of Sea-Level Rise*, ABC News, Aug. 2, 2012, <http://abcnews.go.com/US/north-carolina-bans-latest-science-rising-sea-level/story?id=16913782>

which there is broader agreement.²⁶⁸ In this section, we focus on the role that separation of powers and checks and balances among branches have played in advancing U.S. energy transition.

1. “The devil made me do it”



Litigation has long served as a means for forcing, or attempting to block, action by other branches to address important social issues in the U.S. regulatory landscape. Climate change and energy transition has not been an exception. While climate change litigation emerged in the United States in the 1990s,²⁷⁰ it really began to take hold during the presidency of George W. Bush when the executive branch refused to take action and Congress lacked adequate consensus to move forward.²⁷¹ The Supreme Court’s 2007 decision in *Massachusetts v. EPA*²⁷² – finding that the EPA had abused its discretion in the way in which it justified not regulating motor vehicle greenhouse gas emissions under the Clean Air Act – served as an important turning point in the possibilities for litigation as a key leverage point. This decision has since played a significant role in shaping the U.S. regulatory landscape on climate change and clean energy. As we discuss in depth in the following section, President Obama’s administration has used it to justify actions to regulate both vehicles and stationary sources like power plants under the Clean Air Act. But

²⁶⁸ For an exploration of the role of agencies and courts in advancing regulatory policy when Congress is gridlocked, see Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PENN. L. REV. 1 (2014).

²⁶⁹ http://www.classicalvalues.com/archives/2007/04/post_294.html

²⁷⁰ *City of Los Angeles v. NHTSA* 912 F.2d 478 (D.C. Cir. 1990).

²⁷¹ David Markell and J.B. Ruhl, *An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual* 64 FLORIDA L. REV. 15 (2012).

²⁷² *Massachusetts v. EPA*, 549 U.S. 497 (2007).

Massachusetts v EPA also more broadly reinforced the courts as a forum for influencing other branches. At this point, there have been several hundred cases involving climate change mitigation in some way, in both state and federal courts, and an emerging set of lawsuits addressing adaptation issues.²⁷³

In a divisive partisan environment, court rulings endorsing climate action can serve as a gridlock breaker, allowing regulation to move forward that might not otherwise have been politically possible. High profile climate cases calling on governments to act can provide political cover for willing regulators in the executive branch to make progress despite obstacles. Action in such cases is often framed as being compelled by the court decision. Unlike the vertical structural reframing strategy described in the previous section, the turn to courts is not usually coupled with a substantive reframing of climate change issues by litigants (although in some cases, petitioners are beginning to use this approach, for example, by casting action on emissions as an environmental justice issue for low income communities of color,²⁷⁴ as an element of building disaster resilience,²⁷⁵ or as part of an approach to improve corporate climate risk disclosure).²⁷⁶

Given the constitutionally-based status of federal courts and valuing of judicial independence in all U.S. courts, a litigation strategy has the advantage of giving legitimacy – as well as a degree of perceived non-partisanship – to both the climate change problem and the need for action to address it. As one litigant interviewee explained:

[I]n this country, as much as we sometimes ridicule and complain about them, we do tend to have high regard for courts, especially federal courts and most especially the Supreme Court, notwithstanding all the hits that it has taken, from right and left. And there is this degree to which having

²⁷³ A comprehensive database of climate change cases filed and decided in U.S. courts, including links to judgments, is maintained by the Columbia Climate Change Law Center. See Arnold and Porter LLP, *U.S. Climate Change Litigation Chart*, <http://www.climatecasechart.com>.

²⁷⁴ Cases brought by Communities for a Better Environment together with other NGOs over adverse health impacts of vehicle pollutants like carbon monoxide that also contribute to climate change exemplify this approach. See Communities for a Better Environment, *Current Cases and Campaigns*, <http://www.cbecal.org/legal/current-cases-2/>.

²⁷⁵ The petition to the New York Public Services Commission exemplifies such an approach. See *supra* notes 214–220 and accompanying text.

²⁷⁶ See Petition for Interpretive Guidance on Climate Risk Disclosures, File No. 4547, 19 September 2007, ; Supplemental Petition, June 12, 2008, <http://www.sec.gov/rules/petitions/2008/petn4-547-supp.pdf>; Second Supplemental Petition, 23 November 2009, <http://www.sec.gov/rules/petitions/2009/petn4-547-supp.pdf>. For other petitions on point, see Petition for Interpretive Guidance on Business Risk of Global Warming Regulation, File Number 4-549, 22 October 2007, <http://www.sec.gov/rules/petitions/2007/petn4-549.pdf> (submitted on behalf of the Free Enterprise Action Fund); sources *supra* note 379.

court decisions that take this problem seriously...causes everybody to perk up and take notice.²⁷⁷

However, in exploring the possibilities for litigation as a mechanism for leverage in a partisan environment, it is important to acknowledge that courts are not a panacea to partisanship and that the dynamics around litigation and partisanship are complex. As discussed in Part I, many key stakeholders have deeply entrenched views on climate change, which litigation is unlikely to alter significantly.²⁷⁸ In addition, partisanship influences the ways in those in other branches respond to lawsuits, and the reactions to those responses. While some regulators may remain hostile to moving forward even in the face of judicial and broader public support for climate action, others will be bolstered by positive court rulings paired with supportive public opinion to push harder in their efforts to regulate climate change. When public opinion on climate change is more ambivalent or divided, regulators may either resist action despite the court decision, or derive comfort from judgments that mandate action that would otherwise be politically difficult to undertake.

This section attempts to capture these complexities. As the examples it explores illustrate, the combination of partisan politics and entrenched viewpoints mean that litigation and the public reaction to court cases may not be enough to bolster a proactive regulator or force action by a reluctant one. Those opposing regulation often will not accept litigation-based justifications, and hostile regulators sometimes resist decisions requiring them to act.

For regulators who are proactive in addressing climate change, litigation brought by industry or other challengers can often act as a restraint on regulatory initiatives or at least slow down the process of regulatory development. On occasion, however, proactive regulators also use climate change cases as a justification for and legitimation of a policy approach the administration or agency wants to undertake, particularly where this course carries political risks.²⁷⁹ Court decisions can confer legitimacy for action by allowing regulators to represent that their actions are founded on a legal base and are mandated by the courts.²⁸⁰ In effect, litigation can provide “cover” for regulators who are willing to act but feel concerned about the political consequences.

²⁷⁷ Telephone interview, participant 8 (Nov. 26, 2012).

²⁷⁸ Dan Kahan, *supra* note 18.

²⁷⁹ Bradley C. Canon, *Studying Bureaucratic Implementation of Judicial Policies in the United States: Conceptual and Methodological Approaches*, in JUDICIAL REVIEW AND BUREAUCRATIC IMPACT: INTERNATIONAL AND INTERDISCIPLINARY PERSPECTIVES 80 (Marc Hertogh & Simon Halliday, eds., 2004).

²⁸⁰ Maurice Sunkin, *Conceptual issues in researching the impact of judicial review on government bureaucracies*, in JUDICIAL REVIEW AND BUREAUCRATIC IMPACT: INTERNATIONAL AND INTERDISCIPLINARY PERSPECTIVES 43 (Marc Hertogh & Simon Halliday, eds., 2004).

The dispute over what action the decision in *Massachusetts v. EPA* required provides a helpful illustration of these dynamics. After the Obama Administration failed to pass comprehensive climate change legislation,²⁸¹ the President used his executive branch authority to direct climate regulatory measures under the Clean Air Act – discussed further below – by relying explicitly on the Supreme Court’s *Massachusetts v. EPA* decision to justify his action.²⁸² Partisan divisions also have framed how other politicians have reacted to this justification. Many Democrats have argued that the decision required the president to act while numerous Republicans deny that justification.²⁸³ Democratic senator Diane Feinstein stated: “I believe EPA has to act under the Massachusetts case.”²⁸⁴ In contrast, Republican Senator John Barrasso, author of unsuccessful legislation that would have stripped the EPA authority to regulate greenhouse gas emissions, contended: “The Supreme Court gave EPA permission to act, but it did not mandate it to act. I think EPA is overstepping what it should be doing in terms of impacting Americans’ ability to compete globally.”²⁸⁵ While the decision thus gave President Obama a basis for justifying his actions both legally and politically, those opposed to his actions often did not accept that justification.

As the example of President Obama’s greenhouse gas regulations illustrates, willing regulators may use a climate change opinion to legitimize, justify, or enable regulatory action. However, anti-regulatory officials do not welcome such opinions and may seek to minimize compliance or forego it altogether.²⁸⁶ Although they cannot ignore direct edicts requiring them to act, they can delay their response or minimize the action that they take to comply. A comparison of the George W. Bush and Obama Administration’s regulatory response to *Massachusetts v. EPA* illustrates this point. The Bush Administration’s response to the same opinion that the Obama Administration used to justify action was limited, despite public claims of compliance, reflecting its continued hostility to this federal regulatory approach.

²⁸¹ American Clean Energy and Security Act of 2009, H.R. 2454.

²⁸² Memorandum from President Barack Obama to the Secretary of Transportation and the Administrator of the National Highway Traffic Safety Administration, (Jan. 26, 2009), available at http://www.whitehouse.gov/the_press_office/Presidential_Memorandum_fuel_economy/.

²⁸³ Lawrence Hurely & Elana Schor, *Congress Emits Half-Truths in Spin War Over Mass. v. EPA*, N.Y. TIMES, Mar. 17, 2011, <http://www.nytimes.com/gwire/2011/03/17/17greenwire-congress-emits-half-truths-in-spin-war-over-im-12380.html?pagewanted=all>.

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ Canon, *supra* note 279.

In making these comparisons, though, it is important to acknowledge the complex nature of organizations. Regulatory entities are not monolithic, but rather are comprised of individuals who may vary in their views and interaction with partisan debates, even within a particular administration. As one interviewee pointed out, when *Massachusetts v. EPA* came down, “the career staff” at EPA favored using the Clean Air Act to address greenhouse gas pollution while Bush Administration appointees who made up “the political staff” reacted oppositely, stressing the need for Congressional rather than agency action.²⁸⁷ Ultimately, only when the political and professional personnel aligned under the Obama Administration, could EPA action proceed.²⁸⁸

Of course, courts themselves – despite protections of judicial independence – are at times not entirely non-partisan actors. In the judicial appointment process, candidates are screened for partisan views that can lead to left-leaning or right-leaning nominees depending on the administration in power. This partisan appointment process sometimes correlates to how climate change cases fare before the courts, a reality well-recognized by litigants:

I’ve yet to encounter an Obama appointed or a Clinton appointed judge who doesn’t understand that climate change is real. They very well may not appreciate the severity of it, they may think that the appropriate role of the courts is very narrow and that it is a question for the Congress and the President, not the courts to deal with, but they are clearly aware of the problem. Versus there is still a large subset of the American judiciary that either actually or at least ideologically takes a position that climate change is not real or not established or uncertain or otherwise not something to be dealt with. And those judges are not particularly friendly to climate litigation.²⁸⁹

Moreover, at times, opinions – both in the language that they use or in their treatment of climate science – have paralleled the broader political debates, whether or not the judges were intending to enter the partisan fray. The Supreme Court’s June 2014 decision in *Utility Air Regulatory Group v. EPA* – the third time the U.S. Supreme Court directly focused on climate change – provides an interesting example of the contentious language that dominates legislative and media dialogue entering a judicial opinion.²⁹⁰ The Court in this case

²⁸⁷ Telephone interview, participant 9 (Dec. 3, 2012).

²⁸⁸ *Id.*

²⁸⁹ Telephone Interview, participant 12 (Jan. 14, 2013).

²⁹⁰ *Utility Air Regulatory Group v. EPA*, 134 S.Ct. 2427 (June 23, 2014).

partially upheld and partially struck down EPA’s approach to regulating greenhouse gas emissions from stationary sources under the Clean Air Act in a manner that largely allowed the EPA to proceed. Most relevant to dynamics among partisanship, litigation as political cover, and inter-branch dynamics, though, Justice Scalia’s opinion used strong language decrying the EPA’s overstepping of its authority. For example, the opinion stated:

[I]n EPA’s assertion of that authority, we confront a singular situation: an agency laying claim to extravagant statutory power over the national economy while at the same time strenuously asserting that the authority claimed would render the statute “unrecognizable to the Congress that designed” it. Since, as we hold above, the statute does not compel EPA’s interpretation, it would be patently unreasonable—not to say outrageous—for EPA to insist on seizing expansive power that it admits the statute is not designed to grant.²⁹¹

Although Justice Scalia may not have had any sort of partisan intent in the tone of the opinion – he often writes opinions with colorful language – the wording parallels that of federal legislators opposed to President Obama’s approach.

These partisan dynamics around climate change do not simply manifest in disputes over how regulators should respond to cases. Rather, the courtrooms themselves become important public stages for debates over the science and impacts of climate change. The shift over time in how the Supreme Court treated climate change science, which we have explored in more depth elsewhere, exemplifies these complicated dynamics. Although the Court did not rule on climate change science directly in *Massachusetts v. EPA*, it treated the science as having legitimacy. For example, the Court concluded its standing analysis:

In sum – at least according to petitioners’ uncontested affidavits – the rise in sea levels associated with global warming has already harmed and will continue to harm Massachusetts. The risk of catastrophic harm, though remote, is nevertheless real. That risk would be reduced to some extent if petitioners received the relief they seek. We therefore hold that petitioners have standing to challenge the EPA’s denial of their rulemaking petition.²⁹²

This acknowledgment of climate change by the nation’s highest court had an important impact on the public dialogue. The “massive public

²⁹¹ *Id.* at 2444 (citations omitted).

²⁹² *Massachusetts v. EPA*, 549 U.S. 497, 526 (2007).

and professional attention” drawn by the case²⁹³ has been a conduit for this view to reverberate throughout subsequent public and political debate on climate change.

However, as influential as *Massachusetts* was and continues to be, one strong opinion – even a landmark U.S. Supreme Court one – faces limits in its ability to reshape public perceptions in a partisan environment. Opinions are issued in a broader context in which many other political, media, new media, and even judicial statements also matter. And judges and the courts that they sit on are not completely immune to the societies in which they live no matter how much they strive for independence. A mere four years after *Massachusetts* in *AEP v. Connecticut*, the Court treated climate science much differently, an important reminder that these conversations remain evolutionary. Professor Maxine Burkett explains:

[T]he *AEP* Court takes time in its relatively slender decision to inject doubt about elements of climate science. Abandoning the confidence demonstrated in *Massachusetts v. EPA*, the Court cites to a magazine article expressing doubt about climate change impacts as a counterweight to the voluminous peer-reviewed articles on which the EPA based its findings. Further, the Court pauses again to make a facile indictment of all breathing, sentient beings. In an instant, it dismisses the relative excess with which some have burned carbon for luxury and profit versus those who have for food and shelter.²⁹⁴

Regardless of whether the Supreme Court’s treatment of science in *AEP* was influenced by shifting public attitudes towards climate change, its discussion of the science evolved in parallel with those attitudes.

Moreover, *AEP* did not simply address the substance of climate science, but also concerns about courts as appropriate arbiters of the scientific debates. The Court explained that “[f]ederal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order” and then described specific mechanisms that agencies have, but courts lack.²⁹⁵ The Court’s concern is not new. This language, for example, parallels Justice Scalia’s comment in the *Massachusetts* oral argument: “I told you before I’m not a scientist. That’s why I don’t want to deal with global

²⁹³ Jody Freeman & Adrian Vermule, *Massachusetts v EPA: From Politics to Expertise*, SUPREME COURT REVIEW 51 (2007).

²⁹⁴ Maxine Burkett, *Climate Justice and the Elusive Climate Tort*, 121 YALE L.J. ONLINE 115 (2011), <http://www.yalelawjournal.org/forum/climate-justice-and-the-elusive-climate-tort>.

²⁹⁵ *Am. Elec. Power Co. v Connecticut*, 131 S. Ct. at 2539–40.

warming, to tell you the truth.”²⁹⁶ But the combination of more skepticism about climate change science and about the court’s role in assessing in it constitutes a substantial step back from *Massachusetts*.²⁹⁷

Together, the ways in which regulators use these opinions and the evolution that they represent reinforce the complex interaction between partisanship and litigation. The U.S. Supreme Court and other courts have provided forums where pro- and anti-regulatory forces can contribute to often partisan interactions about science and regulation. Briefs, oral arguments, and opinions, especially in the Supreme Court, are well-publicized, and function as vehicles for high-profile debates over these issues. This respected body’s articulation of views on climate science and regulation influences partisan discourse, but that discourse in turn comes through in the documents filed with and opinions articulated by this court.²⁹⁸

As with the other strategies we have described, using the courts to advance policy on climate change and to foster energy transition has its limits, dictated in part by the broader environment in which cases take place. Even so, litigation remains a worthwhile complement to other strategies and an important component of the iterative evolution of policy over time.²⁹⁹ In part, courts represent another forum in

²⁹⁶ Transcript of Oral Argument, *Massachusetts v. EPA*, 549 U.S. 497 (2007), 2006 WL 3431932, at 12–13; see also Hari M. Osofsky, *The Intersection of Scale, Science, and Law in Massachusetts v. EPA*, 9 OREGON R. INT’L L. 233 (2007).

²⁹⁷ This step back has taken place in a broader context in which the Supreme Court has become more pro-business. Lee Epstein, William Landes, and Richard Posner have conducted an empirical study which concludes that:

Whether measured by decisions or Justices’ votes, a plunge in warmth toward business during the 1960s (the heyday of the Warren Court) was quickly reversed; and the Roberts Court is much friendlier to business than either the Burger or Rehnquist Courts, which preceded it, were. The Court is taking more cases in which the business litigant lost in the lower court and reversing more of these—giving rise to the paradox that a decision in which certiorari is granted when the lower court decision was anti-business is more likely to be reversed than one in which the lower court decision was pro-business. The Roberts Court also has affirmed more cases in which business is the respondent than its predecessor Courts did.

Lee Epstein, William M. Landes, & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431 (2013).

²⁹⁸ These debates over climate change science form part of broader legal and political dynamics around science. For analyses of these dynamics, see RESCUING SCIENCE FROM POLITICS: REGULATION AND THE DISTORTION OF SCIENTIFIC RESEARCH (Wendy Wagner & Rena Steinzor eds., 2006); Holly Doremus, *Science Plays Defense: Natural Resource Management in the Bush Administration*, 32 Ecology L.Q. 249 (2005); Holly Doremus & A. Dan Tarlock, *Science, Judgment, and Controversy in Natural Resource Regulation*, 26 Pub. Land & Resources L. Rev. 1 (2005).

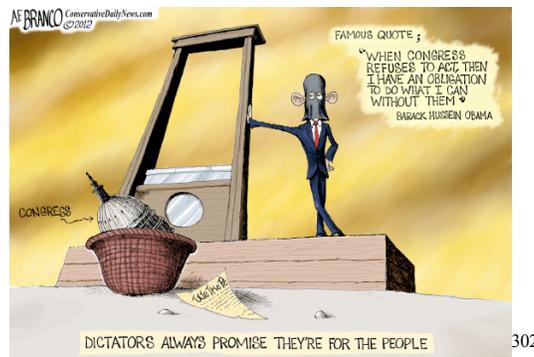
²⁹⁹ Hari M. Osofsky, *Is Climate Change “International”?: Litigation’s Diagonal Regulatory Role*, 49 VA. J. INT’L L. 585 (2009); Hari M. Osofsky, *Diagonal Federalism and Climate Change: Implications for the Obama Administration*, 62 ALABAMA L. REV. 237 (2011); Ann E. Carlson, *Iterative Federalism and Climate Change*, 103 NW. U. L. REV. 1097 (2009).

which partisan debates can take place in the face of gridlock. As one environmental litigator that we interviewed put it:

a lot of this stuff is born of, less of the sense that litigation is the optimal strategy, and more of the sense that at least courtroom doors are open and if you think you can put together some good arguments you can get a court to do something whereas a legislature, this Congress, is difficult.³⁰⁰

Moreover, shifting branches to the courts provides important advantages beyond just an available forum. Namely, the partisan barriers are not as overt; court processes facilitate transparency, debate, and deliberation; and positive decisions can move the law forward. These qualities make litigation an important place for advancing change in a partisan environment, even if it often fails to mitigate the partisanship itself.

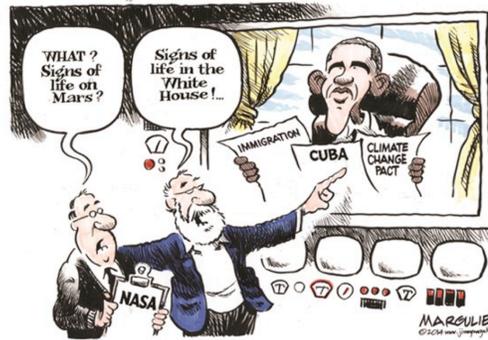
2. “If Congress won’t act, I will”³⁰¹



³⁰⁰ Telephone interview, participant 8 (Nov. 26, 2012).

³⁰¹ <http://abcnews.go.com/Politics/video/obama-congress-wont-act-14841368>.

³⁰² <http://www.climatechangedispatch.com/images/pics6/cartoon-obama-dictator.jpg>.



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Although the courts serve as an important forum and impetus in a partisan environment, the previous discussion illustrates that the executive's view on climate change action and use of authority also deeply impact possibilities for progress in a partisan environment. A reluctant regulator like President George W. Bush and his appointees limited climate change action in a variety of ways, even when pushed by litigation, while President Obama has relied on executive authority throughout his presidency. At times, and most controversially, the Obama Administration has used executive power as a form of branch shifting that allows him to “go around” a gridlocked Congress.

However, representing all of his administration's executive action in that manner would be a vast oversimplification. Some of his administration's actions, particularly on adaptation, are far less controversial. And even the Obama Administration's mitigation regulations have invoked varying partisan reactions. The power plant regulations are far more controversial than the motor vehicle ones, in part because the automobile industry is relatively neutral about vehicle specifications so long as it makes money from them and can operate under clear national standards. This section examines how executive authority, at times operating in conjunction with litigation, has interacted with partisanship during the Obama Administration.

In the early days of the Obama Administration, many expressed optimism that climate policy was entering a new era both domestically and internationally. The subsequent failure of cap-and-trade legislation despite strong Democratic majorities in Congress and the collapse of international negotiations at Copenhagen in 2009 dealt a major blow to a vision of cooperative forward motion.³⁰⁴ In ensuing years, it became increasingly clear that possibilities for bipartisan cooperation on climate and other energy issues were minimal if not

³⁰³ http://media.cagle.com/46/2014/12/23/157855_600.jpg.

³⁰⁴ See *infra* note 15.

non-existent. One of our interviewees summarized the bleak possibilities for Congressional action as follows:

... at the federal level, I'd be shocked if there was federal climate change legislation for the foreseeable future. It's just too difficult an issue. And not just the Republicans fitting about it. If the Republicans weren't screaming about ... There are a lot of Democrats that take cover under the Republican screaming about it; Democrats from coal states and things like that. OK, so, I just think that there's a lot of opposition out there. I don't see that changing anytime soon.³⁰⁵

As possibilities for comprehensive climate legislation faded, the issue of climate change itself suffered a backlash in polls as described in previous sections. Superstorm Sandy provided a temporary shift in politicians' and the public's willingness to engage climate change, but significant partisanship over climate change remained in its aftermath.³⁰⁶

Even during early period of the Obama Administration, in which climate change legislation seemed possible, executive action formed a key part of the Obama Administration's approach. The EPA began taking steps pursuant to *Massachusetts v. EPA* within a week of Barack Obama assuming the presidency. The administration both commenced considering whether greenhouse gas emissions from motor vehicles endanger public health and welfare and whether California should receive a waiver to regulate motor vehicle emissions at the state level (a waiver which had been denied by the

³⁰⁵ In person interview, participant 4 (Nov. 14, 2012). Beyond the limitations of the international negotiations discussed *supra* note 16, Congressional partisanship may constrain U.S. efforts to make new bilateral and multilateral climate change agreements. For example, substantial uncertainty exists regarding how much a November 2014 agreement between the United States and China will move international negotiations forward and how effective U.S. domestic opponents will be at blocking efforts to comply with it. Philip Bump, *The Politics of the U.S.-China Deal*, WASH. POST, Nov. 12, 2014, <http://www.washingtonpost.com/blogs/the-fix/wp/2014/11/12/the-politics-of-the-big-u-s-china-climate-deal/>. Senator McConnell, for example, critiqued the deal on economic terms just after it was announced: "Our economy can't take the president's ideological war on coal that will increase the squeeze on middle-class families and struggling miners. This unrealistic plan, that the president would dump on his successor, would ensure higher utility rates and far fewer jobs." Timothy Cama, *McConnell: U.S.-China Deal "Unrealistic"*, THE HILL, Nov. 11, 2014, <http://thehill.com/policy/energy-environment/223810-mcconnell-blasts-unrealistic-us-china-climate-deal>. Moreover, while this bilateral agreement between the United States and China represents important progress, it is important to put these laudable new commitments into scientific and political perspective. The U.S. pledge to reduce emissions by 26-28% below 2005 levels by 2025 translates into less than the reductions it would have made under the Kyoto Protocol, only 4-5% below 1990 baselines. Email from William Burns to Environmental Law Professors Listserve, Nov. 12, 2014 (on file with authors).

³⁰⁶ See *supra* Part II.C.

Bush Administration and challenged by California in subsequent litigation).³⁰⁷

Since making the Endangerment Finding and granting the waiver less than a year into Barack Obama's presidency,³⁰⁸ the EPA has created and continues to develop substantial new regulations for both motor vehicles and major stationary sources of greenhouse gas emissions.³⁰⁹ The Administration's most significant accomplishment with respect to motor vehicles and climate change thus far is its National Program for emissions and fuel economy standards for new vehicles. Under this program, the EPA and Department of Transportation have promulgated joint rules on fuel economy and tailpipe greenhouse gas emissions, bridging the statutory and agency divide between applicable energy and environmental law. The plan – which emerged from the Obama Administration's efforts to forge a compromise between automakers³¹⁰ and California³¹¹ – allows

³⁰⁷ For a discussion of the Obama Administration's campaign positions and early action on climate change, see Osofsky, *Is Climate Change "International"?: Litigation's Diagonal Regulatory Role*, *supra* note 299.

³⁰⁸ EPA, Endangerment and Cause and Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, Final Rule, Dec. 15, 2009, 74(239) F.R. 66496; EPA, California State Motor Vehicle Pollution Control Standards; Notice of Decision granting a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, July 8, 2009, 74(129) F.R. 32744.

³⁰⁹ For an overview of EPA's mitigation efforts, see <http://www.epa.gov/climatechange/EPAactivities/regulatory-initiatives.html>.

³¹⁰ For automakers' reactions, see, for example, Letter from Frederick A. Henderson, CEO of General Motors Corporation, to Lisa P. Jackson, EPA Administrator, and Raymond H. LaHood, Secretary of Transportation, EPA (May 17, 2009), available at <http://www.epa.gov/otaq/climate/regulations/gm.pdf>; Letter from Stefan Jacoby, President and CEO of Volkswagen Group of America, to Lisa P. Jackson, EPA Administrator, and Raymond H. LaHood, Secretary of Transportation, EPA (May 17, 2009), available at <http://www.epa.gov/otaq/climate/regulations/vw.pdf>; Letter from James E. Lentz, President of Toyota Motor Sales, to Lisa P. Jackson, EPA Administrator, and Raymond H. LaHood, Secretary of Transportation, EPA (May 17, 2009), available at <http://www.epa.gov/otaq/climate/regulations/toyota.pdf>; Letter from Dave McCurdy, President and CEO of the Alliance of Automobile Manufacturers, to Raymond H. LaHood, Secretary of Transportation, and Lisa P. Jackson, EPA Administrator, EPA (May 18, 2009), available at <http://www.epa.gov/otaq/climate/regulations/alliance-of-automobile.pdf>; Letter from John Mendel, Executive Vice President of Automobile Sales for American Honda Motor Company, to Raymond H. LaHood, Secretary of Transportation, and Lisa P. Jackson, EPA Administrator, EPA (May 17, 2009), available at <http://www.epa.gov/otaq/climate/regulations/honda.pdf>; Letter from Alan R. Mulally, President and CEO of Ford, to Raymond H. LaHood, Secretary of Transportation, and Lisa P. Jackson, EPA Administrator, EPA (May 17, 2009), available at <http://www.epa.gov/otaq/climate/regulations/ford.pdf>; Letter from Robert L. Nardelli, Chairman and CEO of Chrysler LLC, to Raymond H. LaHood, Secretary of Transportation, and Lisa P. Jackson, EPA Administrator, EPA (May 17, 2009), available at <http://www.epa.gov/otaq/climate/regulations/chrysler.pdf>; Letter from James J. O'Sullivan, President and CEO of Mazda North American Operations, to Raymond H. LaHood, Secretary of Transportation, and Lisa P. Jackson, EPA Administrator, EPA (May 18, 2009), available at <http://www.epa.gov/otaq/climate/regulations/mazda.pdf>; Letter from Norbert Reithofer, Chairman of the Board of Management of The BMW Group, to Lisa P. Jackson, EPA Administrator, and Raymond H. LaHood, Secretary of Transportation, EPA (May 18, 2009), available at <http://www.epa.gov/otaq/climate/regulations/bmw.pdf>; Letter from Dieter Zetsche,

manufacturers “to build a single light-duty national fleet that would satisfy all requirements under both programs and would provide significant reductions in both greenhouse gas emissions and oil consumption.”³¹² The agencies finalized their first set of rules for model years 2012-2016 of light-duty vehicles in 2010.³¹³ Additional rulemaking efforts have addressed post-2017 model years of light-duty vehicles and emissions from medium and heavy vehicles.³¹⁴ Over time, the federal agencies and California, in collaboration with the automobile industry, have also worked to harmonize state and federal standards.³¹⁵

In addition to the legal challenges brought against the Obama Administration’s motor vehicle regulations, prominent Republicans at times have criticized them. For example, a spokesperson for Mitt Romney’s presidential campaign responded to the release of 2017-25

Chairman of the Board of Management of Daimler AG and Head of Mercedes-Benz Cars, and Thomas Weber, Member of the Board of Management, Group Research, and Mercedes-Benz Cars Development, to Raymond H. LaHood, Secretary of Transportation, and Lisa P. Jackson, EPA Administrator, EPA (May 18, 2009), available at <http://www.epa.gov/otaq/climate/regulations/daimler.pdf>.

³¹¹ For California’s pledge to adopt the less stringent federal standards for Model Years (MY) 2012 to 2016, see Letter from Edmund G. Brown, Jr., Attorney General of California, to Lisa P. Jackson, EPA Administrator, and Raymond H. LaHood, Secretary of Transportation, EPA (May 18, 2009), available at <http://www.epa.gov/otaq/climate/regulations/calif-atty-general.pdf>; Letter from Mary D. Nichols, Chairman of the California Air Resources Board, to Lisa P. Jackson, EPA Administrator, and Raymond H. LaHood, Secretary of Transportation, EPA (May 18, 2009), available at <http://www.epa.gov/otaq/climate/regulations/air-resources-board.pdf>; Letter from Arnold Schwarzenegger, Governor of California, to Lisa P. Jackson, EPA Administrator, and Raymond H. LaHood, Secretary of Transportation, EPA (May 18, 2009), available at <http://www.epa.gov/otaq/climate/regulations/calif-gov.pdf>.

³¹² Notice of Upcoming Joint Rulemaking to Establish Vehicle GHG Emissions and CAFE Standards, 74 Fed. Reg. 24,007, 24,007 (May 22, 2009). The EPA regulations focus on tailpipe emissions under the Clean Air Act, and the National Highway Traffic Safety Administration (NHTSA) regulations involve CAFE standards under the Energy Independence and Security Act and the Energy Policy Conservation Act. They are coordinated for the first time under this program on the basis that “[t]he close relationship between emissions of CO₂ [carbon dioxide] – the most prevalent greenhouse gas emitted by motor vehicles – and fuel consumption, means that the technologies to control CO₂ emissions and to improve fuel economy overlap to a great degree.” *Id.* at 24,009, n.7. For further discussion of compliance and measurement under the program, see *id.*

³¹³ See Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324 (May 7, 2010); also President Barack Obama, Remarks on National Fuel Efficiency Standards in the Rose Garden (May 19, 2009), available at <http://www.whitehouse.gov/the-press-office/Remarks-by-the-President-on-national-fuel-efficiency-standards/> (the Rose Garden agreement).

³¹⁴ Notice of Intent, 75 Fed. Reg. 62,739 (Oct. 13, 2010); Greenhouse Gas Emissions Standards and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles, 75 Fed. Reg. 74152 (Nov. 30, 2010). For correction to proposed rules, see Greenhouse Gas Emissions Standards and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles, 75 Fed. Reg. 81952 (Dec. 29, 2010).

³¹⁵ Press Release, EPA, DOT and California Align Timeframe for Proposing Standards for Next Generation of Clean Cars, Jan. 24, 2011, available at <http://yosemite.epa.gov/opa/admpress.nsf/1e5ab1124055f3b28525781f0042ed40/6f34c8d6f2b11e5885257822006f60c0!OpenDocument>.

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vehicle standards by saying: “The president tells voters that his regulations will save them thousands of dollars at the pump, but always forgets to mention that the savings will be wiped out by having to pay thousands of dollars more upfront for unproven technology that they may not even want.”³¹⁶ However, significant industry involvement in developing and supporting the standards – thirteen major automakers supported the standards even as other industry organizations criticized them³¹⁷ – paired with the failure of legal challenges has dampened partisan disputes. This industry role dovetails with the corporate strategies discussed in the next section.

Far more controversially, as discussed previously, the Obama Administration has used executive authority to require major industrial emitters to reduce their greenhouse gas emissions from stationary sources under section 111 of the Clean Air Act; in fact, contentious politics have repeatedly resulted in the Obama Administration’s delaying aspects of these regulations.³¹⁸ Starting in 2010, EPA established threshold greenhouse gas permit requirements – aimed at the most significant emitters that account for 70 percent of emissions – for new and existing power plants, refineries, and other major industrial emitters under the New Source Review Prevention of Significant Deterioration and Title V.³¹⁹ In September 2013, the EPA proposed a “Carbon Pollution Standard” for new power plants under Clean Air Act section 111(b), which was particularly highlighted in the “war on coal” rhetoric because coal-fired power plants would have to use partial carbon sequestration and storage to meet it.³²⁰ EPA Administrator Gina McCarthy publicly justified that decision as a

³¹⁶ Bill Vlasic, *U.S. Sets Higher Fuel Efficiency Standards*, N.Y. TIMES, Aug. 12, 2012, <http://www.nytimes.com/2012/08/29/business/energy-environment/obama-unveils-tighter-fuel-efficiency-standards.html? r=0>.

³¹⁷ *See id.*

³¹⁸ In February 2010, in response to political pressure regarding the economic impact of planned mandates, the EPA modified its plans to slow down the regulatory process. Then-Administrator Jackson indicated that the EPA would begin to phase in permitting in 2011 for large stationary sources and after 2016 for the smallest sources. *See* Letter from Lisa P. Jackson, EPA Administrator, to Hon. Jay D. Rockefeller, IV, U.S. Senator (Feb. 22, 2010), available at <http://media.washingtonpost.com/wp-srv/special/climate-change/documents/post-carbon/022210adm-letter.pdf>.

³¹⁹ Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010), available at <http://www.gpo.gov/fdsys/pkg/FR-2010-06-03/pdf/2010-11974.pdf# page=1>; U.S. EPA, Clean Air Act Permitting for Greenhouse Gas Emissions - Final Rules, Fact Sheet, Dec. 23, 2010, available at <http://www.epa.gov/NSR/ghgdocs/20101223factsheet.pdf>; Press Release, EPA to Set Modest Pace for Greenhouse Gas Standards (Dec. 23, 2010), available at <http://yosemite.epa.gov/opa/advpress.nsf/6424ac1caa800aab85257359003f5337/d2f038e9daed78de8525780200568bec!OpenDocument>.

³²⁰ *See* Environmental Protection Agency, Carbon Pollution Standards, 2013 Proposed Carbon Pollution Standard for New Power Plants, <http://www2.epa.gov/carbon-pollution-standards/2013-proposed-carbon-pollution-standard-new-power-plants>.

compromise between the most emissions-limiting option – full carbon sequestration and storage – and technological and economic reality, but this did not allay Republican and industry critique.³²¹ In June 2014, the EPA took its next contentious step with the “Clean Power Plan,” which complemented its regulation of new power plants by proposing “emission guidelines for states to follow in developing plans to address greenhouse gas emissions from existing fossil fuel-fired electric generating units; the plan aims to reduce carbon dioxide emissions from the power sector by 30 percent from 2005 levels by 2030.”³²² The Obama Administration released the final version of the Clean Power Plan in August 2015, which amended it somewhat in response to feedback though did not alter these fundamental goals.³²³

The state and federal dynamics around the Clean Power Plan embody the complexities of “go around” strategies based on federal executive action as an approach to progress in a divisive partisan environment. As detailed in the introduction, reactions to the plan split along partisan lines from the start.³²⁴ Since then, Republican opponents of the plan have sought to block implementation along multiple pathways. At a federal level, Energy and Power Subcommittee Chairman Ed Whitfield (R-KY) circulated a discussion draft of the Ratepayer Protection Act in March 2015. This bill, which has little prospect of becoming law, would extend the rule’s compliance dates, including dates for submission of state plans, pending judicial review. More fundamentally, it would allow states to avoid implementation if the governor, in consultation with relevant state officials determines that compliance would have an adverse affect on retail, commercial or industrial ratepayers, or on the electricity system’s reliability.³²⁵ Full Committee Chairman Fred Upton (R-MI) described this bill as “about protecting families and jobs. It gives states the time they need before this expensive and legally shaky new rule puts affordable, reliable power at risk.”³²⁶

Given the limited prospects for federal legislative overrule, however, the primary battlegrounds over the Clean Power Plan have

³²¹ Gina McCarthy, *Keynote Remarks at the University of Michigan Environmental Law and Public Health Conference*, 3 MICH. J. ENVTL. & ADMIN. L. __ (2014).

³²² EPA, Carbon Pollution Emission Guidelines for Existing Stationary Sources, at 14.

³²³ Carbon Pollution Emission Guidelines For Existing Stationary Source: Electric Utility Generating Units, Prepublication Version of the Final Rule (to be codified at 40 C.F.R. Part 60), Aug. 3, 2015, <http://www.epa.gov/airquality/cpp/cpp-final-rule.pdf> [hereinafter “Clean Power Plan”]

³²⁴ See *supra* Introduction.

³²⁵ Whitfield Unveils Ratepayer Protection Act to Address EPA’s Overreaching Power Plant Rule, U.S. House of Representatives Energy & Commerce Committee, Mar. 23, 2015, <http://energycommerce.house.gov/press-release/whitfield-unveils-ratepayer-protection-act-address-epa%E2%80%99s-overreaching-power-plant-rule>.

³²⁶ *Id.*

been and will continue to be courtrooms and state-level governments. Lawsuits brought by Murray Energy Corporation, the largest privately-owned coal company in the United States, and several states opposed to the Clean Power Plan, argued that EPA's 2012 promulgation of national emissions standards for power plants under Clean Air Act Section 112 deprives it of legal authority to establish state-by-state standards for those power plants.³²⁷ The two cases were consolidated and argued before the D.C. Circuit in April 2015, which in June 2015 denied the petition because the rule was not yet final.³²⁸ Additional challenges will certainly be brought now that the rule is final.³²⁹ The pattern in these Clean Power Plan challenges of states dividing into pro- and anti-regulatory groupings follows one that has occurred repeatedly in climate change litigation, including in *Massachusetts v. EPA* and the litigation over the denial of California's request for a waiver to regulate motor vehicle greenhouse gas emissions by the Bush Administration's EPA.³³⁰

The cooperative federalist implementation structure under the Clean Air Act – in which states have flexibility to create their own plans to implement a federal standard – has complicated how partisan divisions have translated into state action. A group of Democratic-leaning states, which largely overlaps with states supporting EPA climate change regulation across numerous cases, filed joint comments in December 2014 supporting the Clean Power Plan with

³²⁷ Specifically, a key part of the legal challenges in the cases focused on conflicting House and Senate versions of the 1990 amendments to the Clean Air Act; the House one bars Section 111(d) regulation of sources already regulated under Section 112 and the Senate one only bars re-regulation of the same pollutant. Petition for Extraordinary Writ, *Murray Energy Corp. v. EPA*, June 18, 2014. West Virginia, Alabama, Alaska, Indiana, Kansas, Kentucky, Louisiana, Nebraska, Ohio, Oklahoma, South Dakota, and Wyoming intervened on behalf of Murray Energy Corp., while California, Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Mexico, Oregon, Rhode Island, Vermont, Washington, and District of Columbia intervened on behalf of the EPA. *West Virginia, et al. v. EPA*, is framed around the same legal challenge, but in the context of a settlement agreement with intervenors. *West Virginia, et al. v. EPA*, Petition for Review, July 31, 2014. In that case, petitioners are West Virginia, Indiana, Kansas, Kentucky, Louisiana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, and Wyoming, and intervenors in support of respondent EPA are New York City, Massachusetts, District of Columbia, Environmental Defense Fund, Natural Resources Defense Council, Sierra Club, California, Connecticut, Delaware, Maine, New Mexico, New York State, Oregon, Rhode Island, Vermont, and Washington. For a summary of the cases and potential future challenges, see *Legal Challenges – Overview and Documents*, E&E PUBLISHING, http://www.enews.net/interactive/clean_power_plan/fact_sheets/legal (last visited Apr. 25, 2015).

³²⁸ *Murray Energy v. EPA*, No. 14-1112, ___ F.3d ___ (June 9, 2015); Coral Davenport, *Judges Skeptical of Challenge to Proposed E.P.A. Rule on Climate Change*, N.Y. TIMES, Apr. 16, 2015, http://www.nytimes.com/2015/04/17/us/legal-battle-begins-over-obama-bid-to-curb-greenhouse-gases.html?_r=0.

³²⁹ *Legal Challenges – Overview and Documents*, *supra* note 327.

³³⁰ See Osofsky, *Is Climate Change “International”? Litigation’s Diagonal Regulatory Role*, *supra* note 299; Osofsky, *The Intersection of Scale, Science, and Law in Massachusetts v. EPA*, *supra* note 296.

some suggested revisions.³³¹ Another group of states, largely Republican and many of which have major coal industries, oppose the Clean Power Plan, but vary in their approach to implementation.³³² Senator McConnell (R-KY) has led an effort, supported by the American Legislative Exchange Council (ALEC) and its campaign to disseminate model legislation, to encourage states to resist implementation.³³³ However, few states have chosen to follow that course out of a practical concern about the regulatory consequences; if they do not create a state implementation plan and the Clean Power Plan goes into effect, the EPA will impose a federal implementation plan on them.³³⁴ While many states have passed resolutions reinforcing their authority and joined courtroom challenges, most state legislation passed in this context thus far has been to advance their implementation efforts (though substantial state legislation is still pending, which could change trends).³³⁵ As highlighted in an

³³¹ Joint State Comments in Response to EPA's Proposed Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, Docket ID No. EPA-HQ-OAR-2013-0602, Dec. 1, 2014, http://www.georgetownclimate.org/sites/www.georgetownclimate.org/files/GCC-States_CPP_Support_and_Comments-Dec%202014.pdf.

³³² See Naveena Sadasivam, *Coal States Building Wall of Red Tape to Resist EPA's Clean Power Plan*, INSIDECLIMATE NEWS, Feb. 17, 2015, <http://insideclimatenews.org/news/17022015/coal-states-building-wall-red-tape-resist-epas-clean-power-plan> (containing a map of how coal states overlap with states bringing lawsuits).

³³³ For examples of ALEC's materials, see ALEC, *The State Factor*, Nov. 2014, <http://alec.org/docs/State-Factor-EPA-Clean-Power-Plan.pdf>, ALEC, *Clean Power Plan Facts – Maps*, <http://www.alec.org/cpp-facts/maps/>, and ALEC, *EPA's Regulatory Train Wreck*, <http://www.alec.org/initiatives/epas-regulatory-train-wreck/>.

³³⁴ For a discussion of the consequences for states that choose not to submit a state implementation plan, see Daniel Selmi, *States Should Think Twice Before Refusing Any Response to EPA's Clean Power Rules*, Sabin Center for Climate Change Law, Columbia Law School, Mar. 2015, https://web.law.columbia.edu/sites/default/files/microsites/climate-change/selmi_-_states_should_think_twice_before_refusing_any_response_to_epas_clean_power_rules.pdf.

³³⁵ See Melanie Condon and Jocelyn Durkay, National Conference of State Legislatures, *States' Reactions to Proposed EPA Greenhouse Gas Emissions Standards*, Apr. 20, 2015, <http://www.ncsl.org/research/energy/states-reactions-to-proposed-epa-greenhouse-gas-emissions-standards635333237.aspx#state>; see also E&E's Power Plan Hub, http://www.eenews.net/interactive/clean_power_plan (last visited Apr. 25, 2015) (providing links to state responses). For additional descriptions of the status of state legislation and its evolution over time, which vary in tone, see Karen Ulenhuth, *State Legislators Take Preemptive Aim at EPA Power Plant Rules*, MIDWEST ENERGY NEWS, Apr. 29, 2014; Jeffrey Tomich and Kristi E. Swartz, *Clean Power Plan Bills Generate Debate across the Southeast, Midwest*, ENERGYWIRE, Mar. 13, 2015, <http://www.eenews.net/stories/1060014977>; Sadasivam, *Coal States Building Wall of Red Tape to Resist EPA's Clean Power Plan*, *supra* note 332; Jeff McMahon, *States Ignoring Mitch McConnell, Working On Clean Power Plan*, FORBES, Apr. 12, 2015, <http://www.forbes.com/sites/jeffmcmahon/2015/04/12/states-ignoring-mitch-mcconnell-epa/>. For examples of positions by advocacy organizations on both sides, compare Aliya Haq, *States Clear Path for Clean Power Plan; Coal Industry and ALEC Floundering*, NRDC, Apr. 13, 2015, http://switchboard.nrdc.org/blogs/ahaq/states_clear_path_for_clean_po.html and Bobby Magill, *States Suing to Stop CO2 Cuts Prep For Them Anyway*, CLIMATE CENTRAL, Sept. 11, 2014, <http://www.climatecentral.org/news/states-suing-to-stop-co2-cuts-prep-for-them>.

April 2015 letter by several Democratic Senators to the National Governors Association, even Senator McConnell’s home state of Kentucky has taken steps to develop a compliance plan.³³⁶

Moreover, the politics and legal dynamics of these challenges to greenhouse gas regulation have been and likely will continue to be intertwined with related battles over Obama Administration efforts to regulate hazardous air pollutants, particularly mercury, from coal fire power plants under Section 112 of the Clean Air Act. For example, when Supreme Court held in June 2015 in *Michigan v. EPA*³³⁷ that the EPA unreasonably failed to consider costs in its regulation of emissions by power plants of mercury and other hazardous air pollutants,³³⁸ the American Energy Alliance, a group with links to the Koch brothers, connected this case to political efforts to resist the Clean Power Plan: “[The] EPA can no longer ignore the costs of its reckless agenda. This decision shows that states should resist EPA’s calls to submit plans for the upcoming climate rule.”³³⁹ More substantively, if these Section 112 regulations are ultimately prevented from moving forward – the Supreme Court ruling is more likely to delay than ultimately prevent those regulations – that aspect of the legal challenge would be eliminated.³⁴⁰

Beyond these state-federal dynamics, a key way in which partisanship may serve as a major barrier to functional responses if the Clean Power Plan goes into effect involves the question of regional collaboration.³⁴¹ Numerous studies make it clear that states would benefit economically through regional multi-state cooperation.³⁴² Moreover, in some regions where electricity markets

[anyway-18013](http://www.countoncoal.org/2015/01/16/governors-use-state-of-the-state-speeches-to-open-fire-on-epas-clean-power-plan/), with Count on Coal, *Governors Use “State of the State” Speeches to Open Fire on EPA’s Clean Power Plan*, Jan. 16, 2015, <http://www.countoncoal.org/2015/01/16/governors-use-state-of-the-state-speeches-to-open-fire-on-epas-clean-power-plan/>.

³³⁶ Letter from Senator Sheldon et. al to National Governors Association, Apr. 14, 2015, http://www.whitehouse.senate.gov/download/?id=33ebe122-635e-4bd6-b59a-9246a3d256ac&download=1&utm_source=EnergyGuardian_email&utm_medium=email&utm_campaign=12801. For additional materials on Kentucky’s decisionmaking around compliance, see James Bruggers, *Kentucky Defends Work Toward Climate Path*, COURIER-J., Mar. 5, 2015, <http://www.courier-journal.com/story/watchdog-earth/2015/03/05/mcconnell-tells-states-to-resist-clean-power-plan-requirements/24457533/>;

³³⁷ 576 U.S. ____ (2015).

³³⁸ *Id.*

³³⁹ Richard Revesz, *What the Supreme Court’s EPA Decision Means for the Mercury Rule and Clean Power Plan*, THE HILL, June 20, 2015, <http://thehill.com/blogs/pundits-blog/energy-environment/246516-what-the-epa-decision-means-for-the-mercury-rule-and>.

³⁴⁰ See Ann Carlson, *MATS Rules Declared Invalid in Michigan v. EPA*, 5-4, LEGAL PLANET, June 29, 2015, <http://legal-planet.org/2015/06/29/mats-rules-declared-invalid-in-michigan-v-epa-5-4/>.

³⁴¹ For an in-depth analysis of the need for regional cooperation, barriers to it, and institutional possibilities for implementation, see Hannah J. Wiseman & Hari M. Osofsky, *Regional Energy: Bridging the Energy-Environment Divide in U.S. Climate Law* (draft on file with authors).

³⁴² See JOHN LARSON ET AL, REMAKING AMERICAN POWER: POTENTIAL ENERGY MARKET IMPACT OF EPA’S PROPOSED GHG EMISSION PERFORMANCE STANDARDS FOR EXISTING POWER

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are run by regional transmission organizations (RTOs) that span several states, such as the Midcontinent Independent System Operator, a failure to cooperate could cause operational challenges for markets that are based on regional least-cost, reliable solutions, adding to concerns that RTOs and the North American Electric Reliability Corporation (NERC) have raised about maintaining reliability in a rapid transition away from coal.³⁴³ However, politics, often dominated by partisanship, and current timelines may hinder this kind of regional cooperation.³⁴⁴

The mitigation actions that the Obama Administration has attempted to justify under *Massachusetts v. EPA* have been accompanied by significant, but far less controversial, action on adaptation. President Obama created an Interagency Climate Change Adaptation Taskforce during his first year in office to explore how federal policies and programs could prepare for climate change better. He simultaneously directed federal agencies to “evaluate agency climate change-risks and vulnerabilities and to manage the effects of

PLANTS (Nov. 2014) (Report of CSIS Energy and National Security Program and the Rhodium Group); M.J. BRADLEY & ASSOCIATES, MULTI-STATE RESPONSES TO GHG REGULATION UNDER SECTION 111(D) OF THE CLEAN AIR ACT, Apr. 2015, <http://www.mjbradley.com/sites/default/files/Multi-State%20Responses%20to%20GHG%20Regulation.pdf>. David Luke Oates & Paulina Jaramillo, *State Cooperation Under the EPA's Proposed Clean Power Plan*, 28 ELECTRICITY J. 26 (2015).

³⁴³ See, e.g., NERC, 2014 Long-Term Reliability Assessment, http://www.nerc.com/pa/RAPA/ra/Reliability%20Assessments%20DL/2014LTRA_ERATTA.pdf (“While the power industry has been successful in complying with prior mass-based emission cap and trade programs (e.g. Acid Rain program, Clean Air Interstate Rule, and RGGI) without creating major electric grid reliability problems, the proposed Clean Power Plan impacts a larger amount of capacity (over 700,000 MW) in a relatively short time frame, potentially posing greater grid reliability impacts compared to prior environmental compliance programs.”); Southwest Power Pool, *Reliability Impact of EPA's Proposed Clean Power Plan* (“Unless the proposed CPP is modified, the SPP region faces serious, detrimental impacts on reliable operation of the bulk electric system – introducing the very real possibility of rolling blackouts or cascading outages that will have significant impacts on human health, public safety, and economic activity.”). Other studies suggest that there are not significant reliability concerns. For example, a study of PJM by Analysis Group in March 2015 found that: “Looking across the nation as a whole, we found that there is a compelling case that carbon pollution can be controlled at existing power plants with out adversely affecting electric system reliability.” SUSAN TIERNEY ET AL., ELECTRIC SYSTEM RELIABILITY AND EPA'S CLEAN POWER PLAN: THE CASE OF PJM, http://www.analysisgroup.com/uploadedFiles/Publishing/Articles/Electric_System_Reliability_and_EPAs_Clean_Power_Plan_Case_of_PJM.pdf; see also SUSAN TIERNEY ET AL., ENSURING ELECTRIC GRID RELIABILITY UNDER THE CLEAN POWER PLAN: ADDRESSING KEY THEMES FROM THE FERC TECHNICAL CONFERENCES 3 (Apr. 2015) (arguing that “The evidence does not support the argument that the proposed CPP will result in a general and unavoidable decline in reliability. While we do expect significant changes to the overall mix of resources under the CPP, we believe resource planners and markets will have sufficient time and resources to respond to a realistic projection of system redispatch and facility retirements.”)

³⁴⁴ Emily Holden, *States Face Barriers to Cooperating on EPA Greenhouse Gas Rule on Power Plants*, E&E PUBLISHING, Nov. 18, 2014, <http://www.eenews.net/stories/1060009097>.

climate change on the agency's operations and mission in both the short and long term."³⁴⁵

Adaptation efforts have continued to develop – often in collaboration with smaller scale efforts by cities, states, regions, and tribes that frequently have been ahead of the federal government – throughout President Obama's two terms. In 2013, federal agencies released climate change adaptation plans covering operations, missions and programs. That same year, the President's Climate Action Plan outlined further steps to prepare for climate change impacts. The plan focuses particularly on removing barriers to action; fostering state, local and tribal efforts; building scientific capacity; and identifying sectoral vulnerabilities.³⁴⁶ A further executive order that year directed federal agencies to take a variety of steps on adaptation,³⁴⁷ and established a federal-level interagency Council on Climate Preparedness and Resilience and a multi-level State, Local, and Tribal Leaders Task Force on Climate Preparedness and Resilience.³⁴⁸

Adaptation measures with a domestic focus, particularly when framed more broadly as discussed in depth in Part II.C, have often received bipartisan support despite broader partisanship around climate change. Eli Lehrer, president of R Street Institute, a conservative, free-market focused think tank, explained: "The best adaptation strategies are very good policy in any case. And whether intentionally or not, a lot of Republicans are already taking the lead on things that are climate adaptation strategies."³⁴⁹ Leaders in both parties have shown awareness of possibilities for "going together" on these issues, not only in the executive sphere, but also in Congress. Mississippi Senator Roger Wicker explains his co-sponsorship of legislation to support federal, state, and local adaptation planning in these terms: "I do believe it is a way for us to do something sensible that is also a little more realistic than trying to change the sea level."³⁵⁰ Although not all Republicans support these measures, and more internationally-oriented action such as President Obama's \$3 billion pledge to United Nations Green Climate Fund created strong

³⁴⁵ Exec. Order No. 13514, 74 Fed. Reg. 52,117 (Oct. 5, 2009).

³⁴⁶ *President Obama's Plan to Fight Climate Change*, THE WHITE HOUSE (June, 25 2013), <http://www.whitehouse.gov/share/climate-action-plan>.

³⁴⁷ Exec. Order No. 13,653, Fed. Reg. 66,819 (Nov. 1, 2013).

³⁴⁸ *Id.*

³⁴⁹ Zack Colman, *Democrats shift from climate 'change' to 'adaptation' to woo Republicans*, WASH. EXAMINER, Apr. 11, 2014, <http://www.washingtonexaminer.com/democrats-shift-from-climate-change-to-adaptation-to-woo-republicans/article/2547109>.

³⁵⁰ *Id.*

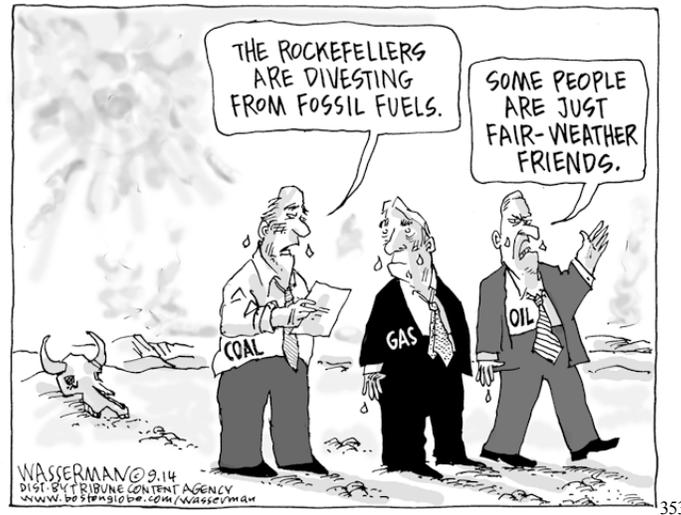
negative reactions by Republicans, executive action on adaptation has received far less pushback than that on mitigation.³⁵¹

While partisan responses to Obama Administration’s executive action vary, his actions form the core of U.S. federal action on both mitigation and adaptation. Moreover, his most controversial “go around” regulations of power plant greenhouse gas emissions have been protected, at least as long as he is in office and they survive courtroom challenges, by the very partisanship that has stymied him in Congress. The dynamics that hindered passage of comprehensive climate legislation also prevent the repeal of the Clean Air Act authority that the EPA relies upon.³⁵² Over time, if regulations remain in place long enough – facilitated by a stalled Congress – there is potential for the change to become entrenched as companies’ business planning and the public evolve in response to them. In other words, it is possible for “go-around” strategies over time to meld with more cooperative approaches to generate broader-based support for measures.

³⁵¹ *Id.*; Kathleen Hennessy & Neela Banerjee, *Obama to Pledge \$3 Billion in Climate Aid for Developing Countries*, L.A. TIMES, Nov. 14, 2014, <http://www.latimes.com/nation/la-fg-obama-climate-20141114-story.html>

³⁵² Moreover, the slow pace of regulatory promulgation and repeal means that regulations finalized by the Obama Administration would remain in place for some months even if a Republican administration committed to rolling them back wins the 2016 presidential election.

C. “Show me the money”



The first two sections of this Part have focused on reframing strategies with respect to government, whether by scaling down to local government or shifting branches. Governments obviously have an important role to play in shaping the regulatory response to climate change and in adopting measures that can move forward on energy transition. However, just as important, if not more so, are actions taken by private actors that are the source of emissions as well as the focus of activities to respond to climate change impacts. Corporations in particular are the largest and most influential group of such actors who actions are deeply tied to the success of mitigation and adaptation efforts. While government regulation plays an important role in shaping corporate behavior and many of the efforts described previously affect (and are fostered or constrained by) corporations, this section considers ways in which strategies can influence private actors directly.

In the world of climate policy, corporations and the private sector – particularly in the energy industry – are often cast as the “bad guys.” Coal and oil and gas companies produce the fossil fuel products that contribute nearly seventy percent of global greenhouse emissions when consumed for electricity generation and transportation.³⁵⁴ These energy companies have at times, and in some

³⁵³ Michael Shank & Julia Trezona Peek, *Dirty Energy Dollars*, U.S. NEWS, Oct. 28, 2014, <http://www.usnews.com/opinion/economic-intelligence/2014/10/28/congress-should-refuse-donations-from-dirty-fossil-fuel-energy-companies>.

³⁵⁴ World Resources Institute, CAIT 2.0, WRI’s Climate Data Explorer, available at [http://cait2.wri.org/wri/Country%20GHG%20Emissions?indicator\[\]=Energy&indicator\[\]=Indust](http://cait2.wri.org/wri/Country%20GHG%20Emissions?indicator[]=Energy&indicator[]=Indust)

cases continue to be, actively involved in lobbying efforts at the national and international levels to thwart action on climate change.³⁵⁵ Others have supported groups that promote skeptical views of climate science.³⁵⁶ In addition, coal and oil and gas companies and their industry associations have frequently been at the forefront of anti-regulatory litigation challenging proactive climate and clean energy measures taken by the Obama Administration and in several states.³⁵⁷

A lot of this activity has a strong partisan edge. For instance, at least two thirds of the energy and natural resource industry's donations since 1990 have gone to Republican candidates.³⁵⁸ Moreover, this split and the amounts of money involved, have grown since the Supreme Court's 2010 *Citizens United* ruling, which increased the opportunities for corporations to influence election campaigns through political donations. For example, in the 2012 presidential election year, energy and resource industry companies donated \$92.6 million to Republicans and \$22.6 million to Democrats. In the 2014 midterm elections, they donated \$58.8 million to Republicans – more than the total donations to Republicans in the 2008 presidential election year – and \$16.3 million to Democrats. Average donations to Republican House and Senate candidates also rose significantly after 2010. Representative Boehner received more donations, \$1,677,887 million, from these industries in 2013-14 than any other candidate, and four of the top five candidates receiving donations from the energy and natural resources industries were Republicans.³⁵⁹

rial%20Processes&indicator[]=Agriculture&indicator[]=Waste&indicator[]=Land%20Use%20and%20Forestry%20(Net%20Forest%20Conversion)&indicator[]=Bunker%20Fuels&year[]=2009&focus=&chartType=geo (showing energy sector figures for 2009).

³⁵⁵ SETH SHULMAN ET AL., *SMOKE, MIRRORS & HOT AIR: HOW EXXONMOBIL USES BIG TOBACCO'S TACTICS TO MANUFACTURE UNCERTAINTY ON CLIMATE SCIENCE* 9 (Cambridge: Union of Concerned Scientists, 2007).

³⁵⁶ Brant Olson and Nick Surgey, *5 ways ALEC Denies the Facts of Climate Change*, FORECAST THE FACTS, Sep. 25, 2014, <https://s3.amazonaws.com/s3.forecastthefacts.org/images/ResponsetoALECPressStatement.pdf>.

³⁵⁷ See, e.g., *Coalition for Responsible Regulation v EPA*, 684 F.3d 102 (D.C. Cir. June 26, 2012); *In re Polar Bear Endangered Species Act Listing & § 4(d) Rule Litig.*, 2011 U.S. Dist. LEXIS 119476 (D.D.C., Oct. 17, 2011); *In re Polar Bear Endangered Species Act Listing & § 4(d) Rule Litig.*, 2011 U.S. Dist. LEXIS 70172 (D.D.C., June 30, 2011); *In re Polar Bear Endangered Species Act Listing & § 4(d) Rule Litig.*, No. 11-5219 (U.S. Court of Appeals, D.C. Cir., Mar. 30, 2013); *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 301 (D.Vt. 2007); *Central Valley Chrysler-Jeep, Inc. v. Witherspoon*, 37 ELR 20023, No. No. 04-6663, (E.D. Cal., Jan. 16, 2007).

³⁵⁸ The Center for Responsive Politics maintains information on corporate political donations on its OpenSecrets website. See *Interest Groups*, <https://www.opensecrets.org/industries/>. This information can be broken down by sector. For patterns of energy/natural resource donations, see <https://www.opensecrets.org/industries/indus.php?Ind=E>.

³⁵⁹ *Id.* *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

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Although blaming energy companies for failed climate policy may be the politically easier course, especially considering these donation numbers, there is growing acknowledgment of the need to engage these companies as crucial partners in the effort to transition the energy economy.³⁶⁰ Fossil fuel companies are not actually as monolithic in their anti-regulatory stance as such a portrayal would suggest; while the coal industry is steadfastly opposed to climate change action, the oil and gas industry has been far more mixed, likely due in part to their greater level of diversification and larger profit margin. In addition, uptake of renewable energy sources and clean fuels by energy and transportation companies is a key element of mitigation action at the national level and in several states.

Corporations operating in many other sectors of the economy are also becoming recognized as vital to effective energy transition and climate governance. In the adaptation sphere, private businesses involved in infrastructure provision, development, and land use, as well as companies that provide property and disaster insurance, have an important part to play in helping to reduce communities' vulnerability to climate change. Companies in the financial and investment sectors are emerging as key players in the regulatory complex that will be necessary to move towards low carbon societies. For example, several reports have been released on the so-called "carbon bubble": the sudden loss in value of fossil fuel assets predicted to result from international constraints on carbon emissions.³⁶¹ Such developments are leading to growing pressure on corporations to improve disclosure of climate-related risk to shareholders and investors, and for institutional investors, such as pension funds and banks, to divest themselves of fossil fuel assets.³⁶²

Increasingly, many companies are aware of the risks that climate change poses to their businesses,³⁶³ and some are beginning to take

³⁶⁰ Rory Sullivan, *Introduction in CORPORATE RESPONSES TO CLIMATE CHANGE: ACHIEVING EMISSIONS REDUCTIONS THROUGH REGULATION, SELF-REGULATION AND ECONOMIC INCENTIVES 2* (Rory Sullivan, ed.), (2008).

³⁶¹ Carbon Tracker Initiative, *Unburnable Carbon: Are the world's financial markets carrying a carbon bubble?* (2012, Carbon Tracker Initiative, United Kingdom); Carbon Tracker Initiative and LSE Grantham Research Institute on Climate Change and the Environment, *Unburnable Carbon 2013: Wasted Capital and Stranded Assets* (2013, Carbon Tracker Initiative, London); Elaine Prior, "Unburnable Carbon" - *A Catalyst for Debate* (2013, Citigroup, Australia); Simon Redmond and Michael Wilkins, *What a Carbon-Constrained Future could Mean for Oil Companies' Creditworthiness* (2013, Standard and Poor's Ratings Services, London); Paul Spedding, Kirtan Mehta and Nick Robins, *Oil and Carbon Revisited: Value at risk from 'unburnable' reserves* (2013, HSBC Bank plc, Oil and Gas/Climate Change Europe).

³⁶² An example of this approach is the fossil fuels divestment campaign being run by 350.org. See <http://gofossilfree.org/>.

³⁶³ See World Economic Forum, *Global Risks 2014 Report* (2014, World Economic Forum, Geneva) (ranking failure of mitigation measures fifth and extreme weather events sixth highest risks of concern); CDP, *Global 500 Climate Change Report 2013* (2013, Carbon Disclosure

proactive measures to position themselves to minimize climate-related losses and to take advantage of competitive opportunities offered by the growth of the clean economy. For this group of companies, partisanship does not seem to play a significant role in their decisions to embrace climate-related measures. Rather, private sector climate action is promoted as good for companies' financial bottom line. Like Cuba Gooding's character in the movie *Jerry McGuire*, the call is to "Show Me the Money!" Put another way, what makes the corporate setting a good non-partisan space for climate action – the lobbying activities and political donations of numerous energy companies notwithstanding – is that in general companies are motivated to do things that improve their financial bottom line. Where initiatives to implement clean energy behavior align with such economic incentives, this can create a powerful momentum for corporate action to address climate change.

An example of this approach – coupling a call for corporate action with a disaster preparedness framing – is "The Risky Business Project." This non-partisan, independent coalition of U.S. business and policy leaders – including former New York major Michael Bloomberg and former U.S. Treasury Secretary Henry Paulson – works to highlight the risks climate change poses for U.S. enterprise.³⁶⁴ In an open letter to the business community published in the *Wall Street Journal* in June 2014, the group called for awareness of the impacts of climate change as a necessity of "[p]roper risk management."³⁶⁵ To further this goal, it commissioned the Rhodium Group to conduct a risk assessment of the potential economic consequences of following a "business as usual" approach to climate change for each region of the United States and for selected sectors of the economy. As Michael Bloomberg explained:

Damages from storms, flooding, and heat waves are already costing local economies billions of dollars – we saw that firsthand in New York City with Hurricane Sandy. With the oceans rising and the climate changing, the Risky Business

Project, London) (Of the 379 companies that responded to the Global 500 survey, more than one third (37%) saw the physical risks of a changing climate as a real and present danger, up from ten per cent in 2011; eighty-one per cent identified climate change risks to their business operations, supply chains, and plans, up from seventy-one per cent in 2012); CDP, *CDP S&P 500 Climate Change Report 2013* (2013, PWC, North America), 5 (seventy-seven per cent of the 334 respondents disclosed exposure to climate change-related risks, up from sixty-one per cent the previous year).

³⁶⁴ See Risky Business website at <http://riskybusiness.org/blog/american-business-must-act-to-reduce-climate-risk>.

³⁶⁵ For the text of the open letter, see Risky Business, American Business must Act to Reduce Climate Risk, Jun. 17, 2014, <http://riskybusiness.org/blog/american-business-must-act-to-reduce-climate-risk>.

report details the costs of inaction in ways that are easy to understand in dollars and cents – and impossible to ignore.³⁶⁶

For companies in the insurance and reinsurance sector, the nature of their business makes them particularly susceptible to calls for greater attention to the economic risks of neglecting climate change. Not only are insurance companies generally risk averse, but they also have much to lose (and possibly something to gain)³⁶⁷ from their front line exposure to the physical risks climate change poses for property and infrastructure. The industry as a whole has been one of the most proactive sectors in addressing adaptation issues and urging governments to do so also.³⁶⁸ Increases in the number, cost, and variability of disaster and weather-related losses in the last decade have convinced some insurance companies, reinsurers, and their trade associations of the need to incorporate climate change into their strategic planning.³⁶⁹ Other insurance companies – such as multinational reinsurer, the Swiss Re Group – have gone a step further taking measures to reduce their corporate carbon footprint in addition to measures designed to reduce their future climate-related losses. In 2003, Swiss Re launched a “Greenhouse Neutral Programme” that aimed to reduce greenhouse gas emissions by 15 percent per employee by 2013 and to offset remaining emissions through the purchase of high-quality carbon credits. This emissions reduction goal was achieved six years early in 2007 and the company has since achieved greenhouse gas reductions in its operations of over 50 percent.³⁷⁰

While many companies do not (yet) perceive the business risks associated with climate change impacts as significant enough to prompt action on the issue,³⁷¹ regulatory risks and associated economic costs from imminent or potential climate or clean energy measures are increasingly given greater attention. Reports prepared by investor group “the Carbon Disclosure Project” (CDP) evidence this

³⁶⁶ Michael R. Bloomberg, interview for the Risky Business Project, Jun. 17, 2014, available at www.riskybusiness.org.

³⁶⁷ For instance, climate change may offer opportunities to develop new sorts of products to manage climate risk and variability.

³⁶⁸ Sean B. Hecht, *Insurance*, in *THE LAW OF ADAPTATION TO CLIMATE CHANGE: US AND INTERNATIONAL ASPECTS* 511 (Michael B. Gerrard and Katrina F. Kuh, eds., 2012).

³⁶⁹ Evan Mills, *Insurance in a Climate of Change*, 309 *SCIENCE* 1040 (2005).

³⁷⁰ Swiss Re, The Climate Group, <http://www.theclimategroup.org/who-we-are/our-members/swiss-re>.

³⁷¹ G.S. JOHNSTON, D.L. BURTON & M. BAKER-JONES, *CLIMATE CHANGE ADAPTATION IN THE BOARDROOM* (2013) (National Climate Change Adaptation Research Facility), <http://www.nccarf.edu.au/publications/climate-change-adaptation-boardroom>. See also J.M. WEST AND DAVID BRERETON, *CLIMATE CHANGE ADAPTATION IN INDUSTRY AND BUSINESS: A FRAMEWORK FOR BEST PRACTICE IN FINANCIAL RISK ASSESSMENT, GOVERNANCE AND DISCLOSURE* (2013) (National Climate Change Adaptation Research Facility, Gold Coast).

trend. For example, the CDP S&P 500 Report for 2013, surveying corporate climate responses across top U.S. companies, found that in the context of steps taken by the Obama Administration to regulate emissions companies displayed “a significantly more mature level of climate management – as well as a drive to lead among peers.”³⁷² Another report issued by CDP in late 2013 found that twenty-nine major publicly traded companies based or operating in the United States across a variety of sectors used an internal price on carbon pollution in their business planning, ranging from USD \$6-\$60 per ton of carbon dioxide equivalent. Most companies covered by the report – including large corporations such as Walt Disney, Google, Xcel Energy, Walmart, Delta, Microsoft, and PG&E Corporation – stated that they expected the eventual emergence of a regulatory approach, of some form, to address climate change. Companies establishing an internal carbon price as part of their business models viewed this “as both an evaluation of risk and a business opportunity if they take steps to limit carbon pollution before others do.”³⁷³

Moreover these trends do not seem to be limited to the United States. At the recent United Nations Climate Summit in New York in September 2014, one of the most significant outcomes was the support offered by 1,042 multinational corporations for international carbon pricing. Several of these companies, including Nestle, Unilever, and Philips, committed to introduce their own internal shadow carbon prices as a measure for reducing their carbon footprint.³⁷⁴ Perhaps more important than these large companies pricing carbon internally is the effect that this move is likely to have on their supply chains, which encompass many small and medium-sized businesses. Improving the resiliency of the private sector as a whole has the capacity to support the adaptation of populations to climate change worldwide and especially in developing countries where micro- and small businesses, rather than multinationals, tend to be the engines of economic growth and job creation.³⁷⁵

The overall theme of readiness for a climate changed-future being considered by some companies as “a source of competitive

³⁷² CDP, *CDP S&P 500 Report*, 4.

³⁷³ *Major U.S. companies disclose internal prices on carbon, cite risk from climate change and extreme weather business opportunities*, Carbon Disclosure Project, 5 December 2013, at <https://www.cdp.net/en-US/News/CDP%20News%20Article%20Pages/Major-US-companies-disclose-internal-prices-on-carbon.aspx> (quoting Tom Carnac, President of CDP North America).

³⁷⁴ World Resources Institute, *Analyzing the Results of the UN Climate Summit*, <http://www.wri.org/blog/2014/09/analyzing-outcomes-un-climate-summit>.

³⁷⁵ IFC Jobs Study, http://www.ifc.org/wps/wcm/connect/0fe6e2804e2c0a8f8d3bad7a9dd66321/IFC_FULL+JOB+STUDY+REPORT_JAN2013_FINAL.pdf?MOD=AJPERES.

advantage”³⁷⁶ is one echoed in interviews we have conducted with attorneys who work as corporate counsel. One lawyer who represented a large utility company described how his client saw benefit in increasing its renewable and natural gas portfolio in order to take advantage of business opportunities afforded by the increasing stringency of regulations for coal plants.³⁷⁷ From the other side of the fence, a lawyer working with an environmental group described how a lot of the things they were seeing from power companies and utilities in terms of fuel switching (coal to gas or renewables) were in some part “climate-driven,” but more often “it’s really the economics” that is the fundamental driver of behavioral shifts. Companies see opportunities to make money and follow them.³⁷⁸

Beyond those companies most directly affected by climate change or potential regulatory measures, there is increasing interest in the role that companies in the finance and investment sectors play in advancing climate action. In the mid-2000s, a coalition of non-governmental organizations petitioned the Securities and Exchange Commission (SEC) to improve company disclosure rules relating to climate change risks facing businesses.³⁷⁹ The SEC issued an interpretative guidance in 2010 which urges listed companies to disclose material climate-related risks to their businesses.³⁸⁰ Importantly, the SEC’s guidance extends beyond physical climate change risks to regulatory risks – both domestic and international – associated with compliance with climate regulatory requirements, indirect effects of regulation, or business trends such as decreased demand for carbon-intensive products. While climate-related disclosures by companies improved in the immediate aftermath of the SEC ruling, this reform has not had the broader transformative change advocates had hoped for.³⁸¹ One interviewee involved in the initial petition to the SEC reflected on the reasons for this:

³⁷⁶ Gretchen Michals, *The Boardroom’s Climate is Changing*, DIRECTORSHIP 14 (Dec/Jan 2009/2010).

³⁷⁷ In person interview, participant 5 (Nov. 14, 2012).

³⁷⁸ Telephone interview, participant 12 (Dec. 2, 2013).

³⁷⁹ See Petition for Interpretive Guidance on Climate Risk Disclosures, File No. 4547, 19 September 2007, <http://www.sec.gov/rules/petitions/2007/petn4-547.pdf>; Supplemental Petition, June 12, 2008, <http://www.sec.gov/rules/petitions/2008/petn4-547-supp.pdf>; Second Supplemental Petition, 23 November 2009, <http://www.sec.gov/rules/petitions/2009/petn4-547-supp.pdf>. For other petitions on point, see also Petition for Interpretive Guidance on Business Risk of Global Warming Regulation, File Number 4-549, 22 October 2007, <http://www.sec.gov/rules/petitions/2007/petn4-549.pdf> (submitted on behalf of the Free Enterprise Action Fund).

³⁸⁰ SEC, Commission Guidance Regarding Disclosure Related to Climate Change, 2010.

³⁸¹ Jim Coburn & Jackie Cook, *Cool Response: The SEC & Corporate Climate Change Reporting*, (Ceres, Boston, 2014).

The response actually wasn't that great, in part because companies do have trouble figuring out what is material and it does sort of run against their grain culturally. And I think the important thing is the time horizon that corporate managers are looking at tends to be shorter than the time horizon that where you can say, you know, it's clear if we have a bunch of refineries that are located in the Gulf of Mexico that may be affected by an increase in storm intensity or rise in sea levels, that may be a grave concern. But if you are looking for something in the next 2 or 3 or 4 years to tell investors about it may not.³⁸²

Shareholder and investor groups, along with some environmental groups, are now investigating additional avenues to pressure companies to improve disclosure around the risks climate change poses for their businesses and assets. Some U.S. groups have been active in initiating shareholder resolutions calling on companies to disclose how climate risk is being managed.³⁸³ Others have targeted institutional investors, such as pension funds, who often control substantial capital, including large investments in fossil fuel assets. The ultimate aim of these efforts, as one advocate explained, is to attack the financial bottom line of dirty energy companies by making fossil fuel investment economically unpalatable for large corporate investors:

The area where the traditional NGOs are very comfortable is stopping fossil fuel companies digging up nice parts of the world. That's where they've gone. A tree or a reef – let's go to court! And of course most of the time they lose but when they win it's champagne corks. But nothing ever changes. These companies are still looking for those opportunities and it just shifts risk to other parts of the globe. We think starving the capital – the oxygen if you like – is a much more solid strategy.³⁸⁴

These efforts are likely to continue to grow and show some promise in shifting corporate behavior.

While partisanship does not appear to be significant barrier to motivating climate action by a wide range of corporations, other

³⁸² Telephone Interview, participant 8 (Oct. 20, 2012).

³⁸³ Shareholder Resolutions, Ceres, <http://www.ceres.org/investor-network/resolutions> (167 climate-related resolutions as of Mar. 12, 2014, 42 withdrawn on basis that company will address). ICCR's Shareholder Resolutions, <http://www.iccr.org/iccrs-shareholder-resolutions> (2014 resolutions).

³⁸⁴ Skype interview, participant 21 (May 21, 2013). The advocate concluded by focusing on the liability issue, arguing that the asset owners rather than the regulators would likely end up being the ones to force risk management. *Id.*

potential obstacles should not be underestimated. Principal among these is the continuing prevalence of short-term thinking in corporate boardrooms, focused on profit opportunities and shareholder returns. Indeed, some in the corporate law world remain skeptical of the capacity for private sector led change in climate policy. As one corporate lawyer put it, directors who attempt to pursue long-term climate-friendly measures:

... are far more susceptible to an action by their disgruntled shareholders if they disband some profitable part of their (dirty) business in the name of saving the planet. ... [T]hose directors with “green” inclinations would quickly find themselves voted off boards or up before the court for breach of the fiduciary duty to make [shareholders] pots of money!³⁸⁵

As with the “small is beautiful” strategy described in the earlier section then, structural reframing of climate action as an economically beneficial course for companies can be a double-edged sword. Leader companies may well see the financial bottom line benefits offered by a more thorough consideration of climate change in their internal decisionmaking processes and in the steps they take to reduce emissions and to improve the resilience of their supply chains. Others with a substantial economic stake in the fossil fuel economy may not be so easily persuaded. And the vast majority of companies remain, for the moment, somewhere in the middle: aware of the business risks posed by climate change but reluctant to take strong measures to change their practices and behavior. Nonetheless, the potential for transformative change originating from the corporate sector is significant, especially as financial and competitive benefits associated with early climate change action and transition away from dirty fuels become more apparent over time.

CONCLUSION: BENEFITS AND LIMITATIONS OF POLYCENTRIC, INCREMENTAL STRATEGIES

In this Article, we have essentially adopted a “do whatever it takes” attitude to advancing action on climate change and energy transition. If an appeal to address climate change does not work due to partisan barriers, try other more appealing framings. If Congress is not a realistic option for passing comprehensive climate legislation, try other, more amenable forums be they local authorities, courts, the executive branch, or the private sector.

However, as demonstrated through the Article’s application of psychological theory to practical cases studies, such an approach need

³⁸⁵ Email exchange, participant 32 (June 12, 2014).

not (and should not) simply be opportunistic. Substantive and structural reframing, particularly when used in combination, can be a powerful strategy for encouraging needed cooperation and circumventing road blocks. The Article highlights the specific substantive and structural strategies that have been most effective in doing so.

There is, of course, now a whole academic literature that has developed to advocate the value of such polycentric approaches to climate regulatory development – we ourselves have made contributions to that literature and are persuaded of the value of multiscalar climate action. Were a new climate treaty to be negotiated in Paris in 2015, or the Congress to pass a carbon tax, we would be among the first out in the streets to celebrate these advances. But we are skeptical that such breakthroughs are coming any time soon, or at least will deliver deep emissions reductions of the levels scientists say are needed. The strategies offered in this Article represent our pragmatic assessment – based on experience, expertise, and research – that a different approach is warranted in response to the energy partisanship that characterizes U.S. climate politics today.

From a more positive perspective, this Article can be viewed as a call to climate advocates not to be discouraged by the obstacles posed by the difficult political environment. There are viable ways around such barriers for those who are committed to making progress on climate and energy issues. These strategies have been employed successfully on the ground for decades, and thinking about them more systematically provides an opportunity to use them even better.

However, we are well aware in putting forward these strategies that they have their own inherent limits. They are necessarily decentralized and incremental. They tend to over-emphasize human values associated with climate resilience and the economic benefits of energy transition rather than other values. They are piecemeal and the sum of the parts may not be sufficient to add up to the required whole. They are often vulnerable to leadership change. And they are not foolproof: the goals of creating a clean energy economy and building disaster resilience will often align with broader climate protection goals but there may be controversial choices with difficult tradeoffs (e.g., ethanol as a biofuel or hard coastal armoring damaging neighboring properties) on the way.

We propose these strategies, not as a sufficient substitute for the bipartisan reconciliation and political will required to make meaningful large-scale commitments, but rather as important ways forward given the current realities. Our hope is that an open conversation that focuses on possibilities for agreement, and

promising forums for making that agreement happen, can help spur that needed progress. These strategies are not intended as tricks, or to add to the vitriolic dialogue going both directions. Rather, we argue that it is time to think seriously and systematically about leverage points based on how we can agree and use them to “go together” as much as possible.

ARTICLES

INTEREST GROUPS AND ENVIRONMENTAL POLICY: INCONSISTENT POSITIONS AND MISSED OPPORTUNITIES

BY

MICHAEL A. LIVERMORE* & RICHARD L. REVESZ**

This Article examines and explains the positions of the principal interest groups over the past four decades with respect to two central questions of environmental policy: the appropriate policy goal and the instrument that should be used to carry out the policy. With respect to the first question, this Article observes that, at the beginning of the contemporary period of environmental law, industry groups strongly supported setting the stringency of environmental standards by reference to cost-benefit analysis. At the same time, environmental advocacy organizations strongly opposed the use of cost-benefit analysis. As environmental regulators gained greater proficiency in the quantification and monetization of environmental benefits, industry groups came to see that, when properly conducted, cost-benefit analysis could justify stringent environmental protection. Consequently, they have abandoned their original enthusiasm for the technique. Similarly, over the same period of time, environmental groups came to see the promise of cost-benefit analysis, for similar reasons.

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With respect to instrument choice, industry groups were originally attracted to marketable permit schemes as a lower-cost means of achieving pollution reduction, while environmental groups were skeptical of these approaches. First with the Clean Air Act Amendments of 1990, and then when faced with the daunting challenge of climate change, environmental groups acknowledged that market mechanisms are more economically and politically viable than command-and-control regimes because they impose far lower aggregate costs on society. And industry groups realized that by attacking marketable permit schemes they might defeat greenhouse gas regulation altogether. While environmental groups and industry have largely switched positions on the two central questions of environmental policy, there was a brief time when their positions largely overlapped. As a result of the fleeting nature of this consensus, however, the opportunities to make substantial progress in rationalizing the system of environmental regulation have been unrealized.

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I. INTRODUCTION

When designing environmental policy, decision makers must address two principal questions: What are the policy's goals? What instrument should be used to carry out the policy? In the United States, these questions have principally been translated into a set of binary choices. First, should the government use cost-benefit analysis instead of alternative risk management frameworks? Second, should the government favor market-based instruments over command-and-control regulation as the principal regulatory instrument?

In the 1970s and 1980s, when U.S. environmental policy was in its infancy, the position of interest groups with respect to these questions, particularly on issues affecting public health, was clear and predictable. On the first question, industry groups—principally trade associations representing polluters—favored the use of cost-benefit analysis, arguing that environmental benefits needed to be weighed against the resulting

undesirable economic consequences.¹ In contrast, environmental groups vigorously opposed cost-benefit analysis, claiming in part that it would systematically lead to weak protections.²

On the second question, industry groups favored marketable permit schemes on the grounds that they led to the least-cost way to meet a given environmental standard and that they provided desirable incentives for technological innovation.³ Environmental groups, in contrast, argued that such schemes were “licenses to pollute” and therefore unethical, and that they would compromise the effectiveness of environmental controls.⁴

Now, decades later, when the field of environmental regulation is relatively mature, industry and environmental groups continue to have strong and opposite positions on each of these principal building blocks of environmental policy. That is not surprising. But what is surprising is that each of the positions held by the competing sides is, to a significant extent, the diametric opposite of the position they held in the 1970s and 1980s.

On cost-benefit analysis, many industry groups have largely abandoned their commitment to weighing environmental benefits against economic costs. Instead, they spend considerable energy casting doubt on the economic models that they themselves had advocated only a few decades earlier, calling them unreliable and manipulable.⁵ In contrast, many industry groups vigorously embrace the mantra of “job-killing regulations,” arguing that any regulation that has a negative impact on jobs should not be undertaken, regardless of how large the benefits—including saving tens of thousands of lives—and how small the number of jobs it might eliminate.⁶ And, to calculate the impact of regulations on jobs, they use economically

¹ See Thomas O. McGarity, *A Cost-Benefit State*, 50 ADMIN. L. REV. 7, 34 (1998) (arguing that “in the real political world the strongest advocates of cost-benefit analysis are large corporations, trade associations and associated think tanks”).

² See David M. Driesen, *Distributing the Costs of Environmental, Health, and Safety Protection: The Feasibility Principle, Cost-Benefit Analysis, and Regulatory Reform*, 32 B.C. ENVTL. AFF. L. REV. 1, 4 (2005) (noting environmentalists’ claims that adoption of cost-benefit standards greatly weakens the effectiveness of environmental laws).

³ See Susan E. Leckrone, *Turning Back the Clock: The Unfunded Mandates Reform Act of 1995 and Its Effective Repeal of Environmental Legislation*, 71 IND. L.J. 1029, 1040 n.69 (1996) (noting that “marketable permit schemes” have been promoted by industry).

⁴ John M. Broder, *From a Theory to a Consensus on Emissions*, N.Y. TIMES, May 16, 2009, <http://www.nytimes.com/2009/05/17/us/politics/17cap.html> (last visited Feb. 14, 2015) (quoting Democratic Representative Jim Cooper: “Our [cap-and-trade] proposal was at first ridiculed by environmentalists as little more than a license to pollute”).

⁵ See *infra* text accompanying notes 22–23.

⁶ See OFFICE OF AIR & RADIATION, U.S. ENVTL. PROT. AGENCY, *THE BENEFITS AND COSTS OF THE CLEAN AIR ACT FROM 1990 TO 2020*, at 5-25 tbl.5-6 (2011), available at http://www.epa.gov/cleanairactbenefits/feb11/fullreport_rev_a.pdf (estimating that the Clean Air Act Amendments of 1990 prevented approximately 160,000 premature deaths in 2010 and will prevent 230,000 deaths in 2020); Motoko Rich & John Broder, *A Debate Arises on Job Creation vs. Environmental Regulation*, N.Y. TIMES, Sept. 5, 2011, at B1, B5 (explaining that business groups oppose environmental regulations, arguing that they are “job killers,” despite the beneficial effects of regulation, including reducing infant mortality, and that the proposed regulation would cause minimal, if any, job loss); see also *infra* text accompanying notes 24–25 (describing the media’s use of “job killing”).

questionable methodologies that have no support in the peer-reviewed literature.⁷

The position of environmental groups has also shifted, though less dramatically. A number of significant groups now engage in methodological discussions of how cost-benefit analysis should be conducted, and participate effectively in the types of administrative proceedings that they would have eschewed decades earlier. And while other groups still view cost-benefit analysis with suspicion, overall the opposition by environmental groups has softened considerably.

As to marketable permit schemes, the industry groups that had been enthusiastic about them until the 1990s have changed their mind, referring to such schemes derisively as cap-and-tax approaches and invoking a parade of horrors that would allegedly follow their adoption.⁸ In contrast, environmental groups have embraced marketable permit schemes and have taken an active role in designing them and lobbying Congress for their adoption.

What happened? Why did the positions of the 1970s and 1980s largely become the opposite positions in the 2000s and 2010s? The best explanation is that neither side had any robust commitment to any of the positions they espoused then, and similarly has no robust commitment to the positions they are espousing now.⁹ Instead, each of the sides had—and continues to have—only a commitment to particular substantive outcomes on the stringency of environmental policy. Industry groups want laxer standards and environmental groups want more stringent standards, and they are both prepared to invoke any argument that will advance their respective positions along that spectrum.

As to cost-benefit analysis, industry groups came to see that, when properly conducted, the technique could justify stringent regulation. Similarly, environmental groups came to see the promise of cost-benefit analysis. In particular, over time the U.S. Environmental Protection Agency (EPA) refined its methodology for computing the value of statistical life, which is the benefit from averting a death from pollution. The value of statistical life is now around \$9 million,¹⁰ and can justify quite stringent regulations, especially when coupled with a growing body of research

⁷ See Michael A. Livermore & Jason A. Schwartz, *Analysis to Inform Public Discourse on Jobs and Regulation*, in *DOES REGULATION KILL JOBS?* (Cary Coglianese, Adam M. Finkel & Christopher Carrigan eds., 2013). Rigorous analyses of employment impacts from environmental regulations tend to find relatively modest effect. For some recent examples of such analyses, see generally chapters by Richard D. Morgenstern; Wayne B. Gray & Ronald J. Shadbegian; and Joseph E. Aldy & William A. Pizer, in *DOES REGULATION KILL JOBS* 33–38, *supra*.

⁸ See *infra* text accompanying notes 59–61.

⁹ For discussion of the general phenomenon of flip-flopping in the policy arena, see Eric A. Posner & Cass R. Sunstein, *Institutional Flip-Flops* (U. Chi. L. Sch., Working Paper No. 501, 2015), available at <http://www.law.uchicago.edu/faculty/research/eric-posner-institutional-flip-flops>.

¹⁰ Lisa A. Robinson & James K. Hammitt, *Research Synthesis and the Value per Statistical Life* 4 (Mossavar-Rahmani Ctr. for Bus. & Gov't, Harv. Kennedy Sch., Working Paper No. RPP-2014-14, 2014), available at http://www.hks.harvard.edu/var/ezp_site/storage/fckeditor/file/RPP_2014_14_Robinson_Hammitt.pdf.

demonstrating causal links between environmental quality and mortality. Similarly, the federal government now uses an estimate for the social cost of carbon—the damage of a ton of carbon dioxide emissions—of around \$40.¹¹ This value, likewise, can justify significant regulation of greenhouse gases.

On marketable permit schemes, environmental groups came to see that they provided the best hope for a comprehensive approach to climate change regulation, in particular because the command-and-control regimes that they had previously favored would be far more expensive and therefore less likely to be adopted.¹² And industry groups realized that maligning marketable permit schemes was a potentially effective strategy to defeat greenhouse gas regulation altogether.

The positions did not flip overnight. In fact, there was a brief moment when it looked like a relative consensus might emerge. But that consensus evaporated almost as soon as it coalesced, as environmental issues became increasingly polarized across the political parties, removing the opportunity and incentive for interest groups to arrive at compromise positions.

II. COST–BENEFIT ANALYSIS

Cost–benefit analysis made its appearance in the administrative state as a deregulatory tool favored by the political coalition that brought Ronald Reagan to the presidency in 1981. Not surprisingly given its genesis, groups interested in environmental protection were strongly opposed to this development. Even when cost–benefit analysis became institutionalized and not only the province of Republican Administrations, such groups absented themselves from participating in proceedings where they could have influenced the methodology, not wanting to be seen as acquiescing in its use. More recently, however, protection-oriented groups have come to see both that cost–benefit analysis was here to stay and that it could support stringent environmental regulation. But almost as soon as it appeared that consensus around the use of cost–benefit analysis might have been possible, conservative politicians and interest groups changed course, abandoning their support.

¹¹ INTERAGENCY WORKING GRP. ON SOC. COST OF CARBON, U.S. GOV'T, TECHNICAL SUPPORT DOCUMENT: TECHNICAL UPDATE OF THE SOCIAL COST OF CARBON FOR REGULATORY IMPACT ANALYSIS UNDER EXECUTIVE ORDER 12866 (May 2013), *available at* http://www.whitehouse.gov/sites/default/files/omb/inforeg/social_cost_of_carbon_for_ria_2013_update.pdf.

¹² See Richard Conniff, *The Political History of Cap and Trade*, SMITHSONIAN MAG., Aug. 2009, <http://www.smithsonianmag.com/air/the-political-history-of-cap-and-trade-34711212/?all> (last visited Feb. 14, 2015) (describing how environmentalists were originally skeptical of marketable permit schemes but that such schemes have proved to be much less expensive than command-and-control alternatives); Fred Krupp, *The Making of a Market-Minded Environmentalist*, STRATEGY+BUSINESS, June 10, 2008, <http://www.strategy-business.com/article/08201> (last visited Feb. 14, 2015) (explaining how critics of marketable permit schemes have been persuaded by the results).

A. Putting a Price on Life

In our 2008 book, *Retaking Rationality: How Cost–Benefit Analysis Can Better Protect the Environment and Our Health*,¹³ we discuss the strong antipathy held toward cost–benefit analysis by protection-oriented groups, including environmentalists, and the embrace of the technique by antiregulatory groups, including industry trade associations and their ideological and political allies.¹⁴ We also argue that this interest group dynamic had deleterious effects on the development of cost–benefit methodologies, because interests that favored stronger protections absented themselves from methodological debates about how cost–benefit analysis should be carried out. As a consequence, cost–benefit analysis became biased against regulation. In essence, environmentalist opposition to cost–benefit analysis became a self-fulfilling prophecy.

In a chapter on “missed opportunities,” we recount the experience of Sally Katzen, Administrator of the Office of Information and Regulatory Affairs (OIRA) in the Clinton White House.¹⁵ Since the promulgation of an executive order by President Reagan in 1981,¹⁶ OIRA has overseen the application of cost–benefit analysis by federal agencies. During the Reagan and George H.W. Bush Administrations, OIRA was reviled by environmental groups, which viewed the office as a “black hole” for regulations, in part because of its delay in performing reviews.¹⁷ When Bill Clinton took office, there was some hope on the part of environmentalists that OIRA would be abolished, and with it, any requirement that agencies conduct cost–benefit analysis. That hope was not borne out, and President Clinton issued Executive Order 12,866, which maintained the basic architecture of OIRA review of cost–benefit analysis, but made important procedural and substantive changes, including emphasizing “distributive impacts” and setting deadlines for review.¹⁸ As we recount in the book, Katzen sought to engage environmental groups in methodological discussions about cost–benefit analysis but was consistently rebuffed.¹⁹ She characterized the position of these groups as follows: “We don’t like cost–benefit analysis, full stop.”²⁰ Indeed, the book notes, “[a]fter spending time prodding groups to participate in the discussion over how to conduct cost–benefit analysis, she became sufficiently frustrated that she ‘gave up in trying to entice them to devote energies to it.’”²¹

¹³ RICHARD L. REVESZ & MICHAEL A. LIVERMORE, *RETAKING RATIONALITY: HOW COST–BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH* (2008).

¹⁴ *Id.* at 10–11.

¹⁵ *Id.* at 31–32.

¹⁶ See Stuart Shapiro, *Unequal Partners: Cost–Benefit Analysis and Executive Review of Regulations*, 35 ENVTL. L. REP. 10,433, 10,435 (2005); Exec. Order No. 12,291, 3 C.F.R. pt. 127 (1982).

¹⁷ REVESZ & LIVERMORE, *supra* note 13, at 26–27.

¹⁸ Exec. Order No. 12,866, 3 C.F.R. 638–39 (1994).

¹⁹ REVESZ & LIVERMORE, *supra* note 13, at 32.

²⁰ *Id.*

²¹ *Id.*

Environmental groups did not absent themselves only from OIRA's offices. An additional anecdote that we discuss in *Retaking Rationality* was a major effort on the part of EPA—a presumably more favorable forum—to revise its guidelines on conducting cost–benefit analysis. The ability to develop their own methodological guidelines is one mechanism that agencies have used to take advantage of cost–benefit analysis as a means of insulating themselves from political interference.²² In the Clinton-era revision, major updates occurred, including a calculation of the value of statistical life, the monetary measure used to value the single largest category of benefits of environmental protection, which is mortality risk reduction.²³ But during deliberations over these updates, while “the views of industry were well represented . . . [t]he environmentalists stayed away.”²⁴

B. A Tentative Embrace

In recent years, there has been a shift on the part of environmental groups toward grudging acceptance of cost–benefit analysis. In August 2008, a few months after we published our book, we launched the Institute for Policy Integrity, a think tank and advocacy organization at New York University School of Law.²⁵ In part, we sought to support protection-oriented groups that decided to participate meaningfully in debates over cost–benefit analyses.²⁶ Protection-oriented groups in general, and environmental organizations in particular, have begun to take an interest in the idea that cost–benefit analysis might advance their causes. Recently, there have been signs of a change in which protection-oriented groups are finally starting to speak confidently in the language of cost–benefit analysis.

One illustrative example of the shift in attitudes toward cost–benefit analysis is the robust partnership between the Institute for Policy Integrity and two of the country's leading environmental groups: the Environmental Defense Fund (EDF) and the Natural Resources Defense Council. This partnership focuses on providing a strong intellectual justification for the use of the social cost of carbon in regulatory proceedings. The social cost of carbon plays a key role in the regulatory impact analysis, not only with respect to the regulation of greenhouse gases under the Clean Air Act,²⁷ but also in other important regulatory contexts, such as the energy efficiency

²² Michael A. Livermore, *Cost–Benefit Analysis and Agency Independence*, 81 U. CHI. L. REV. 609, 678 (2014).

²³ See U.S. ENVTL. PROT. AGENCY, GUIDELINES FOR PREPARING ECONOMIC ANALYSES 87–94 (2000), available at [http://yosemite.epa.gov/ee/epa/erm.nsf/vwAN/EE-0228C-07.pdf/\\$file/EE-0228C-07.pdf](http://yosemite.epa.gov/ee/epa/erm.nsf/vwAN/EE-0228C-07.pdf/$file/EE-0228C-07.pdf).

²⁴ REVESZ & LIVERMORE, *supra* note 13, at 34.

²⁵ Inst. for Policy Integrity, *About Us*, <http://policyintegrity.org/about/> (last visited Feb. 14, 2015).

²⁶ Inst. for Policy Integrity, *Welcome Message from Professor Revesz*, <http://policyintegrity.org/what-we-do/professors-message/> (last visited Feb. 14, 2015) (discussing the reasons for founding the Institute for Policy Integrity and the help the institute provides to advocacy organizations).

²⁷ Clean Air Act, 42 U.S.C. §§ 7401–7671q (2012).

guidelines promulgated by the Department of Energy. The three organizations have been filing comments in every regulatory proceeding in which the social cost of carbon is used to justify the regulation. These comments argue that the Obama Administration's estimate is a reasonable one given the current state of scientific knowledge, but that it should be regarded as the lower bound on the actual number because many important negative consequences of climate change—such as wildfires and forced migration—have not yet been incorporated into the models. We argue that further support should be given to research in this area and that there should be a regularized, periodic process for updating the social cost of carbon. To bring attention to these issues and to act as a catalyst for further work in this area, last year the three organizations launched a “Cost of Carbon Pollution” website that focuses on damages that are omitted from the social cost of carbon calculation.²⁸

Even leading academic voices that had consistently opposed the use of cost–benefit analysis now recognize that there is some value to be had in environmentalists engaging in debates about how best to go about using it. Responding to a discussion of the Institute for Policy Integrity's work in this area, Professor Douglas Kysar of Yale Law School, and a scholar–member at the Center for Progressive Reform, stated that “assuming Livermore and Revesz are correct that cost–benefit analysis is here to stay—and [I have] no reason to doubt their prediction—then proponents of environmental, health, and safety regulation would do well to start talking the talk as best they can.”²⁹

More generally, advocates of stronger environmental protections have started to understand the importance of cost–benefit analysis as a tool. The biggest groups have hired economists³⁰ and taken steps to be involved in even the most detailed of cost–benefit questions. The value of a statistical life, once reviled as a crass manner of placing a dollar figure on the worth of a human being, is now beginning to have a place in the toolbox of progressive advocacy organizations. And arguments in defense of the social cost of carbon are now commonplace among several environmental organizations.

C. Turning Away from Cost–Benefit Analysis

Unfortunately, any seeming opportunity to build consensus over environmental policy in the common language of cost–benefit analysis has turned out to be fleeting. In the aftermath of the serious economic crisis that

²⁸ The Cost of Carbon Pollution, *About the Project*, costofcarbon.org/about (last visited Feb. 14, 2015); see also PETER HOWARD, FLAMMABLE PLANET: WILDFIRES AND THE SOCIAL COST OF CARBON 4 (2014), available at http://costofcarbon.org/files/Flammable_Planet_Wildfires_and_Social_Cost_of_Carbon.pdf (discussing adverse consequences omitted from the government's social cost of carbon estimate).

²⁹ Douglas A. Kysar, *Politics by Other Meanings: A Comment on “Retaking Rationality Two Years Later,”* 48 HOUS. L. REV. 43, 76 (2011).

³⁰ See *id.* at 55.

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began in 2008, the political right has been insistently calling for an end to new environmental protections. Rather than focusing on cost–benefit analysis, it has sought to reframe the debate around specific economic factors, such as employment, growth, or energy prices. For example, during the 2012 campaign, Mitt Romney addressed the issue as follows:

Where standards are put in place to constrain the issuance of regulations—such as requiring the use of cost–benefit analysis—they tend to be vulnerable to manipulation and also disconnected from the central issue confronting our country today, namely, generating economic growth and creating jobs. The end result is an economy subject to the whims of unaccountable bureaucrats pursuing their own agendas.³¹

It is telling that Romney, with his Boston Consulting Group and Bain pedigree, and who made his career in an industry that relied heavily on economic models, would turn his back on the central tool of his former trade.

Conservative academics have also become more skeptical of the value of cost–benefit analysis. Again responding to the Institute for Policy Integrity’s work, Alexander Volokh, a noted libertarian and faculty member at Emory Law School, stated that perhaps “libertarians should reconsider their tolerance of cost–benefit analysis and focus more on making their case for deregulation in moral terms.”³²

In place of promoting cost–benefit analysis, antiregulatory voices now appear to focus more intensely on labeling environmental regulations as “job killing.” From 2007 to 2011, the phrase “job-killing regulations” underwent a 17,550% increase in usage in U.S. newspapers—from just four appearances in 2007 to over seven hundred in 2011.³³ A study by Peter Dreier of Occidental College and Christopher R. Martin of the University of Northern Iowa found that the number of stories with the phrase “job killer” increased 1,156% between the first three years of the George W. Bush Administration and the first three years of the Obama Administration, from 16 stories to 201 stories.³⁴ In response to these claims, there has been increasing pressure on EPA to examine the employment effects of its rules, and although job effects will rarely affect the overall efficiency of a major rule, this type of analysis can be helpful in deflating extravagant claims about the employment effects of its rules.³⁵

³¹ ROMNEY FOR PRESIDENT, INC., *BELIEVE IN AMERICA: MITT ROMNEY’S PLAN FOR JOBS AND ECONOMIC GROWTH* 55 (2011), available at <http://grist.files.wordpress.com/2012/01/believeinamerica-planforjobsandeconomicgrowth-full.pdf>.

³² Alexander Volokh, *Rationality or Rationalism? The Positive and Normative Flaws of Cost–Benefit Analysis*, 48 HOUS. L. REV. 79, 80–81 (2011).

³³ Livermore & Schwartz, *supra* note 7.

³⁴ PETER DREIER & CHRISTOPHER R. MARTIN, “JOB KILLERS” IN THE NEWS: ALLEGATIONS WITHOUT VERIFICATION 14–15 (2012), available at http://www.uni.edu/martinc/JobKillerStudy_June2012.pdf.

³⁵ See Livermore & Schwartz, *supra* note 7, at 241–42.

While environmentalists have moved toward cost-benefit analysis, industry groups have backed away. Compared to their earlier positions, there has been an about-face, in which the opponents of the technique have become at least lukewarm supporters, while previous enthusiasts have lost their fervor and switched sides.

III. MARKETABLE PERMITS

The evolution of views about marketable permits over the past several decades has followed a similar pattern. Perhaps even more so than for cost-benefit analysis, marketable permit schemes initially found support among conservatives, were increasingly embraced by environmental groups, and were eventually abandoned by industry and other regulatory skeptics—at least in the context of greenhouse gases. Originally, proponents of marketable permits characterized the technique as they did cost-benefit analysis: as a preferable alternative to the dominant approach—here, command-and-control regulation. However, in the context of climate change, the alternative was perhaps *no* regulation, so this advantage disappeared in the minds of industry groups and their ideological allies. In addition, the fact that a nationwide marketable permit scheme must be affirmatively passed by Congress poses an additional hurdle not present to cost-benefit analysis,³⁶ which is already institutionalized and can be modified by unilateral executive order.³⁷

A. Market Environmentalism

In the 1960s and early 1970s, economists and EPA regulators proposed the use of marketable permit schemes as a tool for reducing pollution at the least cost.³⁸ The concept entered the political arena in the 1980s, when C. Boyden Gray, then a high-ranking Reagan Administration official, promoted

³⁶ See John M. Broder, *House Passes Bill to Address Threat of Climate Change*, N.Y. TIMES, June 27, 2009, <http://www.nytimes.com/2009/06/27/us/politics/27climate.html> (last visited Feb. 14, 2015) (overviewing the difficulties of passing nationwide marketable permit scheme in 2009).

³⁷ See Shapiro, *supra* note 16, at 10,435.

³⁸ At that time, the concept was most commonly referred to as “emissions trading.” The initial idea is most often credited to John Dales, but several others contributed to the early development of, and theoretical support for, the framework. See generally J.H. DALES, *POLLUTION, PROPERTY & PRICES* (1968) (proposing the use of market mechanisms as policy tools to efficiently address pollution); see also Thomas D. Crocker, *The Structuring of Atmospheric Pollution Control Systems*, in *THE ECONOMICS OF AIR POLLUTION* 61–85 (Harold Wolozin ed., 1966) (advocating a marketable permit program to address air pollution); J.H. Dales, *Land, Water, and Ownership*, 1 CANADIAN J. ECON. 791, 801–02 (1968); W. David Montgomery, *Markets in Licenses and Efficient Pollution Control Programs*, 5 J. ECON. THEORY 395, 396 (1972) (providing a theoretical framework for the use of allowance markets to address pollution). Economists continued to explore the framework, attempting to quantify its potential cost savings over traditional regulation. See, e.g., T.H. TIETENBERG, *EMISSIONS TRADING: AN EXERCISE IN REFORMING POLLUTION POLICY* 42–44 (1985) (estimating that some command-and-control systems cost twice as much as a theoretically pure tradable permit system).

it as a preferable approach to the traditional method of addressing air pollution.³⁹ Its supporters preferred emissions markets because they were predicted to accomplish desired environmental goals in a less burdensome fashion by not prescribing exactly how firms needed to reduce their emissions and by allowing market mechanisms to allocate that burden most efficiently.

Industry responses to marketable permit schemes appear to have been more diverse than its almost-uniform early support for cost-benefit analysis. This reaction can be attributed to two reasons: the value placed on certainty,⁴⁰ and the fact that markets create winners and losers. Unlike cost-benefit analysis, which was uniformly regarded by industry as reducing regulatory burden—and supported enthusiastically as such—early emissions trading-type options were not embraced by industry to the same degree. One such *loser* resulting from the Clean Air Act Amendments of 1990 was American Electric Power Company (AEP), the operator of a large power plant in the Ohio Valley that contributed to acid rain in New England.⁴¹ AEP fought the acid rain trading program, claiming that it would result in “the potential destruction of the Midwest economy.”⁴² Numerous other utility companies initially opposed the amendments. But over time the position of prominent industry groups changed. They came to appreciate the success and cost-saving measures of the acid rain trading program, and many endorsed the cap-and-trade approach during the lead up to the Waxman-Markey climate change legislation two decades later.⁴³ Mike Morris, the CEO of AEP, attributed this shift to the recognition that marketable permits “turned out to be a beautiful idea,” saving industry a significant amount of money in compliance costs while benefitting the environment.⁴⁴

On the other hand, environmental groups initially greeted the concept of marketable permits with suspicion.⁴⁵ Their opposition to emissions trading fell into three categories: moral objections to the concept that clean air is “for sale”; concerns about prioritization of goals—specifically, that environmental quality would be sacrificed for economic efficiency; and negative reactions to the symbolic message sent by a system that allows the polluters—not the government—to make decisions about tradeoffs between economics and the environment.⁴⁶ Seemingly motivated by these concerns,

³⁹ See Conniff, *supra* note 12.

⁴⁰ See Robert W. Hahn & Gordon L. Hester, *Where Did All the Markets Go? An Analysis of EPA's Emissions Trading Program*, 6 YALE J. ON REG. 109, 142 (1989) (attributing part of industry resistance to emissions trading to the uncertainty of environmental regulations).

⁴¹ See Michael Kranish, *A Clean Water Revival*, BOSTON GLOBE, Oct. 17, 2010, http://www.boston.com/yourtown/malden/articles/2010/10/17/washing_away_of_acid_rain_offer_s_lesson/ (last visited Feb. 14, 2015).

⁴² *Id.* (internal quotation marks omitted).

⁴³ *Id.*

⁴⁴ *Id.* (internal quotation marks omitted).

⁴⁵ See Krupp, *supra* note 12 (describing that when Krupp became executive director of EDF in 1984, most of his colleagues did not share his interest in using market mechanisms to combat environmental problems, preferring to stick to a litigation strategy instead).

⁴⁶ Hahn & Hester, *supra* note 40, at 142.

environmental groups opposed early forms of trading such as bubbling and offsets.⁴⁷ The only major environmental organization that showed a strong interest in developing market-based solutions to environmental problems—EDF, under the new leadership of Fred Krupp—was reviled by the left as “cynical and gutless.”⁴⁸

B. A Moment of Consensus

Despite these criticisms, Krupp’s early support for marketable permit schemes placed him at the center of a brief moment of consensus over market-based mechanisms in U.S. environmental policy. In 1986, Krupp received a call from C. Boyden Gray, who was then counsel to Vice President George H.W. Bush, in response to an op-ed Krupp had published in the *Wall Street Journal*.⁴⁹ Gray’s interest in addressing environmental issues was perhaps not mainstream for the Reagan Administration staff,⁵⁰ but when George H.W. Bush was elected President in 1988, Gray turned to Krupp and EDF for ideas on how to address the growing problem of acid rain and the related foreign policy implications for the United States’ relationship with Canada. Gray sought to provide the new President with a legacy issue on the environment, an issue that was still largely bipartisan at that time.⁵¹ Accounts of the passage of the Clean Air Act Amendments of 1990—which included the landmark emissions trading program that capped the output of sulfur dioxide, a precursor to acid rain—describe the initial response of many stakeholders as skeptical of the framework.⁵² However, it passed Congress with remarkably bipartisan vote counts and was quickly lauded as an innovative policy, and especially touted after its implementation was largely viewed as successful.⁵³

As a result, more Republicans, industry leaders, and environmental groups embraced marketable permit schemes as viable alternatives to command-and-control regulation in appropriate contexts. The success of the

⁴⁷ See *Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 840–41 (1984).

⁴⁸ Krupp, *supra* note 12 (quoting Citizens Party co-founder Barry Commoner’s criticism of EDF’s willingness to work on market-oriented incentives and collaborate with the Republican Administration) (internal quotation marks omitted).

⁴⁹ See *id.* (outlining Krupp’s vision for the next wave of the environmental movement, in which environmentalists collaborate with policy makers and industry on creative and flexible solutions).

⁵⁰ See Conniff, *supra* note 12 (describing the Reagan White House as a place “where environmental ideas were only slightly more popular than godless Communism”).

⁵¹ See *id.* (discussing Bush’s campaign promise to be the “environmental president”).

⁵² See *id.* (describing initial skeptics as including environmentalists, and staff of the EPA, the White House, and Congress); Krupp, *supra* note 12 (recalling opposition from the media, environmental groups, Congress, and the Bush Administration).

⁵³ See Michael A. Livermore & Richard L. Revesz, *Cap and Trade Was Republicans’ Good Idea*, HUFFINGTON POST, May 25, 2011, http://www.huffingtonpost.com/richard-l-revesz-and-michael-a-livermore/cap-and-trade-was-republi_b_489863.html (last visited Feb. 14, 2015) (“Only ten senators (five Democrats and five Republicans) vote[d] against the final bill—as bipartisan as it gets.”).

Montreal Protocol,⁵⁴ which used a trading mechanism to phase out the use of ozone-depleting chlorofluorocarbons, further boosted the credibility of marketable permit schemes. Alongside these policy successes, academic commentators continued their general support for market-based approaches.⁵⁵

By the 2000s, support for market mechanisms gained the status of bipartisan consensus. In 2005, George W. Bush's Administration promulgated a trading scheme under the Clean Air Interstate Rule,⁵⁶ in order to address interstate pollution spillovers. As a result, three Republican presidents in a row had enacted some form of emissions trading program: Reagan had overseen a phasedown of lead in gasoline; George H.W. Bush had signed the acid rain legislation and negotiated the Montreal Protocol for the reduction of chlorofluorocarbons; and George W. Bush had promulgated regulations controlling interstate pollution.⁵⁷

Even Newt Gingrich, the House Speaker who had railed against regulation during the 1994 elections with his Contract for America,⁵⁸ spoke in favor of cap-and-trade approaches for greenhouse gases in a 2007 interview, and appeared in a television commercial with then-House Speaker Nancy Pelosi in support of immediate action on climate change.⁵⁹ In the 2008 presidential election, the presidential nominees from both parties—Barack Obama and John McCain—supported a cap-and-trade scheme for reducing greenhouse gases,⁶⁰ so that this matter was not a point of contention during the course of the general election. While environmentalists largely opposed

⁵⁴ Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 1522 U.N.T.S. 3, available at <https://treaties.un.org/doc/Publication/UNTS/Volume%201522/volume-1522-I-26369-English.pdf>.

⁵⁵ See, e.g., Alan J. Krupnick et al., *On Marketable Air Pollution Permits: The Case for a System of Pollution Offsets*, in *BUYING A BETTER ENVIRONMENT: COST-EFFECTIVE REGULATION THROUGH PERMIT TRADING* 7, 12 (Erhard F. Joeres & Martin H. David eds., 1983); TIETENBERG, *supra* note 38, at 38; Robert W. Hahn, *Innovative Approaches for Revising the Clean Air Act*, 28 NAT. RESOURCES J. 171, 174 (1988).

⁵⁶ Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NO_x SIP Call, 70 Fed. Reg. 25,162 (May 12, 2005) (codified at 40 C.F.R. pts. 72–74, 77).

⁵⁷ Richard Schmalensee & Robert Stavins, *The Power of Cap and Trade*, BOSTON GLOBE, July 27, 2010, http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2010/07/27/the_power_of_cap_and_trade/ (last visited Feb. 14, 2015).

⁵⁸ See Frank Clifford, *Bill Would Limit Federal Power over Environment*, L.A. TIMES, Dec. 28, 1994, http://articles.latimes.com/1994-12-28/news/mn-13769_1_federal-government (last visited Feb. 14, 2015) (explaining that the Job Creation and Wage Enhancement Act, part of the Contract with America, “declare[s] war with the nation’s environmental laws”).

⁵⁹ See Pub. Broad. Serv., *Hot Interviews Newt Gingrich*, <http://www.pbs.org/wgbh/pages/frontline/hotpolitics/interviews/gingrich.html> (last visited Feb. 14, 2015) (“I think that if you have mandatory carbon caps combined with a trading system, much like we did with sulfur, and if you have a tax-incentive program for investing in the solutions, that there’s a package there that’s very, very good. And frankly, it’s something I would strongly support.”).

⁶⁰ See Andrew C. Revkin et al., *On the Issues: Climate Change*, N.Y. TIMES, <http://elections.nytimes.com/2008/president/issues/climate.html> (last visited Feb. 14, 2015).

such mechanisms in the mid-1980s, by the 2008 election they were described as “ador[ing]” cap and trade.⁶¹

C. From Theory to Praxis, to Debacle

But when the time came to turn this theoretical cap-and-trade consensus into policy reality, things began to fall apart. When the Waxman–Markey climate bill—with a cap and trade greenhouse gas program at its heart—passed the House of Representatives, shifting the debate to the Senate, Republican pundits were quick to recast the bill as a tax on energy.⁶² The Republican Party’s “Pledge to America” in 2010 included language expressly opposing cap and trade, which it called an “energy tax.”⁶³ Republicans retook the House in 2010, running partly against what they called “cap-and-tax,” characterized as a job-killing big government program.⁶⁴ This shift between the 2008 presidential election and the 2010 midterms had solidified by 2012, when Republican candidates for the presidential nomination attempted to back away from their almost-universal previous support of cap and trade.⁶⁵

Industry involvement in the greenhouse gas cap-and-trade debate surrounding the unsuccessful attempt to pass legislation during the 111th Congress was mixed and contentious.⁶⁶ The U.S. Chamber of Commerce opposed the bill,⁶⁷ but several of its members joined the U.S. Climate Action

⁶¹ See Matt Negrin, *Whatever Happened to Cap and Trade?*, ABC NEWS, July 17, 2012, <http://abcnews.go.com/Politics/OTUS/environment-happened-cap-trade-global-warming/story?id=16790018> (last visited Feb. 14, 2015) (describing cap and trade as “the system environmentalists adored for regulating gases that trap heat in the atmosphere”).

⁶² See Jeremy P. Jacobs, *Barrasso Knocks Cap and Trade in GOP Response*, THE HILL, May 23, 2009, <http://thehill.com/blogs/blog-briefing-room/news/lawmaker-news/35441-barrasso-knocks-cap-and-trade-in-gop-response> (last visited Feb. 14, 2015).

⁶³ HOUSE REPUBLICANS, A PLEDGE TO AMERICA: A NEW GOVERNING AGENDA BUILT ON THE PRIORITIES OF OUR NATION, THE PRINCIPLES WE STAND FOR & AMERICA’S FOUNDING VALUES 43 (2010), available at <http://pledge.gop.gov/resources/library/documents/solutions/a-pledge-to-america.pdf>.

⁶⁴ See Chris Good, *Almost Every 2012 Republican Has a Cap-and-Trade Problem*, THE ATLANTIC, May 13, 2011, <http://www.theatlantic.com/politics/archive/2011/05/almost-every-2012-republican-has-a-cap-and-trade-problem/238776/> (last visited Feb. 14, 2015) (internal quotation marks omitted).

⁶⁵ See David Weigel, *Pretty Much Every Republican Front-Runner Used to Support Cap and Trade*, SLATE.COM BLOG (May 11, 2011), http://www.slate.com/blogs/weigel/2011/05/11/pretty_much_every_republican_front_runner_used_to_support_cap_and_trade.html (last visited Feb. 14, 2015) (listing six candidates who had previously expressed support for cap and trade, with the only exception in the field being Mitch Daniels).

⁶⁶ See John M. Broder, *House Passes Bill to Address Threat of Climate Change*, N.Y. TIMES, June 26, 2009, http://www.nytimes.com/2009/06/27/us/politics/27climate.html?_r=2&hp& (last visited Feb. 14, 2015) (“Industry officials were split, with the United States Chamber of Commerce and the National Association of Manufacturers opposing the bill and some of the nation’s biggest corporations, including Dow Chemical and Ford, backing it.”).

⁶⁷ See WILLIAM L. KOVACS, U.S. CHAMBER OF COMMERCE, STATEMENT OF THE U.S. CHAMBER OF COMMERCE ON: JOINT CAUCUS HEARING ON “CAP AND TRADE: IMPACT ON JOBS IN THE WEST, AND THE NATION” 2, 5 (2009), available at https://www.uschamber.com/sites/default/files/legacy/testimony/090730_capandtrade_testimony.pdf; Michael Burnham, *U.S. Chamber of Commerce*

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Partnership (USCAP), a coalition of industry and environmental stakeholders that attempted to hammer out a workable compromise that could attract the necessary votes to become law.⁶⁸ Opponents of cap and trade lambasted the USCAP member companies in the blogosphere as turncoats, losers, and bald-faced rent seekers aiming to profit through a classic “Baptists and Bootleggers” coalition.⁶⁹ Meanwhile, the National Association of Manufacturers announced that a study it had commissioned “confirm[ed] that the Waxman-Markey bill is an ‘anti-jobs, anti-growth’ piece of legislation,”⁷⁰ and the National Mining Association warned of “devastating [job] losses” and a reduction in household disposable income of \$1,800 per year.⁷¹ The collaboration between centrist environmental groups and industry players ultimately disintegrated with the pressure. One prominent industry member began joining other opponents of the bill by labeling it as a “cap and tax” measure.⁷² After the Waxman–Markey bill passed the House, momentum slowed and several key members of USCAP—BP, ConocoPhillips, and Caterpillar—left the group, citing disappointment over the details of the bill.⁷³ Senator Mitch McConnell placed the epitaph: “I think cap-and-trade, which is also known as the national energy tax, is dead in the United States Senate.”⁷⁴

Sharpens Critique of House Climate Bill, N.Y. TIMES, May 15, 2009, <http://www.nytimes.com/gwire/2009/05/15/15greenwire-us-chamber-of-commerce-sharpens-critique-of-ho-19116.html> (last visited Feb. 14, 2015).

⁶⁸ See U.S. Climate Action P’ship, *About Us*, <http://www.us-cap.org/about-us/> (last visited Feb. 14, 2015) (declaring USCAP’s “pledge to work with the President, the Congress, and all other stakeholders to enact an environmentally effective, economically sustainable, and fair climate change program”); see also ERIC POOLEY, *THE CLIMATE WAR: THE BELIEVERS, POWER BROKERS, AND THE FIGHT TO SAVE THE EARTH* 142, 170 (2010) (quoting Duke Energy executive Jim Rogers, a member of USCAP, responding to criticism of his participation by coal mining executive Robert Murray of Murray Energy: “Legislation is coming. We can help shape it, or we can sit on the sidelines and let others do it”).

⁶⁹ POOLEY, *supra* note 68, at 168–69 (quoting statements made by various opponents of climate action, such as Steven J. Milloy of Junkscience.com, Senator James Inhofe, and Competitive Enterprise Institute founder Fred Smith).

⁷⁰ Erin Streeter, *State-by-State Analysis of Waxman-Markey Cap and Trade Legislation Paints Dour Picture for Nation’s Economy: NAM-ACCF Study Concludes Bill Will Cost 2.4 Million Jobs*, NAT’L ASS’N OF MFRS., Dec. 3, 2009, <http://www.nam.org/Communications/Articles/2009/08/StatebyStateAnalysisofWaxmanMarkeyCapAndTrade.aspx> (last visited Feb. 14, 2015) (quoting Jay Timmons, executive vice president of the National Association of Manufacturers).

⁷¹ *House Committee Approves Sweeping Climate Change Legislation*, NMA MINING WK., May 22, 2009, at 1, available at http://nma.org/pdf/mining_week_archives/mw052209.pdf; Press Release, National Mining Association, *NMA Urges House to Reject Waxman-Markey Climate Proposal* (May 20, 2009), available at http://maplight.org/files/map_research/NMA.pdf.

⁷² See Eric Pooley, *The Smooth-Talking King of Coal—And Climate Change*, BLOOMBERG BUSINESSWEEK, June 3, 2010, http://www.businessweek.com/magazine/content/10_24/b4182058740829.htm (last visited Feb. 14, 2015) (describing Jim Rogers of Duke Energy’s frustration with President Obama’s proposal to auction 100% of the permits, rather than allocate a significant amount for free).

⁷³ See MICHAEL J. GRAETZ, *THE END OF ENERGY: THE UNMAKING OF AMERICA’S ENVIRONMENT, SECURITY, AND INDEPENDENCE* 239 (2011).

⁷⁴ Jordan Fabian, *McConnell: Cap-and-Trade “Dead”*, THE HILL, Aug. 24, 2010, <http://thehill.com/blogs/blog-briefing-room/news/115501-mcconnell-pronounces-cap-and-trade-dead> (last

IV. CONCLUSION

We end with two observations. First, why did the positions of interest groups change so dramatically? In large part, the choice set changed over the decades. In the 1970s and 1980s, the choice on the stringency of standards was between health-based standards favored by environmental groups, and cost-benefit analysis favored by industry. The choice now is between further standard setting—however it might be conducted—and essentially a moratorium on standards. Environmental groups have embraced the first position and are often prepared to accept cost-benefit analysis, and industry groups have embraced the second, with jobs analysis as the code word for a moratorium on regulation. And the appropriately robust valuations of statistical life and the social cost of carbon help make environmental groups comfortable with the methodology. On regulatory tools, in the 1970s and 1980s, the choice was between command-and-control standards favored by environmental groups, and marketable permit schemes favored by industry groups. Now, the choice is often between marketable permit schemes and no regulation at all, with environmental groups favoring the former and industry groups supporting the latter. An analysis of why this shift occurred is beyond the scope of this Article. Reasons for the shift include the changing nature of the Republican Party, with the moderate wing becoming far less influential; the vast increase of money in politics, and the economic crisis that began in 2008.

Second, we have paid a high price for the missed opportunity of a consensus around cost-benefit analysis and marketable permit systems. The failure to pass climate change legislation is the most significant loss. But there was also a great cost in terms of the loss of rationality in environmental policy. Richard Schmalensee, a distinguished economist, pleaded with fellow Republicans: “[M]arket-based policies should be embraced, not condemned by Republicans (as well as Democrats). After all, these policies were innovations developed by conservatives in the Reagan, George H.W. Bush, and George W. Bush administrations (and once strongly condemned by liberals).”⁷⁵ Together with his co-author Robert Stavins, Schmalensee admonishes politicians on the dangers of abandoning principle for short-term political gain:

To reject this legacy and embrace the failed 1970s policies of one-size-fits-all regulatory mandates would signify unilateral surrender of principled support for markets. If some conservatives oppose energy or climate policies because of disagreement about the threat of climate change or the costs of those policies, so be it. But in the process of debating risks and costs, there should be no tarnishing of market-based policy instruments. Such a scorched-earth

visited Feb. 14, 2015); *see also* Ezra Klein, *Cap-and-Trade Is Dead*, WASH. POST, July 19, 2010, http://voices.washingtonpost.com/ezra-klein/2010/07/were_not_getting_a_price_on_ca.html (last visited Feb. 14, 2015).

⁷⁵ Schmalensee & Stavins, *supra* note 57.

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approach will come back to haunt when future environmental policies will not be able to use the power of the marketplace to reduce business costs.⁷⁶

Similarly, the rejection of cost–benefit analysis by industry groups and conservatives has important consequences. Jobs impact analysis, which focuses on a very limited band of regulatory consequences, is not a legitimate substitute for cost–benefit analysis, with its comprehensive examination of the effects of regulatory choices. If an approach along these lines gains legitimacy, the quality of our environmental decision making will be considerably poorer.

⁷⁶ *Id.*

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Bob Inglis: Climate Change and the Republican Party

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Republican Bob Inglis is a former South Carolina congressman. In 2010, he lost his bid for re-election after telling a radio host that he believed humans were contributing to climate change. "The most enduring heresy that I committed was saying the climate change is real," he told FRONTLINE. This is the edited transcript of an interview conducted on July 12, 2012.

Take us back to what your role was in Congress. ...

I represented the 4th District of South Carolina ... from the election '92 until election '98. And then I was out six years and then came back for another six years between the election 2004 and the election 2010.

Why did you leave, and why did you come back?

I left after six years because I had voluntarily subjected myself to a six-year term limit, so I had to leave the House. Ran [for] the Senate unsuccessfully in '98, and then returned to commercial real estate practice, practice of law, and then came back to Congress in 2004 and would have happily continued on after 2010, but I got specifically uninvited to the Tea Party.

Tell us about that. How did that happen? ...

I think what happened is I was focused on some things that seemed long term, and the voters were more focused on the near term. We had the financial collapse in 2008, we had the ongoing recession surely in the '10, and so they were focused on this month's mortgage and this month's paycheck. I was seen as talking about things of the future, and so that mismatch created a problem for me politically for sure. ...

What do you think was the main factor and the reason that you lost in 2010?

I committed various heresies against the Republican orthodoxy. I voted against [the

Iraq] troop surge. ... [I] voted to disapprove [Rep.] Joe Wilson's [R-S.C.] outburst against President Obama, for example. I was for an immigration proposal that might include a path to citizenship.

And still all those were heresies, but the most enduring heresy that I committed was saying the climate change is real, and let's do something about it.

I voted against cap and trade, because I think it's a big tax increase. It grows government; it decimates American manufacturing; it's hopelessly complicated. ... But I proposed an alternative, and the alternative got me in some trouble. It's basically a revenue-neutral tax swap where we would reduce taxes on payroll, shift the tax to carbon dioxide and revenue-neutral rates that the government wouldn't grow, but we would just change what we tax as a way of trying to get the true cost comparisons on the fuels. ...

Why was it such a heresy for you to say what you said about climate change? ... What happened that made that suddenly an untenable position?

Part of it is that the economy was bad, so when people are dealing with this month's mortgage and this month's paycheck and their boat is just inches above the waterline, they don't want anybody standing up, rocking the boat.

So when you're talking about things of the future and challenger fuels and the fuels of the future, that's pretty much standing up in the boat and rocking it. Voters were more inclined to say: "Listen, just sit down in the boat. Don't anybody rock this thing unless you see if we can get through this patch." ...

But it also had an interesting sort of religious heresy element to it as well. In this district, we call ourselves the "shiny buckle of the Bible Belt." So I think for some it is a religious heresy ... for us to presume that any action that we would take would affect the longevity of his creation [and] is an affront to sovereignty of God. ...

... In 2008 you had two candidates that were running for president, and on both sides it was real. So what changed?

... First was the economy going down. ... The second thing is that religious element to it. ... But I think the other part of it is just purely political heresy, and that it became convenient to say that this is a Democrat idea, and therefore let's reject everything that Barack Obama would say.

So this sort of populist rejectionism took hold, and so anything that looked like or sounded like it came from a Democratic kind of an address, that would be "return to sender" on that. So I think all three of those things happened really.

Was [Al Gore's movie, An Inconvenient Truth] part of the impact of it or what?

I think so. I mean, Vice President Gore became very associated with the issue. ... It's not like Al Gore's running for any office these days, ... but for some reason he remains a lightning rod for many conservatives on this issue. ...

... What was known on Capitol Hill? ... What do you think is really behind [the rejection] of the science?

... So when you're dealing with an existential threat like death or like climate change, if you see it as we are all toast anyway, then denial is a pretty good way of coping. So a convenient way to dismiss the anxiety [that] comes from the awareness of climate changes, you say: "Must not be a real. Scientists must be off."

Another part of that is that if I accept the science, then perhaps it means I need to change my behavior. Perhaps we really do need to figure out how to innovate on the energy front. And if I don't want to innovate or

"When you're dealing with an existential threat like death or like climate change, if you see it as we are all toast anyway, then denial is a

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feel it would be too expensive, I don't want to admit that ... **pretty good way of coping.**" I'm selfish, so the better way to dispose of it is to say, "Well, science must not be right." Dismissing the science becomes a way of getting around changing my life. ...

Another one is there's an assumption of technological progress, that somebody is going to fix it, whoever that somebody is. I remember speaking with a grandpa who I knew very well, and I know him to be a very caring fellow. ... He was upset with me about voting [against] cap and trade. He agreed with that, that I should have voted against cap and trade, but he very much disagreed with any focus on energy and climate.

So I was talking to him about, "What about your grandkids?" And he said, "I think they can get [by on] their own." ... I don't think that that caring fellow really meant it quite that bluntly. I think what he meant was, somebody will figure something out.

And of course my response to him is, well, technological innovation will sure work better if we set the economics right, because what we believe as conservatives, and people who believe in free enterprise, is if you set the economics right, somebody chasing the dollar will deliver to me a better product. They will make money, and they will serve my needs. That's what makes our system go around.

But he can't get to that next step of getting the price on carbon, because if you attach that price, that external hidden cost to the product, it changes economics and all kinds of exciting things happening for the enterprise system.

But he wants to stick at the point of saying it's not a cost. The CO₂ is not a cost; it's not a negative. If it's a negative externality, it's of zero value. If you attach a zero to it, there's no change in the pricing structure. So for him, it's very important to continue to deny the science because he wants to assign a zero to the cost of carbon.

Like [the ad about] carbon: "Some people call it pollution. We call it life."

Right. They're breathing it, so therefore how could it possibly be bad? And of course I tried to explain that. I'm not a scientist. I was on [the Committee on Science and Technology]. I just played one when the lights came on.

... I used to pooh-pooh climate change. In my first term in the Congress, six years, I said: "A bunch of nonsense. Al Gore's imagination." We had a very successful press conference where we absolutely panned Vice President Gore's proposals on a Btu [British thermal unit] tax. So that was Inglis 1.0. ...

My kids had an impact on me. I got in trouble for saying this, but my oldest was voting for the first time when I ran again in '04, and he said, "Dad, I will vote for you, but you are going to clean up your act on the environment." And so I had this new constituency: my son, my four daughters, my wife, all feeling the same way.

But then the other thing that really happened was as I get to Congress [for the] second time, I was on the science committee and got to see the evidence. And the main evidence really was in Antarctica, is the ice core drillings that show that in a mile of ice on top of the South Pole, ... we've got what the scientists believe is 800,000 years or so of records of the earth's atmosphere, because the South Pole is a desert. It only gets a quarter of an inch of precipitation a year. So in those ice core drillings, you can find a record of the amount of CO₂ over time in the atmosphere. ...

And so for me it became pretty clear in that evidence that, gee, that makes sense; that we just started burning all this fossil fuel, we affected the chemistry of the air. Physics are physics, and light comes in, heat doesn't go out, you are warming.

[Journalist] David Frum once said something very interesting to me. He said, "We learn what we need to learn in order to protect ourselves." And I think that's a lot of what's going on in the rejection of climate sciences, is I want to protect who I am; I want to protect my lifestyle; I want to protect what I built.

And the way to do that is to not receive information about how this fossil fuel thing really is creating a problem, because my life is sort of built on those fossil fuels. If I'm challenged to change that, and I want to protect what I've got, I reject that information. And so we learn what we need to learn in order to protect ourselves. ...

You are talking about you only know what you want to know. Who were some of the people? ...

It's really, really disappointing that there are people out there that are selling themselves as experts who aren't. ... Lord [Christopher] Monckton, who is actually a journalist who holds forth on climate science, ... people sadly on my side of the aisle have listened to him and presented him as an expert. ...

Why do you think that is?

Because I think he's saying something that people want to hear. ...

The thing so unusual about that, though, is that we conservatives are usually the people who use the example of the buggy whip manufacturers. In our passionate advocacy of free trade, we say you can't hold back the market.

If the market is saying we don't need buggy whips anymore because we are going to ride in Henry Ford's automobiles, then we conservatives, people who believe in free enterprise and believe in free markets, have typically been the ones who have argued against, for example, labor unions, who invariably are the ones trying to hold onto the buggy whips and protect their jobs.

We invariably are the ones saying you've got to roll with this thing. You've got to innovate; you've got to go forward; you can't stand still. And we are right in saying that. We are surely right.

But oddly, on fossil fuels, we are now in the position of saying no, we cannot go forward. We can't see any future besides fossil fuels, and we insist on "Drill, baby, drill" as the answer.

One of the fascinating hearings I have been to in Washington was a hearing with Anne Korin of the Set America Free Coalition. She is testifying at [the House Committee on] Foreign Affairs. She says to the committee: "You've got 3 percent of the world's proven oil reserves. OPEC has 70 percent. Change the game."

And so the questions came from both the Republican side and the Democratic side, same questions — fascinating to watch this. Republicans asked, "What about the Balkan reserves?" And the Democrats — this is before the Gulf oil was spilled — would say: "What about the Gulf [of Mexico]? Could we get more oil there?" ...

So when it came my time to ask her a question, I said, "Miss Korin, the problem here is you've just called us oil wimps, and we Americans don't like being called wimps about anything, but you just called us oil wimps." And I said that "What we need to realize is we are innovation giants, so why don't we just change the game? Why do we keep on challenging Tiger Woods to a golf match? Why don't we say, 'Tiger, listen, I hear your knees hurt; maybe your back isn't so good. How about a little basketball, you know?'"

Let's get into a different game. Let's figure out a way to say to the Middle East, to the people that don't like us very much with that oil: "We just don't need you like we used to. We've got a different [way] of getting around now."

But oddly, really I don't understand why it is that we conservatives seem to be in the position of saying, "No, we've got to hold on to this barrel of oil." ...

[The Congressional Budget Office] had a study recently. They showed that even if you drill heavily in the United States — which I think we should, by the way. It makes sense near term. Dig it as much as we can so that we can continue to operate but meanwhile

even more aggressively be pursuing the future fuels, the challenger fuels rather than these incumbent fuels. But CBO studies show that if you drill a great deal more, you don't bring down the price of gasoline.

In [this] case, you are dealing with a cartel, and the cartel has a dominant position. So let's say we take our 3 percent, and we drill, baby, drill, and we get to double it at 6 percent. Maybe we triple it, get to 9, quadruple, you get to 12 percent. Well, OPEC is then down to what, maybe 60 percent of world supply?

That means that when we drill and produce more oil, they just ratchet back the supply, keep the price where they wanted. So why are we playing this game within it? Why don't we figure out a way to get out of this, to innovate, and why do we keep on holding onto this buggy whip since we've got to protect those jobs, which is not the DNA of conservatism? ...

... So what's really going on behind the scenes? How much do you people on Capitol Hill, the ones who are saying they don't believe in it, how much do they really know about it? Do they know, and they are just saying something different?

...

The challenge that we're taking up in this Energy and Enterprise Initiative that I'm working on is basically creating a safe space for conservatives to pay attention to science, because right now it doesn't seem safe to pay attention to the science because the ideology says no, the science is wrong.

So we've got to create a safe zone where Republicans, conservatives can start talking about the economics and how setting the economics right could really change, have free enterprise deliver a real muscular solution to energy and climate far better than a big-government approach of mandates that are always clumsy and tax incentives that are most often fickle. They expire.

"Right now it doesn't seem safe to pay attention to the science because the [conservative] ideology says no, the science is wrong."

Right now the production tax credit is almost gone or will be going at the end of the year. Wind turbine orders are way down. Solar ain't happening without that production tax credit. So why don't we just set the economics right is what we are going to be arguing.

...

So our challenge is to create an opportunity for members of Congress, elected officials, to actually lead on this.

Most of us complain about Congress. We say it's a place that doesn't reflect us; they don't listen to us. Actually, Congress well reflects the American people. It gives us exactly what we ask for. We say we want a balanced budget, but please don't touch my parents' Medicare, and please don't touch the Social Security, and I've got a relative that needs Medicaid for disability conditions, so please don't touch any of those things.

Well, if you don't touch Medicare, Social Security and Medicaid, you are not balancing the budget. Congress hears me very well. Let's balance the budget. Don't touch those big three. And so Congress doesn't act, which is exactly what I'm asking them to do. Don't act.

Now, the same thing on climate change. I sort of want this innovation. I think I could see how that would be great. But on the other hand, I think it might be painful if you really affected my energy prices right now and put the real cost on there.

And so Congress does exactly what we ask them to do. At some point, though, the American people begin to lead, and then politicians join in that leadership. So you've got to build the support in the country, and then the political process will reflect that support.

So explain what you are doing now and how you hope to change this.

We did this thing called the Energy and Enterprise Initiative, and it's an attempt to convince conservatives that we actually have the answer to energy and climate. It's called free enterprise, and it's called accountability.

It's just attaching the true cost to all the fuels. Eliminate all the subsidies for all fuels, the government picking winners and losers. That's a clumsy way of doing business, and you end up [with solar panel maker] Solyndra and embarrassments like that.

So let's just eliminate all the subsidies for all the fuels, and then let's attach all the costs to all the fuels so that then there is a true cost comparison between the incumbent fossil fuels and the challenger fuels.

That will make innovation happen, and the result will be that we'll really win the triple play of this American century, I believe, which means that we can simultaneously create wealth by creating these new technologies that we sell around the world. And that creates jobs, so we create wealth.

Second, we improve the national security of the United States, particularly if we can innovate in the transportation sector and get off this dependence on petroleum.

And the third, if we care, we clean up the air. If you don't believe it's necessary to clean up the air and dispute the science, well, can we just go with those one and two then? Are you for wealth creation, job creation, and are you for improved national security? ...

Why [has] every president since Richard Nixon made the same speech about ending this dependence on foreign oil? And they are still making the same speech. Answer: We haven't yet begun to fight, not for enterprise, because the costs are in our petroleum.

We think petroleum is high; we think gasoline is high. It didn't begin to show the real cost of it. When we consider the supply-line protection that we pay for in defense costs, the risk that we take in national security since the blood that we have shed in protecting that supply line, it's way more expensive than the \$3.30 or \$3.50, whatever it is, we are paying. If you stuck it to petroleum and said, "Listen, we want to do some honest cost accounting here," we'd see the real price, and we'd start innovating. ...

So in the case of coal-fired electricity, it sure does look cheap until you add the 23,600 people who die prematurely each year of lung diseases because of the soot out of coal-fired electrical plants and the 3 billion lost work days. You put that in the equation, and you see that gee, coal-fired electricity isn't that cheap. ...

Why is it such a difficult thing? ...

Because what I'm saying has been a discordant note in the Republican song, and we don't like discordant notes. The dominant theme has been we're just going to go drill more of our own oil and we are going to solve this problem. We are going to dig some more coal; we're going to solve this problem.

But we need to come along with this other note. ... But for now, it's become the dominant theme that no, we've just got what we've got. We've got to live within this world. This world is fossil fuel; it's incumbent fuels. These challenger fuels aren't going to work. They are too expensive.

And what I had hoped to convince conservatives of is that unless you are some wide-eyed liberal, you really shouldn't believe that there's such a thing as a free lunch. ...

We pay through our health insurance policies. We pay through higher premiums that cover the people who have these long[-term] ailments who show up at the hospital. We cover the cost of Medicare and Medicaid patients through our taxes and the cost that the hospital has to shift onto one of those three that has those cards that are available to them. ...

We are paying them, every penny of it, just not at the meter and not at the pump. If you

pay it there, then you'd have an enlightened customer, a consumer acting in enlightened self-interest to innovate. And that drive to innovate would create an opportunity for an entrepreneur to deliver the better product. That's the power of the freedom price system.

...

How influential are the forces that want to keep up the old system in terms of the campaign contributions, the money and politics? How big of a factor do you think all of that has been, and the shifts and some of the rejection of the science?

I think it's a significant factor. The campaign contributions from the incumbent fossil fuels, kind of related entities, are significant and drive some of the discussion.

I think that there are not so much direct contributions to campaigns, though. It's more in creating think tanks and what appears to be an intellectual position that says the science is wrong. It's funding the doubt about science is where they are making their most effective play. That's where the money is having the biggest impact. ...

How much credit do you think those think tanks and those creators of doubt get in changing the public debate and making this a more polarized issue?

I think they have been very successful. They have really done an amazing job of introducing doubt where there really was very little doubt in the scientific community. ...

When you get the financial collapse going, that's what made it possible for some well-spent money to blow doubt into the science, because, you know, the bankers failed us, the Fed failed us, the federal government is failing us, it's spending too much money and these scientists [who are] funded by that federal government, they are probably in it, too, and besides, they are godless liberals. ...

What makes you say that they were successful? ...

If you see the polling data, you see a real dip in the number of people who buy into the science and who accept the science and a hardening of positions. ...

This isn't going to be easy to fix. ... We are talking real change. But it is a big change to go from horse and buggies and those buggy whip manufacturers to Henry Ford's car. ...

[Congress] sits there and doesn't act until there's some kind of crisis, and then there's something to propel us forward. And that's what we've got to hope for, some catalyzing kind of sense [of] let's go forward; let's handle this. That's when the Americans are [at] their best. It's like Winston Churchill said: "You can always count on the American people to do the right thing after they have exhausted every other option" [sic].

And so we are going to do the right thing on energy and climate, maybe after we've exhausted every other option. But we are going to get there, I believe, because we are a nation of innovators who believe in the future. ...

I want to go back and make sure that we get really the story of what happened in your race. How do you know that it was because of the climate change stance?

Let me give you a sense of the scene. I had a big tent gathering in Spartanburg County, a bunch of Republicans underneath a very big tent. ... And so there comes a question to me from the local Christian talk radio host, who says, "Yes or no: Do you believe in human causation on climate change?"

I had a bad habit of answering questions, so I said yes. Boo, hiss, comes the crowd. I was blasted out from underneath the tent. There are a couple of hundred, 300 people there. I mean, it was intense.

So then the question went to the other [candidate]. ... He said, "Inasmuch as it hasn't been proven to the satisfaction of the people that I represent, the answer is no, there is no human causation in climate change."

I thought to myself it was a good political answer. It doesn't exactly win your Profile in Courage kind of award, you know. It was a particularly good political answer. ...

[One] very important thing about science is that for many people, there's this real conflict between faith and science. And particularly in some districts like the one I had the joy of representing, there are people that really do see a conflict between their faith and science. I don't. ...

I think God wants us and science to discover this creation, so why wouldn't we listen to the people who have given their lives to this endeavor, who have learned and who know things that I don't know? Why would we shut them out and decide to listen to some people of not-so-credible backgrounds who had been funded [by] some folks who are in a conscious effort to introduce doubt where very little exists? I don't know.

But we are going to get beyond that. I think that eventually people are found out. [Sen.] Joe McCarthy was found out, and history didn't treat him very well. And I don't believe that history is going to treat the merchants of doubt on climate change any better than we are treating the merchants of doubt on the link between cigarette smoking and cancer. ...

"I don't believe that history is going to treat the merchants of doubt on climate change any better than we are treating the merchants of doubt on the link between cigarette smoking and cancer."

... The rise of the Tea Party. ... How did that play into your race, and how much of a factor was that in terms of your opponent, ads used against you?

... I'm a pretty conservative fellow. I got 93 American Conservative Union rating; 100 percent Christian Coalition; 100 percent National Right to Life; A with the NRA; zero with the ADA, Americans for Democratic Action, a liberal group; and 23 by some mistake with the AFL-CIO. I demand a recount. I really wanted a zero from the AFL-CIO. So I'm a pretty conservative fellow, but not conservative enough for the Tea Party. ...

I had a primary opponent [Charles Jeter] in 2008 who called me the Al Gore of the Republican Party. ... I'd say: "No, Charles, it's promise and opportunity. You've just got to look at it the right way." And, you know, it's innovation; it's a future; it's a way out of this box we're in. It's a way out of the inherent conflict we've got in the future with, for example, China over scarce resources of petroleum, for example.

But in 2008 when he said that, it started to stick, and it became sort of an oft-repeated theme on talk radio, and that is a major source of information, of course, for Republican primary voters, especially when you are facing a runoff, which is a low-turnout election. We knew it's very difficult. And that would seem to be a dominant theme that they were hearing, is that Inglis has left the reservation; he has gone off message here; he is over there somewhere with Al Gore. ...

The dominant narrative was, no, you just reject this. And we're mad about our financial circumstances. We don't trust these people in government, and they failed us. And they have. The whole system was failing; the financial system, the government system, all of it seemed to be failing.

They created a rejectionist mood, and the narrative was we get to move away from these people that want to do big-government planning and that sort of thing, and let's just go hunting fish at our own land. I understand the instinct. It's just that at the end of the day, we're all in this together. ...

So your former colleagues on Capitol Hill now are sort of boxed in on this issue. Do you feel sympathy for them? What do you think is the mind-set of why people feel they can't talk about [it]?

I think many really know better, and many are aware of the science. I think they're nervous about the science, and I think they're also aware that if they're conservatives,

that you can't build a credible conservative movement where you're trying to hold back facts with shaky ideology. It just won't last, so I think they are nervous. They are aware.

But, you know, the first people up out of the foxholes get their heads blown off, so it's maybe a little bit too early to ask them to get up out of the foxholes. We've got to build some air cover for them to try to get up that hill. We're going to try to do that at home for them to build support, so that if they have some air support, maybe they'll get up out of the foxholes, start charging the hill. ...

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shaker · 3 years ago

I disagree with every aspect of Mr. Inglis' politics - except for his reasoned stand on climate change. In the not-so-far future, he will be proven correct, but for now, the Koch brothers funded "Tea Party" will continue to be the pawns to conflate "freedom" with the ability of the fossil fuel industry to control energy policy. Money creates monsters who care not of the future, or even humanity, but only of short-term profit. I think that we all have to ask a little bit less of the Earth, especially in regards to energy use, in order to blunt the power of these "people" who have a stranglehold over our lives and the life of this world.

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FROM SLATE, NEW AMERICA, AND ASU

This Man Is America's Best Hope for Near-Term Climate Action

He's a Republican.

By Eric Holthaus

AMERICA'S BEST HOPE FOR NEAR-TERM CLIMATE ACTION IS A REPUBLICAN



Bob Inglis in 2010 at Columbia University in New York City.

Photo illustration by Slate. Photo by Spencer Platt/Getty Images.

Conservative climate champions are often laughed off or ignored. But what's happening within the American political right could **change everything**, and fast.

Each year since 1989, the JFK Library bestows its Profile in Courage award to a public servant who takes a principled but unpopular position. **This year**, the award went to Bob Inglis, a former congressman from South Carolina who's turned into America's best hope for near-term climate action. Oh, he's also a Republican.

As you might expect, Inglis wasn't always a climate campaigner. In his acceptance speech last week at the JFK Library in Boston, he described how and why he changed his mind on global warming:

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Inglis served in Congress for 12 nonconsecutive years, but once his children reached voting age, they persuaded him to take a closer look at climate science. Inglis traveled to Antarctica—twice—and his conversations with scientists there convinced him climate change was a growing threat that everyone, especially conservatives, needed to take more seriously. Science, plus his deep Christian faith, convinced Inglis that taking action on climate—and saving countless lives in the process—was the right thing to do. Almost immediately, he began **advocating for** carbon pricing: He argued that it would be good for business *and* the environment. He even began looking to Canada for inspiration. Since 2008, the **government of British Columbia** has had in place arguably **the most successful climate policy on the planet**. During a **2009 speech** on the House floor, he called an American plan for a British Columbia-style revenue-neutral carbon tax a “fabulous opportunity.”

But his belief in the science of climate change became a liability for Inglis during the contentious 2010 primary election—an election associated with the rise of the Tea Party brand of ultraconservatism—and Inglis lost his seat **in a landslide**.

Since then, Republican views on climate change have inched ahead, and Inglis has made it his mission to spread the word: Protecting our planet is the ultimate bipartisan issue. “My grandfather’s legacy is kept alive by Bob’s courageous decision to sacrifice his political career to demand action on the issue that will shape life on Earth for generations to come,” said JFK descendant Jack Schlossberg, who presented the award to Inglis.

This is the point at which progressives and **climate hawks** might understandably get a bit cynical. But hear me out: For years now, the Republican electorate **has been shifting** toward accepting the scientific consensus on climate change. **A recent survey** showed moderate Republicans—which still make up about half of all Republican voters—are now essentially indistinguishable from the general population in terms of their beliefs on climate. More than 70 percent of Republicans now believe that human activities are contributing to global warming.

Most importantly, there’s **recent evidence**—and a few **case studies**—that point toward the root of Republican hostility toward climate action as mostly a matter of disliking the solutions on the table. That’s helped the fossil fuel industry **fund a load of anti-science rhetoric** and propelled climate change into the nation’s **most divisive political issue**. An optimist might say all that’s needed is a climate-action proposal that conservatives can get excited about.

That’s where Inglis comes in.

Essentially, Inglis is proposing cover for Republicans to vote for a price on carbon by offsetting any revenue it produces with equal or greater cuts in corporate taxes and personal income taxes. Such a proposal might turn the United States—which currently has among the highest business taxes in the world—**into a tax haven** and help drive economic growth. It **could be tricky** to pull off, but if done the right way, it **would probably be popular** with almost everyone *and* be an efficient way of tackling climate change.

In the meantime, there’s a **huge gap** between opinion polls and how Republican politicians vote on climate—and maybe between Republican politicians’ private beliefs and public actions. In 2013 Inglis told ***This American Life*** that he believes we could pass meaningful legislation today if his former Republican colleagues were “allowed to vote their conscience on climate change.”

Last week, I spoke with Inglis to get a clearer idea of why he’s so hopeful that Republicans could actually pave the way for bold action on climate.

“Too often the environmental left presents only the danger and not the opportunity of climate change,” Inglis told me. “Of course it’s a danger—the science is very clear. But it’s also an incredible free-enterprise opportunity, because why do we have to be dependent on these stinky fuels? Why can’t we have cleaner air? Why can’t we have distributed energy systems that light up the world with more energy, more mobility, and more freedom? Why can’t we?”