

Environmental Federalism in a Dark Time

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I. INTRODUCTION

The election of Donald Trump on November 8, 2016, represented a radical break with many established patterns, norms, and conventions in American political life, and the consequences of that election continue to reverberate on issues as far flung as foreign affairs and gender relations. Environmental issues are an area where Trump’s disruptive presidency has had particular effect. Political appointees to senior positions in environmental protection and natural resource management have strong ties to regulated industry, a track record of hostility toward the agencies they manage, a history of skepticism about climate science, and frequently all three.¹ Since taking over the Environmental Protection Agency (EPA), Department of Energy, and Department of Interior, the Trump Administration’s primary agenda has been to delay or roll back the environmental and climate efforts of previous Administrations.² Although environmental groups have opposed these measures, the reality is that it is extremely difficult to force agencies to implement and enforce the law if they are disinclined to do so.³ Until the end of the Trump presidency, environmental protection at the federal level can be expected, by and large, to remain in a state of stasis at best, and possibly to decay considerably.

The principle of federalism has become something of a rallying cry in recent efforts by the Trump Administration and its allies to scale back environmental regulation. For example, during his short and troubled tenure, former EPA

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¹Although written prior to the 2016 election, environmental philosopher Dale Jamieson’s *REASON IN A DARK TIME: WHY THE STRUGGLE AGAINST CLIMATE CHANGE FAILED—AND WHAT IT MEANS FOR OUR FUTURE* (2014) helps capture some of the tenor of the current moment in environmental politics.

²Michael Greshko et al., *A Running List of How President Trump Is Changing Environmental Policy*, NAT’L GEOGRAPHIC (Aug. 2, 2018), <https://news.nationalgeographic.com/2017/03/how-trump-is-changing-science-environment/> [<https://perma.cc/5JB3-8N2P>].

³*See, e.g., Heckler v. Chaney*, 470 U.S. 821, 837 (1985) (holding nonenforcement decision of administrative agencies to be largely unreviewable).

Administrator Scott Pruitt argued that the federal government has become too intrusive and that states should be returned to a position of “regulatory primacy” on environmental matters.⁴ One example of this emphasis on federalism is the hostility shown toward an Obama-era regulation that clarifies the scope of the Clean Water Act.⁵ For decades, the EPA and the Army Corps of Engineers (which administers portions of the Act) had interpreted their jurisdiction under the Act broadly.⁶ The Waters of the United States rule was consistent with that practice.⁷ The immediate disavowal of the rule by the Trump Administration is one indicator of the change in course that is under way.⁸

Some states have responded to the impending federal retreat by forging ahead. California has continued to take aggressive steps to curb greenhouse gas emissions, and has even taken steps to project its influence internationally; for example, by engaging in high profile discussions on climate policy with Chinese officials and co-hosting a global climate policy summit with United Nations Officials,⁹ New York is restructuring its electricity market to better accommodate renewable resources and recently ordered a phase-out of coal plants in the state,¹⁰ and the Governor of Virginia has ordered his state Department of Conservation to draw up plans for the state to meet the requirements of the Clean Power Plan, notwithstanding any changes at the

⁴ Andrew Childers, *Scott Pruitt Could Tip Regulatory Power from EPA to States*, BLOOMBERG BNA (Jan. 18, 2017), <https://www.bna.com/scott-pruitt-tip-n73014449932/> [<https://perma.cc/UY2H-MMJ5>]; see also Coral Davenport et al., *E.P.A. Chief Scott Pruitt Resigns Under a Cloud of Ethics Scandals*, N.Y. TIMES (July 5, 2018), <https://www.nytimes.com/2018/07/05/climate/scott-pruitt-epa-trump.html> [on file with *Ohio State Law Journal*].

⁵ See *About Waters of the United States*, EPA (last updated Jan. 30, 2018), <https://www.epa.gov/wotus-rule/about-waters-united-states> [<https://perma.cc/S249-XEEQ>].

⁶ See *Clean Water Act, WOTUS*, AMERICAN FARM BUREAU FED’N, <https://www.fb.org/issues/regulatory-reform/clean-water-act/> [<https://perma.cc/KZF4-G9HE>].

⁷ Critics of the rule have, naturally, argued that it “vastly expand[ed] EPA’s and the Corps’ regulatory authority beyond the limits approved by Congress.” *Id.* Under this interpretation, the Trump Administration merely seeks to reestablish the status quo ante of less federal control. Regardless, the *prioritization* of this particular rule indicates the Trump Administration’s emphasis on federalism issues.

⁸ See Coral Davenport, *E.P.A. Blocks Obama-Era Clean Water Rule*, N.Y. TIMES (Jan. 31, 2018), <https://www.nytimes.com/2018/01/31/climate/trump-water-wotus.html> [on file with *Ohio State Law Journal*].

⁹ Jessica Meyers, *China is Now Looking to California—Not Trump—to Help Lead the Fight Against Climate Change*, L.A. TIMES (June 6, 2017), <http://www.latimes.com/world/asia/la-fg-china-global-climate-20170606-story.html> [<https://perma.cc/Q7D9-K384>]; *About the Summit*, GLOB. CLIMATE ACTION SUMMIT, <https://globalclimateactions summit.org/about-the-summit/> [<https://perma.cc/AC9S-QFJ2>].

¹⁰ *Reforming the Energy Vision*, N.Y. STATE, <https://rev.ny.gov/> [<https://perma.cc/9WVD-YB3B>]; *Governor Cuomo Announces Proposed Regulations to Make New York Power Plants Coal-Free by 2020*, N.Y. STATE (May 17, 2018), <https://www.governor.ny.gov/news/governor-cuomo-announces-proposed-regulations-make-new-york-power-plants-coal-free-2020> [<https://perma.cc/8FPD-H8AV>].

federal level.¹¹ Overall, fourteen states (plus Puerto Rico) have joined the U.S. Climate Alliance, committing themselves to meeting the targets adopted by the Obama Administration for the United States under the Paris Accord, which has been renounced by the Trump Administration.¹² Several state attorneys general have worked together to use the power of their offices to oppose the Trump Administration's environmental agenda.¹³

Despite these hopeful signs of resistance, the net effect of the Trump Administration's efforts to scale back federal environmental policy is likely to undermine rather than energize state environmental policymaking. In states dominated by Democratic politicians, environmental policies at odds with the new political leadership at the national level is a way to signal their partisan allegiance, akin to the Republican state leaders who refused to participate in the Affordable Care Act Medicaid expansion.¹⁴ But state policymaking is not needed only in so-called Blue states. Though Blue states can develop new policies that may more efficiently and effectively address environmental harms in their own states, they cannot directly influence policymaking in Red and Purple states—those which are dominated by Republicans or are not fully dominated by either party (respectively). Moreover, the policies that are adopted by Blue states may not be politically attractive in Red and Purple states.

In order to effectively address nationwide environmental problems, the most valuable information that could be obtained from state-level environmental policymaking is political information about which policies can be attractive to decisionmakers in Red and Purple states. This political information is distinct from data on which policies are actually most effective when implemented, but instead focuses on how proposed policies are likely to be received in different political environments. Political information from Red and Purple states has the potential to break the gridlock on environmental issues that now overwhelms our national political institutions, by demonstrating forward-looking solutions that might be palatable across the political spectrum at either the state or federal level.¹⁵ Unfortunately, there is little evidence that—without a sustained push by the federal government—Red and Purple states will do much beside maintain

¹¹ Jack Fitzpatrick, *Virginia Looks to Cut Emissions Regardless of Clean Power Plan Review*, MORNING CONSULT (May 16, 2017), <https://morningconsult.com/2017/05/16/virginia-looks-cut-emissions-regardless-clean-power-plan-review/> [<https://perma.cc/J4L9-BD77>].

¹² Georgina Gustin, *14 States: We're on Track to Meet Paris Climate Goals, Despite Trump*, INSIDE CLIMATE NEWS (Sept. 21, 2017), <https://insideclimatenews.org/news/21092017/states-paris-trump-climate-change-alliance-leadership-jerry-brown-cuomo-inslee-nrdc-2050> [<https://perma.cc/8YA6-ENXX>].

¹³ Lisa Friedman & John Schwartz, *Borrowing G.O.P. Playbook, Democratic States Sue the Government and Rack Up Wins*, N.Y. TIMES (Mar. 21, 2018), <https://www.nytimes.com/2018/03/21/climate/attorneys-general-trump-environment-lawsuits.html> [on file with *Ohio State Law Journal*].

¹⁴ Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1078 (2014).

¹⁵ Michael A. Livermore, *The Perils of Experimentation*, 126 YALE L.J. 636, 706 (2017).

the current status quo. Without those efforts at the state level, showing the way for national-level politicians to make new coalitions and alignments on environmental issues, there is a danger that the current state of impasse may prove difficult to leave behind.

II. ENVIRONMENTAL FEDERALISM AND INFORMATION GATHERING

Although politicians are often happy to offer paeans to states' rights, they rarely talk much about the values served by federalism. Granting more power to the states is not an end unto itself, but rather a means of promoting other ends. Traditionally, the most commonly accepted purposes of decentralizing governance authority are preference diversity, political responsiveness, better attention to local conditions and effects, and experimentation.¹⁶ These benefits of decentralization must be balanced against the benefits of centralization, which include harmonization and more complete internalization of externalities. U.S. environmental law does not always fit with these substantive justifications for centralization or decentralization,¹⁷ but nonetheless, these are the motivating values behind the cooperative federal-state relationship found in U.S. environmental law.

An area of particular focus in federalism scholarship in recent years is a focus on the political side of experimentation. Justice Brandeis's famous "laboratories of democracy" model of federalism explicitly analogized state decision-making to a scientific process.¹⁸ Of course, it is possible for state policy experimentation to generate "deliberative information" of the kind that could be used by a public-spirited decision maker to improve social well-being.¹⁹ This deliberative information might even include new perspectives on moral or ethical questions.²⁰ For example, on the issue of immigration, there is

¹⁶ See Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 386–400 (1997).

¹⁷ See generally Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. PA. L. REV. 2341 (1996) (discussing the impacts of the Clean Air Act and how those effects comport with justifications for centralizing environmental policy, such as preventing states from incentivizing polluters to locate in their jurisdiction with less stringent regulations and the ability of the national government to deal with externalities of pollution that are felt nationwide).

¹⁸ *New State Ice Co. v. Leibmann*, 285 U.S. 262, 310–11 (1932) (Brandeis, J., dissenting).

¹⁹ Livermore, *supra* note 15, at 640.

²⁰ See generally Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889, 1894 (2014) (discussing "discursive benefits of structure"); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998) (discussing democratic experimentalism and its potential to reconcile two different schools of thought on federalism). To some degree, democratic or discursive benefits discussed by Gerken, Dorf, and Sabel straddle the line between the categories of deliberative and political information. See Livermore, *supra* note 15, at 640. There is some value in distinguishing between the two types of information, but the more important insight is that information from policy experimentation—no matter its kind—can be put to both good and bad uses, depending on the incentives and motivations of the relevant actors.

considerable variation in local attitudes and policies. The “discretionary spaces of federalism” allow local officials to implement their preferred policies (at least to some extent).²¹ These policy choices become an opportunity for people to discuss and defend their values in a context where their real world consequences are visible.²²

But it is also possible for state experimentation to generate information on the political effects of different policies—as when local politicians observe whether their peers in other jurisdictions are rewarded or punished by voters for their choices. This second political type of information can be used by advocates or politicians to promote their agendas, which range from maximizing well-being to securing personal pecuniary rewards. This type of political information might involve lobbying tricks that can be used by special interest groups to extract special favors from state legislatures, but it also includes organizing or communications strategies that can be used by public interest oriented groups. Devolving authority to the states can produce both deliberative information as well as political information, both of which can be put to both good or bad uses, depending on the motivations of the players involved.

Creating the right balance of centralized and decentralized authority requires careful attention to context. The Waters of the United States rule is a good example. The rule clarifies the jurisdiction of the EPA (and Army Corps of Engineers) to regulate smaller water bodies and wetlands under the Clean Water Act.²³ If state or local governments can control this pollution effectively, then this might be an area where decentralization makes sense. But, if polluters are able to use local policy experiments to learn how to effectively advocate for weaker standards, while environmental interests have a harder time sharing information across jurisdictions, the net effect may be learning that facilitates special interests at the expense of the public. In addition, many states have passed laws banning any clean water regulation that is more stringent than federal standards, meaning that if the EPA pulls away, it creates a policy vacuum, rather than a space for experimentation.²⁴ In this case, the information-creating potential for decentralization might provide a justification for more, rather than less, involvement by the national government.

Climate change provides a reverse case study. There are extremely powerful reasons to regulate greenhouse gases at the national, or even global, level. It is

²¹ Gerken, *supra* note 20, at 1910 (quoting Cristina M. Rodríguez, *Negotiating Conflict Through Federalism: Institutional and Popular Perspectives*, 123 YALE L.J. 2097 (2014)).

²² See Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 595 (2008). See generally Cristina M. Rodríguez, *Federalism and National Consensus* (unpublished manuscript) (on file with the *Ohio State Law Journal*) (discussing ideological diversity in the context of federalism policy debates).

²³ See *supra* note 6.

²⁴ ENVTL. LAW INST., STATE CONSTRAINTS: STATE-IMPOSED LIMITATIONS ON THE AUTHORITY OF AGENCIES TO REGULATE WATERS BEYOND THE SCOPE OF THE FEDERAL CLEAN WATER ACT 11 (2013), <https://www.eli.org/sites/default/files/eli-pubs/d23-04.pdf> [<https://perma.cc/DM8F-9F4G>].

a basic fact of greenhouse gases that, no matter where they are emitted, they contribute equally to climate change around the world.²⁵ For the purposes of climate change damages in California, it is irrelevant if greenhouse gases are emitted in Los Angeles or Beijing. This physical fact means that there are massive inter-jurisdictional externalities in the case of climate change, and—absent a policy or liability regime—rational but self-interested jurisdictions will release levels of emissions that are sensible from a local perspective but inefficiently high from a global perspective. That is why climate advocates have focused so much of their efforts on a global agreement. Domestically, the national government is exposed to more risks of climate damage than any given state, and so can be expected, in general, to internalize more of these climate externalities and pursue more efficient policies.

Despite these strong reasons to favor national action, the Obama Administration's Clean Power Plan relied heavily on states to determine their climate policies.²⁶ While the national government set an overall emissions limitation goal, states had a substantial amount of leeway in deciding how to meet that goal.²⁷ This particular allocation of federal and state authority created tremendous potential for the state experimentation to generate useful political information. Climate change is an area where a deep state of gridlock has settled in at the national level, and new ideas for political coalitions and alignments are desperately needed. By forcing states—including those dominated by Republican politicians—to develop climate policies, the Clean Power Plan created incentives for political actors to develop policies and messaging around the issue that would appeal to diverse constituencies. After a period of experimentation, the diverse approaches could be compared to each other, not only based on their policy success, but also based on their political appeal. This information could then feed into the national climate discussion, potentially helping to resolve the current state of impasse on the issue. This potential information-upside helps justify greater decentralization than might otherwise make sense.

Unfortunately, the Clean Power Plan was stayed by the U.S. Supreme Court before it could be put in place, and since the 2016 presidential election, Administrator Pruitt has begun taking steps toward its repeal.²⁸ Without an effective prod at the national level, there is precious little incentive for states that are not otherwise inclined to do so to enact meaningful reductions. Perhaps ironically, the massive decentralization of climate policy that will likely occur

²⁵ NICHOLAS STERN, *THE ECONOMICS OF CLIMATE CHANGE: THE STERN REVIEW* 28 (2007).

²⁶ See Alison Cassady & Myriam Alexander-Kearns, *5 Ways the Final Clean Power Plan Puts States at the Helm of Their Energy Future*, THINK PROGRESS (Aug. 5, 2015, 7:08 PM), <https://thinkprogress.org/5-ways-the-final-clean-power-plan-puts-states-at-the-helm-of-their-energy-future-185320f9fa93/> [<https://perma.cc/J93N-SD45>].

²⁷ *Id.*

²⁸ Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 82 Fed. Reg. 48,035 (Oct. 16, 2017).

due to EPA's retreat will mean less, not more, information generated by the states on smart and politically savvy approaches to climate change. Nevertheless, there is some hope for progress on climate at the state level in the coming years. Politicians in Blue states are already staking out positions on climate change to signal their disagreement with the Trump Administration.²⁹ This will create space for some policy experimentation. It is reasonably likely that some Red and Purple states may make policy in related areas, such as clean energy. Although the framing is different, these policies have obvious climate benefits, and some valuable political information may be generated. Even if the global nature of the greenhouse gas pollution likely interferes with states engaging in optimal policy adoption, that does not imply that no progress can be made.

The following two Parts flesh out in more detail the effects of the Trump EPA's decision to roll back federal climate change policy.³⁰ The Clean Power Plan had the potential to generate the kind of information that could have profoundly shifted the political conversation on climate change. Abandoning the Plan will mean that there is much less potential for that kind of shift. But, even without the active involvement of the federal government, state action is occurring: examining how states are responding to the new policy vacuum at the federal level instructively illustrates both what could have been, and what may still come to pass.

III. STATE OF CLIMATE POLICY

In light of President Trump and Administrator Pruitt's statements that they intend to repeal the Clean Power Plan and other federal greenhouse gas regulations,³¹ states have a choice as to whether or not they plan to move forward on climate policy. Blue states, and possibly some Purple states, are likely to keep acting to reduce greenhouse gas emissions, while Red states and other Purple states are likely to stop any preparations they had begun to comply

²⁹ See David Hasemyer, *The New Climate Watchdogs: Democratic Attorneys General Take on Trump*, INSIDE CLIMATE NEWS (Dec. 21, 2017), <https://insideclimatenews.org/news/21122017/climate-change-attorney-general-trump-lawsuit-2017-year-review> [<https://perma.cc/SQV4-5G8L>].

³⁰ See *infra* Parts III, IV.

³¹ See Nathan Rott, *Trump Moves to Let States Regulate Coal Plant Emissions*, NAT'L PUB. RADIO (Aug. 21, 2018, 10:02 AM), <https://www.npr.org/2018/08/21/639396683/trump-moves-to-let-states-regulate-coal-plant-emissions> [<https://perma.cc/PZ9Y-4NSQ>]; Brady Dennis & Juliet Eilperin, *EPA Chief Scott Pruitt Tells Coal Miners He Will Repeal Power Plant Rule Tuesday: 'The War Against Coal Is Over'*, WASH. POST (Oct. 9, 2017), https://www.washingtonpost.com/news/energy-environment/wp/2017/10/09/pruitt-tells-coal-miners-he-will-repeal-power-plant-rule-tuesday-the-war-on-coal-is-over/?utm_term=.d86ed3c0d2ef [<https://perma.cc/V5FD-3AH7>]; Tom DiChristopher, *Trump EPA Will Revise Obama Fuel Efficiency, Greenhouse Gas Emissions Rule for Autos*, CNBC (Apr. 2, 2018), <https://www.cnbc.com/2018/04/02/trump-epa-will-revise-obama-fuel-efficiency-rules-for-autos.html> [<https://perma.cc/557A-YCU6>].

with the Clean Power Plan. While the technical information on the relative effectiveness of different policies adopted in Blue states may prove valuable to all states and the federal government when they eventually decide to move forward with climate policy,³² the political information developed in Blue states about how to get policies adopted is unlikely to be applicable in Red states, with their distinctive political forces. With fewer Red states moving forward, the country will lose out on developing valuable political information on how to advance climate policy in more conservative areas.³³ In this Part, we focus on this missed opportunity.

A number of Blue states are charging ahead to reduce the greenhouse gas emissions that contribute to climate change, and they are learning political lessons that may prove useful, but only in other progressive jurisdictions. California has long been a leader on climate policy, with its 2006 Assembly Bill 32, which created a cap and trade system and other forms of greenhouse gas regulations.³⁴ However, even in a Blue state like California, with Democratic supermajorities in both houses and a Democratic governor, climate regulation has not always faced smooth sailing. The initial authorization for significant portions of Assembly Bill 32 was set to expire in 2020.³⁵ In 2015, oil and gas interests joined with lower-income community advocates to block an extension of Assembly Bill 32, arguing that the burdens, but not the benefits, would disproportionately fall on poor communities and communities of color.³⁶ After much legislative and gubernatorial effort over two terms, the greenhouse gas reduction program was extended to 2030, with a re-authorization of the cap and trade program but also more oversight for the Air Resources Board in administering the program and additional specific requirements to address criteria air pollutants in disadvantaged communities.³⁷ California's approach

³² See, e.g., Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64662 (Oct. 23, 2015) (reviewing the results from California and the Regional Greenhouse Gas Initiative states in deciding what approach to apply to select the best system of emission reduction for greenhouse gas emissions from power plants under the Clean Power Plan).

³³ It is possible that even under the Clean Power Plan, Red states would have refused to develop policies and instead have decided to allow the EPA to proceed through Federal Implementation Plans. If that had been the case, then the information-production benefits of the rule would have been reduced.

³⁴ Assemb. B. 32, 2006 Leg., Reg. Sess. (Cal. 2006).

³⁵ See Cara Horowitz, *California's Cap-and-Trade Program After 2020*, LEGAL PLANET (July 22, 2016), <http://legal-planet.org/2016/07/22/californias-cap-and-trade-program-after-2020/> [https://perma.cc/ACL9-J5R7].

³⁶ See Chris Megerian & Melanie Mason, *California's New Climate Change Laws Almost Didn't Happen This Year. Here's How Lawmakers Pulled It Off.*, L.A. TIMES (Sept. 2, 2016), <http://www.latimes.com/politics/la-pol-sac-climate-deal-inside-look-20160902-snap-htmlstory.html> [https://perma.cc/P4CZ-JQ9W].

³⁷ See S. B. 32, 2016 Leg., Reg. Sess. (Cal. 2016); Assemb. B. 197, 2016 Leg., Reg. Sess. (Cal. 2016); Assemb. B. 398, 2017 Leg., Reg. Sess. (Cal. 2017); Assemb. B. 617, 2017 Leg., Reg. Sess. (Cal. 2017). See also *Comments on Discussion Draft, 2030 Target Scoping Plan Update 1*, INST. FOR POLICY INTEGRITY (Dec. 16, 2016), <http://policyintegrity.org/>

may provide useful political information for other Blue states looking to address similar concerns from disadvantaged communities, but its model is unlikely to prove politically useful outside of Blue states because it is viewed as atypically liberal.

Other Blue states are also moving forward on climate policy, with political lessons that may prove useful to other Blue states, but likely not more broadly. For example, Washington has developed a number of policies addressing greenhouse gas emissions over the years, including the governor's office adopting the Social Cost of Carbon to value the climate effects of state policy proposals.³⁸ In 2016, climate advocates placed an initiative on the state ballot to require a statewide revenue neutral carbon tax.³⁹ Other environmental advocates, including the Sierra Club, opposed the measure because they were developing their own statewide proposal which would involve more targeted beneficiaries of the funds raised by carbon regulation.⁴⁰ The revenue-neutral carbon tax measure failed to pass.⁴¹ Meanwhile, the executive branch has been developing its own carbon cap program,⁴² and mainstream environmental groups and labor groups have been working together to develop a redesigned carbon tax legislative proposal that would satisfy the various stakeholders.⁴³

documents/Policy_Integrity_ARB_use_of_SCC_under_AB_197_FINAL.pdf [https://perma.cc/MU3C-N8N2]; California Air Resources Board, *The 2017 Climate Change Scoping Plan Update*, ES1–3 (Jan. 20, 2017), https://www.arb.ca.gov/cc/scopingplan/2030_sp_pp_final.pdf [https://perma.cc/BCC9-MR6V].

³⁸ WASH. STATE DEP'T OF COMMERCE, *THE SOCIAL COST OF CARBON 2* (Sept. 29, 2014), <http://www.commerce.wa.gov/wp-content/uploads/2015/11/Energy-EV-Planning-Social-Cost-of-Carbon-Sept-2014.pdf> [https://perma.cc/VBH9-EF3E]; Washington Carbon Pollution Reduction and Clean Energy Action, Exec. Order 14-04 (Apr. 29, 2014), *available at* http://www.governor.wa.gov/sites/default/files/exe_order/eo_14-04.pdf [https://perma.cc/FWG2-PX4F].

³⁹ Lewis Kamb, *Washington Voters Reject Initiative to Impose Carbon Tax on Fossil Fuels*, SEATTLE TIMES (Nov. 8, 2016), <https://www.seattletimes.com/seattle-news/politics/carbon-emissions-tax-initiative-732/> [https://perma.cc/DFM3-KDVM].

⁴⁰ See Chelsea Harvey, *The Battle Over Washington State's Carbon Tax Has Gotten Even Weirder*, WASH. POST (Nov. 7, 2016), https://www.washingtonpost.com/news/energy-environment/wp/2016/11/07/the-bizarre-political-fight-over-washington-states-ballot-measure-to-tax-carbon/?utm_term=.eafdd43e68ca [https://perma.cc/QK8W-G6CH]; Rebecca Leber, *Inside the Carbon Tax Fight That's Dividing Environmentalists*, MOTHER JONES (Nov. 1, 2016, 4:19 PM), <http://www.motherjones.com/environment/2016/11/washington-carbon-tax-i732/> [https://perma.cc/W6MS-NVKS].

⁴¹ Kamb, *supra* note 39; Marianne Lavelle, *Washington State Voters Reject Nation's First Carbon Tax*, INSIDE CLIMATE NEWS (Nov. 9, 2016), <https://insideclimatenews.org/news/09112016/washington-state-carbon-tax-i-732-ballot-measure> [https://perma.cc/PGP2-8XHU].

⁴² See WASH. STATE DEP'T OF ECOLOGY, *CHAPTERS 173-442 AND 173-441 WAC: OVERVIEW OF THE CLEAN AIR RULE* (Oct. 2, 2017), *available at* <https://ecology.wa.gov/Regulations-Permits/Laws-rules-rulemaking/Closed-rulemaking/WAC-173-442,-441-Overview> [https://perma.cc/85XP-JCY5].

⁴³ Hal Bernton, *Washington State Alliance to Push a Reworked Carbon-Tax Proposal*, SEATTLE TIMES (Nov. 12, 2016), <https://www.seattletimes.com/seattle-news>

That bill, as well as a climate bill in Oregon, failed in the 2018 legislative session, but advocates are optimistic for the prospect of passing climate laws through future legislative sessions and initiative processes.⁴⁴

Climate policy efforts are moving forward in some Purple states, which could provide political information that is more broadly applicable in Red and Purple states. For example, in May 2017, the governor of Virginia instructed the state's Department of Environmental Quality to develop a greenhouse gas reduction plan for the state.⁴⁵ In November 2017, the Virginia Air Pollution Control Board approved a proposal to release for public comment that would integrate Virginia into the Regional Greenhouse Gas Initiative, and the process of facilitating that integration has begun.⁴⁶ New Jersey also has begun the process to re-enter the Regional Greenhouse Gas Initiative program.⁴⁷ A handful of states with Republican governors have also joined the U.S. Climate Alliance, a consortium of states created after the election to help advance greenhouse gas policy.⁴⁸ Massachusetts also issued a new set of greenhouse gas regulations that go above and beyond its commitments in the Regional Greenhouse Gas Initiative, proposed in early 2017, finalized in August 2017, and amended in

/environment/washington-state-alliance-to-push-a-reworked-carbon-tax-initiative/ [https://perma.cc/PJH8-GRUB].

⁴⁴ Seattle Times Staff & Associated Press, *Washington State's Carbon-Tax Bill Dies in Legislature*, SEATTLE TIMES (Mar. 1, 2018), <https://www.seattletimes.com/seattle-news/politics/washington-states-carbon-tax-bill-dies-in-legislature/> [https://perma.cc/Z6HP-4RG6]; Pete Danko, *Oregon Cap-and-Trade Backers Eye 2019 After Failed Short-Session Bid*, PORTLAND BUS. J. (Mar. 3, 2018), <https://www.bizjournals.com/portland/news/2018/03/03/oregon-cap-and-trade-backers-eye-2019-after-failed.html> [https://perma.cc/AM6D-DA7Z].

⁴⁵ Reducing Carbon Dioxide Emissions from Electric Power Facilities and Growing Virginia's Clean Energy Economy, Exec. Directive 11 (2017), available at <http://governor.virginia.gov/media/9155/ed-11-reducing-carbon-dioxide-emissions-from-electric-power-facilities-and-growing-virginias-clean-energy-economy.pdf> [https://perma.cc/G8CN-HQGW].

⁴⁶ Regulation for Emissions Trading Programs, 34 Va. Reg. Regs. 924 (proposed Jan. 8, 2018); Robert Zullo, *Virginia State Air Pollution Control Board Approves Draft Rule that Would Regulate Power Plant Carbon Emissions*, RICHMOND TIMES-DISPATCH (Nov. 16, 2017), https://www.richmond.com/news/virginia/virginia-state-air-pollution-control-board-approves-draft-rule-that/article_0b5c9430-050f-5345-a5ad-a444d083a067.html [https://perma.cc/EH72-CGJR]; Robert Walton, *With Proposal to Join RGGI, Virginia Would Be First Southern State to Cap Carbon*, UTIL. DIVE (Jan. 10, 2018), <https://www.utilitydive.com/news/with-proposal-to-join-rggi-virginia-would-be-first-southern-state-to-cap-c/514537/> [https://perma.cc/MM6P-W8XX].

⁴⁷ Peter Maloney, *New Jersey to Rejoin RGGI in New Executive Order*, UTILITY DIVE (Jan. 29, 2018), <https://www.utilitydive.com/news/new-jersey-to-rejoin-rggi-in-new-executive-order/515802/> [https://perma.cc/BFZ8-TVTG].

⁴⁸ See *Alliance Principles*, U.S. CLIMATE ALL., <https://www.usclimatealliance.org/alliance-principles/> [https://perma.cc/H9C5-JHQJ]; *Governors*, U.S. CLIMATE ALL., <https://www.usclimatealliance.org/about-us/> [https://perma.cc/3FY5-ZHAL] (listing seventeen states as members, of which Massachusetts, Vermont, North Carolina and Virginia have Republican governors).

both December 2017 and August 2018.⁴⁹ In theory, the Massachusetts regulations could help provide political information on what approaches are feasible for a Republican governor. However, the Massachusetts Department of Environmental Protection was developing the regulation in response to a court order that found that the agency had failed to properly implement its Global Warming Solutions Act of 2008.⁵⁰ As a result, the governor had more political cover than another state's Republican governor who might want to move the ball forward on climate policy in the absence of a court order.⁵¹

Perhaps the biggest drawback of the change in federal administrations is the fact that many Red and some Purple states have pulled back from efforts they had been making to implement the Clean Power Plan and other greenhouse gas policies under the Obama Administration. For example, Arizona had formally announced that it was undertaking efforts to comply with the Clean Power Plan, despite its opposition to the plan on legal grounds.⁵² Arizona is no longer undertaking those efforts under this new Administration, and coal power plants in the state are staying open longer than they had planned.⁵³ Likewise, Idaho, Pennsylvania, Ohio, South Carolina, and a number of other states had been working to develop Clean Power Plan compliance plans, but are now no longer moving forward with these actions.⁵⁴ With these Red and Purple states pulling

⁴⁹ See Electricity Generator Emissions Limits, 310 CMR 7.74, (Aug. 2018), available at <https://www.mass.gov/guides/electricity-generator-emissions-limits-310-cmr-774> [<https://perma.cc/CFB5-P7SG>]. See also Inst. For Policy Integrity, Comments to Massachusetts Department of Environmental Protection on Reducing Greenhouse Gas Emissions Under Section 3(d) of the Global Warming Solutions Act 1 (Feb. 24, 2017), http://policyintegrity.org/documents/Institute_for_Policy_Integrity_Comments_on_Regulations_to_Implement_Global_Warming_Solutions_Act.pdf [<https://perma.cc/9AGM-S5YN>] (“The Commonwealth of Massachusetts shows its dedication to reducing its greenhouse gas emissions in the Global Warming Solutions Act, in Governor Baker’s Executive Order 569, and in these proposed regulations.”).

⁵⁰ See *Kain v. Dep’t of Env’tl. Prot.*, 49 N.E.3d 1124, 1128 (Mass. 2016).

⁵¹ A similar dynamic could present itself for other Republican governors at a future time, in which case the Massachusetts example may prove illuminating.

⁵² See *Clean Power Plan Hub: Arizona*, E&E NEWS, https://www.eenews.net/interactive/clean_power_plan/states/arizona [<https://perma.cc/DM2T-6PVU>] (describing Arizona’s plan to reduce carbon emissions after the stay of the Clean Power Plan).

⁵³ See Associated Press, *Navajo Council OKs Lease Extension for Arizona Coal Plant*, U.S. NEWS & WORLD REPORT (June 27, 2017), <https://www.usnews.com/news/best-states/arizona/articles/2017-06-27/navajo-council-approves-lease-extension-for-coal-plant> (on file with *Ohio State Law Journal*). Note, however, that this plant, while inside Arizona, is under Navajo, not state jurisdiction.

⁵⁴ See *Clean Power Plan Hub: Idaho*, E&E NEWS (Feb. 25, 2016), https://www.eenews.net/interactive/clean_power_plan/states/Idaho [<https://perma.cc/5FXU-9SZJ>]; *Clean Power Plan Hub: Pennsylvania*, E&E NEWS (Nov. 2, 2016), https://www.eenews.net/interactive/clean_power_plan/states/Pennsylvania [<https://perma.cc/NK4G-UQFN>]; *Clean Power Plan Hub: Ohio*, E&E NEWS (May 13, 2016), https://www.eenews.net/interactive/clean_power_plan/states/ohio [<https://perma.cc/2X6T-88YC>]; *Clean Power Plan Hub: South Carolina*, E&E NEWS (Feb. 24, 2016), https://www.eenews.net/interactive/clean_power_

back from their efforts to develop workable climate policy under the Clean Power Plan, the country will lose out on a great deal of valuable political information that could have been generated.

Additionally, the Trump Administration has begun taking steps to preempt state initiative on certain aspects of climate policy.⁵⁵ Under the Clean Air Act, California is unique among states in having the authority to set its own automobile emissions standards, which other states can then choose to adopt instead of the federal standards.⁵⁶ In granting California a waiver from general preemption requirements, Congress recognized the state's unique pollution problem and pioneering efforts in imposing automobile emission restrictions.⁵⁷ In 2009 and 2013, EPA granted California's request for a waiver to set its own emission standards for greenhouse gases from cars through model year 2025.⁵⁸ EPA recently proposed the revocation of California's waiver to set its own emissions standards for cars.⁵⁹

IV. STATE ELECTRICITY POLICY

State electricity policy is interrelated with, but still distinct from, state climate policy. The electricity sector is responsible for 34 percent of national

plan/states/south_carolina [<https://perma.cc/AY89-H3XT>]. Some of the states even planned to continue moving forward actively in the face of the Supreme Court's February 2016 stay of the rule.

⁵⁵ See, e.g., Jennifer A. Dlouhy et al., *EPA Chief Signals Showdown with California on Fuel Emission Standards*, BLOOMBERG (Mar. 13, 2018), <https://www.bloomberg.com/news/articles/2018-03-13/epa-chief-signals-showdown-with-california-on-tailpipe-standards> [<https://perma.cc/2CJ4-GUWZ>].

⁵⁶ See 42 U.S.C. § 7543(b)(1) (2012); 42 U.S.C. § 7507 (2012).

⁵⁷ See S. REP. NO. 403, at 33 (1967) ("Senator Murphy convinced the committee that California's unique problems and pioneering efforts justified a waiver of the preemption section to the State of California."); see also Rachel L. Chanin, Note, *California's Authority to Regulate Mobile Source Greenhouse Gas Emissions*, 58 N.Y.U. ANN. SURV. AM. L. 699, 716 (2003) ("There is some evidence that the waiver provision was primarily enacted to give California flexibility to tackle its unique smog problem, resulting from special geographic characteristics and high population levels.").

⁵⁸ 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, 74 Fed. Reg. 32744 (2009); California State Motor Vehicle Pollution Control Standards, Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's Advanced Clean Car Program and a Within the Scope Confirmation for California's Zero Emission Vehicle Amendments for 2017 and Earlier Model Years, 78 Fed. Reg. 2112 (Jan. 9, 2013) (giving California a waiver of Clean Air Act preemption).

⁵⁹ The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, 83 Fed. Reg. 42,986, 42,999 (proposed Aug. 24, 2018).

emissions of carbon dioxide.⁶⁰ Furthermore, over recent years, including with the Clean Power Plan, state electricity policy began incorporating more consideration of associated climate impacts.⁶¹ Nonetheless, state energy policy has retained a distinct set of laws and customs separate from environmental policy.⁶² With respect to electricity policy, though Blue states are likely to keep pushing forward on clean energy policy despite the change in administrations, some Red and Purple states may also keep pushing forward on clean energy policy, generating useful political information in a sector that may have substantial climate benefits. However, the federal government might be able to throw a wrench in the efforts of states to innovate, if the Federal Energy Regulatory Commission or Department of Energy attempt to preempt state policy, stymying the ability of those states to develop useful political information.

With respect to Blue states, a number of states have been working to push clean energy forward. For example, New York's Public Service Commission has been redesigning its system to support the clean energy grid of the future through its Reforming the Energy Vision proceeding.⁶³ New York has also

⁶⁰ *Frequently Asked Questions, How Much of U.S. Carbon Dioxide Emissions Are Associated with Electricity Generation?* U.S. ENERGY INFO. ADMIN. (last updated June 8, 2018), <https://www.eia.gov/tools/faqs/faq.php?id=77&t=11> [<https://perma.cc/436P-RE7D>].

⁶¹ *See, e.g.,* Mike Hughlett, 'Social Cost' of Carbon Dioxide Emissions from Power Plants Increased, MINN. STAR TRIB. (July 27, 2017), <http://www.startribune.com/minnesota-regulators-increase-social-cost-of-co2-emissions-but-not-as-much-as-asked/437066353/> [<https://perma.cc/HG6P-C7BT>] (providing statistics on CO2 emissions).

⁶² *See* Todd S. Aagaard, *Energy-Environmental Policy Alignments*, 90 WASH. L. REV. 1517, 1519–20 (2015) (discussing the differences between energy and environmental law and policy).

⁶³ *See Reforming the Energy Vision, About the Initiative*, N.Y. STATE DEP'T OF PUB. SERV. (last visited Oct. 2, 2017), <http://www3.dps.ny.gov/W/PSCWeb.nsf/All/CC4F2EFA3A23551585257DEA007DCFE2?OpenDocument> [<https://perma.cc/TVV2-8FV2>]; *Reforming the Energy Vision, Key Documents*, N.Y. STATE DEP'T OF PUB. SERV. (last visited Oct. 2, 2017), <http://www3.dps.ny.gov/W/PSCWeb.nsf/All/C12C0A18F55877E785257E6F005D533E?OpenDocument#Orders> [<https://perma.cc/N6KZ-E2F8>] (cataloguing key orders in the proceeding); *see also* Inst. For Policy Integrity, Comments to New York State Public Service Commission on New York State Department of Public Service, Benefit Cost Analysis Handbooks in the Reforming Energy Vision Proceeding 1 (Sept. 26, 2016), http://policyintegrity.org/documents/BCA_Handbook_Reply_Comments.pdf [<https://perma.cc/8AQ4-3E3Q>] (making recommendations to New York's Public Service Commission for improvements to its benefit-cost analysis methodology); Inst. For Policy Integrity, Comments to New York State Public Service Commission on New York State Department of Public Service, Staff White Paper on Ratemaking and Utility Business Models 2 (Oct. 26, 2015), http://policyintegrity.org/documents/Oct2015_REV_comments.pdf [<https://perma.cc/9LHR-6NP2>] ("In recent years, New York has continued to strengthen its role as a leading state in modernizing its electrical grid in the face of a changing world."); Inst. For Policy Integrity, Comments to New York State Public Service Commission on New York State Department of Public Service, Staff White Paper on Benefit Cost Analysis in the Reforming Energy Vision Proceeding 2 (Aug. 21, 2015), <http://policyintegrity.org/docum>

reevaluated its incentives paid to low carbon electricity generating resources, through its Clean Energy Standard program with its Renewable Energy Credits and Zero Emissions Credits.⁶⁴ Hawaii has set a goal of 100% renewable energy by 2045.⁶⁵ (A recent bill with a similar target just passed in California in the 2018 legislative session.)⁶⁶ Minnesota has undergone a thorough process to incorporate the Social Cost of Carbon into its resource planning decisions, based on a state law that requires consideration of environmental externalities.⁶⁷ The state recently approved a higher value of the Social Cost of Carbon, but less than what environmental advocates had pushed for.⁶⁸ Similarly, the Washington

ents/REV_Comments_Aug2015.pdf [https://perma.cc/PG3H-X3R7] (“[T]he Commission adopted an approach consistent with Policy Integrity’s recommendations.”).

⁶⁴ N.Y. Pub. Serv. Comm’n, Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard, Order Adopting a Clean Energy Standard Case 15-E-0302 (Aug. 1, 2016). *See also* Inst. For Policy Integrity, Comments to New York State Public Service Commission on New York State Department of Public Service, Staff White Paper on Clean Energy Standard 15 (Apr. 22, 2016), http://policyintegrity.org/documents/Comments_on_Clean_Energy_Standard_White_Paper.pdf [https://perma.cc/69GP-ZLAQ] (“[T]he proposed ACP for zero emission credits (‘ZECs’) is the difference between the anticipated operating costs of each nuclear facility and the forecasted wholesale price.”); Inst. For Policy Integrity, Comments to New York State Public Service Commission on Staff’s Responsive Proposal for Preserving Zero-Emissions Attributes 3 (July 22, 2016), http://policyintegrity.org/documents/Policy_Integrity_Comments_on_Staffs_Responsive_Proposal_for_Preserving_ZeroEmissions_Attributes.pdf [https://perma.cc/G9GG-6WK3] (“Staff has moved away from this approach and instead suggested a new formula that is based on the portion of the Social Cost of Carbon (‘SCC’) that is uninternalized in the energy markets.”).

⁶⁵ Jake Richardson, *100% Renewable Energy Goal for Hawaii: Governor Signs Bill*, CLEAN TECHNICA (June 11, 2015), <https://cleantechnica.com/2015/06/11/100-renewable-energy-goal-hawaii-governor-signs-bill/> [https://perma.cc/X48F-38UN]; Jeff St. John, *Hawaii Utility’s 100% Renewable Energy Plan Gets the Green Light*, GREENTECH MEDIA (July 19, 2017), <https://www.greentechmedia.com/articles/read/hawaiian-electric-100-renewable-energy-plan-green-light#gs.AgB6BLw> [https://perma.cc/223K-ABWG].

⁶⁶ *See* S. B. 100, 2017 Leg., Reg. Sess. (Cal. 2017); Alexei Koseff, *California Approves Goal for 100% Carbon-Free Electricity by 2045*, SACRAMENTO BEE (Sept. 10, 2018, 10:32 AM), <https://www.sacbee.com/news/politics-government/capitol-alert/article218128485.html> [https://perma.cc/L6X7-6L6K].

⁶⁷ *See* STATE OF MINN. OFF. OF ADMIN. HEARINGS FOR THE PUB. UTIL. COMMISSION, THE FURTHER INVESTIGATION INTO ENVIRONMENTAL AND SOCIOECONOMIC COSTS UNDER MINNESOTA STATUTES SECTION 216B.2442, SUBDIVISION 3 (Apr. 15, 2018), *available at* https://mn.gov/oah/assets/2500-31888-environmental-socioeconomic-costs-carbon-report_tcm19-222628.pdf [https://perma.cc/ZYY5-DBWA] (explaining the administrative law judge’s reasoning for recommending adoption of the Federal Social Cost of Carbon metric for measuring the environmental impact of CO₂ emissions).

⁶⁸ *See* Hughlett, *supra* note 61 (reporting that the Minnesota Public Utilities Commission increased the value of the social cost of carbon from a range of 44 cents to \$4.53 per short ton to a range of \$9.05 to \$43.06 per short ton by 2020); Gavin Bade, *Minnesota Regulators Boost Carbon Cost Estimates for Utility Planning*, UTIL. DIVE (July 28, 2017), <http://www.utilitydive.com/news/minnesota-regulators-boost-carbon-cost-estimates-for-utility-planning/448175/> [https://perma.cc/5G6F-YW47]; Inst. For Policy Integrity,

Utilities and Transportation Commission recently instructed three of the state's regulated utilities to begin using a social cost of carbon value in their analysis of resource alternatives in their Integrated Resource Plans.⁶⁹

It is not just Blue states pushing for clean energy policy, however. Some Red and Purple states—and municipalities within those states—keep working to promote cleaner generation as a part of their electricity mix. For example, in 2015, the Nevada Public Utilities Commission had significantly reduced net metering subsidies for rooftop solar generation.⁷⁰ A large public outcry followed, along with a shift of the state legislature from Red to Blue,⁷¹ and in June of 2017, the Republican governor signed a bill restoring the higher net metering subsidies for rooftop solar.⁷² The 2017 legislative session also included a suite of other clean energy bills that were passed and signed by the governor.⁷³ In Colorado, the Public Utilities Commission instructed a utility to use the Social Cost of Carbon in a sensitivity analysis for its Integrated Resource Plan,⁷⁴ which could result in a less carbon-intensive resource mix.

The availability of sources of cheap and plentiful renewable energy sources can create incentives for otherwise more conservative states to support clean energy policy. For example, the newly elected Republican governor of Iowa has

Comments to the Minnesota Public Utilities Commission in the Matter of the Further Investigation into Environmental and Socioeconomic Costs Under Minn. Stat. § 216B.2422, subdivision 3 1 (July 26, 2017), http://policyintegrity.org/documents/Policy_Integrity_comments_to_MN_PUC_re_SCC_072617.pdf [<https://perma.cc/7A87-PQEC>].

⁶⁹ See Hal Bernton, *Washington State Regulators Tell Utilities to Tally Social Costs of Carbon Emissions*, SEATTLE TIMES (May 9, 2018), <https://www.seattletimes.com/seattle-news/environment/washington-state-regulators-tell-utilities-to-tally-social-costs-of-carbon-emissions> [<https://perma.cc/E2C8-FFW4>].

⁷⁰ See Sanya Carley & Lincoln L. Davies, *Nevada's Net Energy Metering Experience: The Making of a Policy Eclipse*, BROOKINGS MOUNTAIN WEST, Nov. 2016, https://www.unlv.edu/sites/default/files/page_files/27/Brookings-Policy-Brief-NevadaNetEnergy.pdf [<https://perma.cc/JM4G-ZL3H>] (explaining changes in Nevada's green electricity incentive programs).

⁷¹ See Michelle Rindels & Felicia Mello, *'Blue Wave' Sweeps Democrats Back to Control in Nevada Legislature*, LAS VEGAS SUN (Nov. 9, 2016), <https://lasvegassun.com/news/2016/nov/09/blue-wave-sweeps-democrats-back-to-control-in-neva/> [<https://perma.cc/5C5B-36DW>].

⁷² See Assemb. B. 405, 79th Assemb., Reg. Sess. (Nev. 2017); Robert Walton, *Nevada Governor Signs Net Metering Bill*, UTIL. DIVE (June 16, 2017), <http://www.utilitydive.com/news/nevada-governor-signs-net-metering-bill/445177/> [<https://perma.cc/SS2P-BWKH>].

⁷³ See Riley Snyder, *Despite Major Vetoes, Lawmakers Advanced Pro-Renewable Energy Agenda*, NEV. INDEP. (June 19, 2017), <https://thenevadaindependent.com/article/despite-major-vetoes-lawmakers-advanced-pro-renewable-energy-agenda> [<https://perma.cc/FY2J-38VM>].

⁷⁴ See Colo. PUC, Decision No. C17-0316, *The Application of Public Service Company of Colorado for Approval of its 2016 Electric Resource Plan, Proceeding No. 16A-0396E*, 25, 30 (Mar. 23, 2017), available at https://www.dora.state.co.us/pls/efi/efi_p2_v2_demo.show_document?p_dms_document_id=863402 [on file with the *Ohio State Law Journal*] (explaining Colorado PUC's position on Social Cost of Carbon as an important tool for understanding and reducing the impacts of carbon emissions).

listed “developing the most innovative energy policy in the country” as one of her four key platforms, and wind energy makes up over 36 percent of state electricity.⁷⁵ Likewise, though the state of Texas has not formally incentivized wind production, the ready availability of wind has led it to make up over 14 percent of state electricity production.⁷⁶ Certain more liberal municipalities within conservative states have taken formal steps to incentivize clean energy production. For example, the municipal utility in Austin, Texas has implemented the Social Cost of Carbon in its resource planning process.⁷⁷ (Austin’s utility also supported the Clean Power Plan in the litigation challenging the rule.)⁷⁸

These examples of Red and Purple states, and their municipalities, moving forward on clean energy policy provide some information on the kinds of climate policies that can satisfy Republican constituencies, efforts that may be copied or built upon in jurisdictions with similar political dynamics. However, it is possible that the federal government might try to stymie these state efforts, which would hamper these states’ abilities to generate useful political information. States and the federal government share jurisdiction over electricity under the Federal Power Act, with state public utilities commissions addressing retail transactions and the Federal Energy Regulatory Commission addressing wholesale transactions.⁷⁹ The dividing line can be murky, especially with newer behind-the-meter resources like rooftop solar and energy storage.⁸⁰

Competitor generators often challenge state policies that favor other types of generators as being preempted by the Federal Power Act or violating the dormant commerce clause.⁸¹ These cases are often addressed without the

⁷⁵ See OFFICE OF THE GOVERNOR OF IOWA, GOALS, IOWA.GOV, <https://governor.iowa.gov/goals> [<https://perma.cc/E5VA-F8ED>]; *State Fact Sheets: Iowa Wind Energy*, AMERICAN WIND ENERGY ASSOCIATION, available at <http://awea.files.cms-plus.com/FileDownloads/pdfs/Iowa.pdf> [<https://perma.cc/Q5XY-HAUU>] (providing statistics on Iowa’s wind energy).

⁷⁶ See *State Fact Sheets: Texas Wind Energy*, AM. WIND ENERGY ASS’N, <http://awea.files.cms-plus.com/FileDownloads/pdfs/Texas.pdf> [<https://perma.cc/7SP4-3DM2>] (providing statistics on Texas’s wind energy).

⁷⁷ See *2017 Accomplishments*, SOLAR AUSTIN, <https://solaraustin.org/solar-austin-2017-accomplishments/> [<https://perma.cc/3WBZ-VHMK>] (“Solar Austin negotiated to have the environmental benefits added to the calculation [of Austin Energy] in the form of the social cost of carbon.”).

⁷⁸ See Mose Buchele, *Texas Power Players Sit Out Political Opposition to Clean Power Plan*, NPR NEWS (Apr. 16, 2016), <http://www.npr.org/2016/04/16/474462519/texas-power-players-sit-out-political-opposition-to-clean-power-plan> [<https://perma.cc/25XV-4LHK>].

⁷⁹ See Matthew R. Christiansen, *FPA Preemption in the 21st Century*, 91 N.Y.U. L. REV. ONLINE 6 (2016), available at http://www.nyulawreview.org/sites/default/files/NYU_LawReviewOnline-91-Christiansen_0.pdf [<https://perma.cc/Y2EM-8TVK>].

⁸⁰ See *id.* at 7.

⁸¹ See, e.g., Julia Pyper, *Why Court Victories for New York, Illinois Nuclear Subsidies Are a Big Win for Renewables*, GREENTECH MEDIA (July 31, 2017), <https://www.green>

involvement of the Federal Energy Regulatory Commission, such as recent cases in New York and Illinois federal courts that challenged those states' Zero Emission Credit programs that compensate nuclear energy production for its low-carbon attributes.⁸² In both of those cases, the state programs were upheld against preemption and dormant commerce clause challenges at the district court level, without the involvement of the Federal Energy Regulatory Commission.⁸³ The Federal Energy Regulatory Commission filed an amicus curiae brief in the Seventh Circuit, arguing that the Federal Power Act does not preempt the Illinois Zero Emission Credit program, and the Seventh Circuit upheld Illinois's program.⁸⁴

However, the Federal Energy Regulatory Commission might change its position in future cases and could have the option of ruling that similar state policies impermissibly interfere with wholesale markets and are, therefore, preempted. A ruling of this sort would carry independent force, and likely also deference from a court deciding the issue. If the Federal Energy Regulatory Commission decides to travel down this path, that could interfere with the ability of states to pursue clean energy policy and generate useful political information about how to do so.

V. CONCLUSION

Although the federalist structure of the U.S. system creates sites of political resistance and contestation during a dark time in environmental politics,⁸⁵ in cases where collective action is needed, the national government remains indispensable. Some states, especially Blue states, continue to forge ahead on climate and clean energy policy in the face of regulatory rollbacks at the federal level. But these efforts face headwinds in the form of resistance from the federal government. Even worse, development on these policies has slowed or stopped in many Red and Purple states under the Trump Administration. This represents a lost opportunity to develop valuable political information about how to productively approach climate policy in more conservative areas. The lack of experimentation on climate policy in conservative states means that, when a moment of national policy making on climate again arises, the Republican party is likely to be short on proactive ideas. Without a policy program that

techmedia.com/articles/read/nuclear-subsidies-court-new-york-illinois-renewable-energy#gs.oKgSQGM [https://perma.cc/7W4C-5R9P] (discussing various lawsuits over federal regulation of electricity).

⁸² See *id.*

⁸³ See *id.*

⁸⁴ Brief for the United States and the Federal Energy Regulatory Commission as Amici Curiae in Support of Defendants-Respondents and Affirmance at 27, *Village of Old Mill Creek v. Star* (Nos. 17-2433 & 17-2445) (“[T]he Court should conclude that the Federal Power Act does not preempt the Illinois ZEC program.”); *Elec. Power Supply Ass’n v. Star*, Nos. 17-2433 & 17-2445, 2018 WL 4356683, at *2 (7th Cir. 2018).

⁸⁵ See Bulman-Pozen, *supra* note 14.

acknowledges and responds in a meaningful way to the reality of climate change, Republicans may again find themselves in a reactive and oppositional mode, leading either to a repeat of the policy failures of the past, or policy progress that lacks bipartisan support. Either way, the track record of halting, easily reversed, and extremely limited action on climate change is, unfortunately, likely to continue.