

**FROM THE GREENHOUSE TO THE POORHOUSE:
Carbon Emissions Control and the Rules of Legislative Joinder**
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Pending legislation to address carbon emissions would include large subsidies for existing emitters. These subsidies make little sense economically or politically. Worse, they divert resources needed to address two crucial issues that the proposed legislation largely ignores: the impact of raising carbon costs on low-income people and the massive structural federal deficit.

A carbon tax or cap-and-trade system would increase costs substantially not only for transportation but for food and housing. With poverty rising even before the current economic downturn, these price increases' consequences could be dire. The structural deficit will require deflationary tax increases or spending cuts. Combining carbon regulation with these measures could do severe damage.

Although few challenge their merits, these proposals may nonetheless fail if a consensus emerges that they are extraneous to climate change legislation. Overly complex legislation often does bog down, and we lack coherent normative principles for "issue joinder" in public policy debates. Such principles can be derived and counsel addressing both low-income subsidies and deficit reduction as part of climate change legislation.

Another challenge is finding efficient means to deliver subsidies without disrupting incentives to conserve. Energy companies are likely to divert proposed allocations for this purpose to writing off bad debt. Funding energy assistance programs similarly will crowd out existing resources. Prior piecemeal efforts to address high energy costs provide invaluable lessons on designing a system to offset rising carbon costs without distorting consumers' incentives. The large majority of proceeds not needed for low-income subsidies should be reserved for deficit reduction.

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I. Introduction

In legislation as in litigation, the outcome springs from two separate choices. First, the system must determine which issues will be joined for decision. Second, it must decide them. In both legislative and judicial law-making, the second of these issues receives far more attention. Just as we only occasionally note what claims or parties the trial court excluded from a case that became prominent in an appellate court, we focus on the final legislation enacted, or perhaps on the bill defeated, not on the process by which that particular set of issues came together as a single bill.

This focus on ultimate decisions in part reflects their more obvious finality. Their binary character, and the more accessible substantive grounds that ostensibly drive them, also contribute to the tendency to attend to final decisions at the expense of those formulating the issues for resolution. Finally, courts and legislatures typically handle questions of which issues to join for decision relatively inconspicuously: through dry motion practice in litigation and in backroom negotiations legislatively.

Issue and party joinder in litigation results from both strategic considerations and normative rules. Parties seek or oppose joinder to confuse or focus a jury, to broaden or simplify discovery, to exhaust opponents' resources or to husband their own, and for a host of other strategic reasons. Procedural rules and trial judges' discretion allow or restrict joinder based on normative considerations.

Party joinder in legislatures is controlled constitutionally: except in rare cases where a member's qualifications or misconduct are at issue, the identities of the parties are as fixed as those of the adjudicators within the legislative process – because the two groups are the same. Legislative issue joinder, however, reflects the same mix of parties' strategic judgments and the system's normative concerns. Legislators and interest groups advising them make strategic judgments about which aggregation of issues will best advance their affirmative or negative agendas. The system imposes normatively driven constraints on their ability to pursue their chosen strategies. As with litigation, these external constraints come from a combination of explicit rules and exercises of discretion. The mix of rules and discretion varies by legislative body: many state legislatures have rules effectively limit each bill to a single object while others either lack or ignore such rules. Congress generally allows particularly freewheeling issue joinder. This offers numerous means for burdening opponents' proposals with unpopular or distracting riders. As a result, a common way of favoring a particular substantive result, such as deficit reduction or closing military bases, is to establish special rules limiting the issues that may be joined to such initiatives.

A paucity of rules imposing *ex ante* principles for legislative issue joinder is particularly important because discretion over those matters is exercised not by impartial judges but rather by the same opinionated legislators that will ultimately decide the issue. Debate in the broader political arena, however, can circumscribe legislators' ability to serve their own strategic interests on joinder questions. For example, voters may punish legislators for voting against joinder

of a proposal they favor not understanding joinder's potential to bring down an underlying bill that they also support. And in the broader political arena, no formal rules constrain joinder of either parties or issues. Voters and even journalists are far less savvy about how alternative aggregations of issues will influence ultimate outcomes. The norms that guide their judgments about which interests, and which claims, are sufficiently related to deserve to be heard as part of a particular debate therefore can have a powerful impact on the ultimate policy outcomes.

Many of the same norms that limit joinder in litigation also guide it in the legislative process. Both arenas permit joinder to avoid duplicative and inconsistent decision-making but seek to guard against a problem becoming so cumbersome that it delays resolution of the core dispute or risks confusing the decision-maker.¹ Some may conceptualize this inquiry in essentially utilitarian terms: finding the degree of aggregation that maximizes economies of scale. Others, however, temper these calculations with judgments that some claims have an intrinsic right to be joined with closely related claims regardless of the consequences.

The myopic focus on ultimate decisions renders students of legislation oddly flatfooted at crucial times. With legislation, as opposed to judge-made law, playing an ever more dominant role in the U.S. legal system, the inability to understand principles of legislative joinder is the rough equivalent of being unable to anticipate the precedential implications of a new common law or constitutional decision. For example, a fundamental change in the politics of an issue may make clear that *some* legislation is likely. Without understanding legislative joinder, however, observers cannot begin to estimate the likelihood that this substantive consensus will produce a broad response, a narrow response, or unexpected gridlock: will agreement on large issues carrying along a host of more contestable measures on smaller points, will the legislature insist on keeping the legislation "clean" of distracting side issues to ensure quick approval of a narrow initiative, or will enough disputed side issues be joined to fracture the apparent majority for the underlying initiative and yield no legislation at all.

The lack of a coherent theory of legislative joinder also hobbles judicial interpretation of statutes. Most theories of interpretation begin with inquiries into actual or hypothetical intent. Commonly, the court will assert that those that enacted the statute in question likely had this or that intent. For example, Einer Elhauge posits that the polity enacting a statute would want interpreting courts to consider legislative history because that would maximize the polity's influence on subsequent public policy.² He assumes that a court can determine which of the possible interpretations would have been most likely to have been enacted,

¹An additional concern in legislative joinder that is absent in litigation is that decisions are on an all-or-nothing basis. Legislative joinder thus can force a substantive decision without majority support.

²EINER ELHAUGE, STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION 116 (2008).

had they been presented to the legislators that created the statute at issue.³ Others have made similar claims.⁴ Yet as Kenneth Arrow demonstrated, under many common arrangements of preferences, this question may be unanswerable without knowing the order in which the proposals come up for decision. Which choice a legislature would have made even more commonly depends on joinder decisions – especially when the actual legislation relied on strategic votes from legislators that did not support the disputed provision at all.

New Textualists, most prominently Justice Scalia, disparage this inquiry on several grounds, including the impossibility of ascertaining a unitary intent among the scores or hundreds of people whose assent was required to enact the legislation and the risk that judges will disguise their own willfulness as a search for legislative intent.⁵ Yet in New Textualists’ search for what the words of a law mean, they consider a kind of hypothetical intent: what would someone using this language mean.⁶ Although this inquiry does not depend on what a particular legislature meant on a particular occasion, it nonetheless relies on a sense of how the legislature *typically* speaks. Thus, for example, a New Textualist may find an interpretation “wrong if it does not fit with the use of [that term] throughout the Act.”⁷ That implicitly assumes a joinder process that produces a coherent whole. Textualist and non-textualist judges alike may read statutes on related subjects *in pare materia*, applying interpretations from one to another.⁸ Yet if the two are separate because legislative joinder rules prevented them from being enacted together, merging them at the interpretive stage effectively defies the legislature’s choice.

Perhaps the most famous modern example of the pivotal role of joinder is the prohibition of employment discrimination on the basis of sex in the Civil Rights Act of 1964. Looking at the overall political climate at the time, virtually no one would believe that this country was prepared to enact such sweeping legislation. In fact, the ban on sex discrimination may never have had sincere majority support in Congress. It entered, and remained in, the legislation on the strength of a coalition of sincere supporters – a distinct minority – and virulent racists, who saw the sex discrimination ban as a “poison pill” whose joinder could bring down the legislation as a whole.⁹ The lack of majority support for the provision

³*Id.* at 119-21.

⁴*United Steelworkers of America v Weber*, 443 US 193, 227 (1979)(Rehnquist, C.J., dissenting); Roscoe Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379, 381 (1907).

⁵ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 18 (1997).

⁶*Id.* at 32.

⁷*Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 723 (1995) (Scalia, J., dissenting).

A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section to produce a harmonious whole. Thus, it is not proper to confine interpretation to the one section to be construed.

2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, *STATUTES AND STATUTORY CONSTRUCTION* § 46:5, at 189-201 (7th ed. 2007).

⁸*Branch v. Smith*, 538 U.S. 254 (2003).

⁹CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE*

on the merits subsequently has posed severe challenges for intentionalist judges seeking to interpret it.¹⁰

More recently, opponents of a bankruptcy overhaul with overwhelming congressional support (reflecting the credit card companies' campaign contributions) managed to stall action for several years in large part by joining abortion to the debate. The opponents demanded that the legislation deny bankruptcy relief to damage awards against persons obstructing access to abortion clinics. Once they won joinder, the two sides in the abortion debate each became determined not to allow the bill to pass without a treatment of the issue that they favored.

The failure to account for legislative issue joinder also calls into question the assumptions about institutional competence that underlie much contemporary constitutional theory. Even if one believes that the legislature is better at making certain kinds of ultimate decisions once properly framed,¹¹ if its joinder rules prevent the pivotal choices from coming up for a vote, those superior capacities may never come to the fore and hence be irrelevant to the extent of judicial deference properly afforded. Distortions resulting from joinder rules, like those flowing from the disproportionate leverage of concentrated interest groups,¹² can prevent the median legislator's will from prevailing and, for analogous reasons might justify a more searching form of judicial review.¹³ Indeed, because problematic joinder rules defeat rather than merely distort the will of the majority, they may be more compelling candidates for offsetting reductions in judicial deference.¹⁴

1964 CIVIL RIGHTS ACT 115-16 (1985).

¹⁰See *Johnson v. Transportation Agency, Santa Clara County* 480 U.S. 616, 629 (1987)(relying of congressional intent with regard to race as a guide to resolving gender case)..

¹¹See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 56-58 (1980)(describing the differential institutional competence theory); ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 224-28 (1962)(seeing the legislature as aggregator of public opinions); BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 173 (1921)(warning judges to maintain their separate functions); see HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* 88-94 (William N. Eskridge, Jr. & Philip P. Frickey, eds. 1994)..

¹²MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 11-16 (2d ed. 1971).

¹³Cass R. Sunstein, *Interest Groups in American Public Law*, 38 *STAN. L. REV.* 29 (1985).

¹⁴The current health care reform debate offers a case in point. At this writing, the median senator probably prefers a plan that emphasizes regulating the private insurance market over direct state provision of health insurance through a "public option." The inability to marshal sixty votes to defeat a potential Republican filibuster, however, may force the Democratic leadership to invoke special "reconciliation" procedures that would disallow filibusters and allow passage with fifty-one votes. The joinder rules for reconciliation, however, disallow most regulatory provisions, allowing only tax and spending changes. 2 U.S.C. § 644(b)(1)(A) (2008). This will effectively force the legislation to rely on public health insurance by taking regulation in the private market off the table. To be sure, such legislation will only pass if it wins majorities in both houses. But the result will be more statist than most Members of Congress likely would prefer. One could reasonably ask whether that result deserves the same judicial respect as an unconstrained majority choice might.

Joinder difficulties defeated health care reform on its last time in the public spotlight, in 1994. The congressional Republican leadership opposed Democratic proposals; many believed they wanted no legislation at all. Given the broad public support for health care reform, however, they had to tread lightly. MICHAEL B. KATZ, *THE PRICE OF CITIZENSHIP* 266-73 (2001). As a result,

Rarely have the legal, political, and ethical difficulties surrounding legislative joinder become more important than in the current climate change debate. The election of a president committed to action on climate change, with apparently comfortable congressional majorities, led many to believe that legislation's enactment is assured. A close vote in the House and delayed consideration in the Senate have exposed the political difficulties of the issue. What has remained largely unappreciated is how the scope of legislative joinder will determine the content and long-term consequences of that legislation.

In particular, three important classes of claims have competed for inclusion in climate change debates and legislation. First, current carbon emitters have sought compensation for the increased costs that emissions reductions will impose on them. Second, advocates for low-income consumers have sought offsets for higher prices to avoid being driven deeper into poverty. And third, persons across the political spectrum have advocated for using the proceeds of emissions permit sales to reduce the soaring federal deficit. Although a wealth of polling shows the electorate has by far the strongest feelings about reducing the deficit, that is the one set of claims whose joinder with the climate change debate seems to have been most decisively rejected. By contrast, compensating existing emitters, the set of claims with the greatest potential to undermine the core goal of carbon emission reductions and the one that, at least as applied to industrial emitters, likely has the least public support, has taken a dominant position in the debates and legislative process. Some of this is a familiar public choice tale of the effectiveness of small, concentrated interest groups, particularly those with enormous wealth. Another part of the explanation, however, lies in unarticulated conceptions of which kinds of claims are or are not too tangential to merit inclusion in a particular debate. Understanding how these conceptions regulate legislative joinder is crucial both to improving environmental, anti-poverty, and fiscal policy in the near- and long-term and to developing a theory of legislative joinder applicable across substantive areas.

Receiving huge allocations of carbon permits free of charge would provide an enormous windfall to these energy companies, far exceeding any losses they might experience due to the reductions in permissible emissions. These allocations also have largely crowded out distributional and fiscal concerns. Policies increasing the cost of energy will disproportionately affect low-income people, who pay more for energy costs as a proportion of their budgets than more affluent households. Some prominent proposals for regulating climate change also include large subsidies for existing carbon emitters; the vast majority of

several Republicans, including the House and Senate Minority Leaders, introduced legislation that would expand health insurance coverage far beyond what current law then or now provided. Overwhelming majorities of representatives and senators co-sponsored at least one sweeping reform bill. The Democratic leadership's inability to formulate workable joinder principles, rather than any substantive disagreements, prevented meaningful action on the floor of either chamber and resulted in an outcome, preservation of the status quo, more restrictive than almost any Members preferred.

these subsidies would accrue to the relatively affluent owners of these companies, further exacerbating the regressive impact.

In addition, climate change regulation will have major fiscal implications. Even after the current recession-induced surge in the deficit subsidies, current policies condemn the United States to a long-term fiscal imbalance estimated at around three percent of its gross domestic product (GDP). A gap of this size cannot be closed without considerable economic pain.¹⁵ Emissions reduction, through a carbon tax or an auction of carbon emissions permits, is the one major opportunity available for closing a large part of that gap that would structure that pain in a socially constructive manner. Conversely, the economy may suffer serious harm if it must absorb *both* the disruption of carbon emissions curbs that do not reduce the deficit *and* separate deficit control legislation. Restraining environmental waste while committing fiscal waste would be a grim irony indeed.

This article is a first, modest step at filling these important gaps. It contends that the climate change debate needs to be expanded from its current exclusive focus on environmental and business concerns to consider distributive justice and fiscal policy. In particular, it criticizes proposals to give away valuable emissions permits as the irresponsible product of industry's rent-seeking. Instead, it urges that any permitting regime should auction off emissions permits, devoting the proceeds to aid to low-income people, basic research likely to lead to alternative energy sources and greater energy efficiency, and reducing the structural federal deficit. In the process, it develops principles for delineating the bounds of other social policy debates with potentially complex, far-flung interactions.

Part II provides an overview of the politics and economics of climate change policy. It does not rehearse the scientific arguments for action: that has been done elsewhere with far more power and eloquence than this essay could hope to match. It does, however, highlight the distributional and fiscal components of the climate change problem that public discourse to date has largely ignored. It then demonstrates that the heavy corporate subsidies in emerging climate change proposals are neither politically nor economically justified.

Although some environmental groups have shown a laudable sensitivity to distributional issues, many have argued that any broadening of the terms of the debate increases the risk of impasse and failure. And few environmentalists have shown much willingness to admit fiscal concerns to the debate. Starting from the premise that the pending arrangement is not inevitable, Part III seeks to derive principles for determining when additional constraints, such as the distributive and fiscal concerns offered here, should be admitted to a policy debate over the existing participants' objections. These principles must find a plausible middle

¹⁵As Michael Boskin, Chairman of the Council of Economic Advisors to the first President Bush notes, "[t]he impact of raising taxes for budget balance could be severe." Michael J. Boskin, *Economic Perspectives on Federal Deficits and Debt*, in *FISCAL CHALLENGES: AN INTERDISCIPLINARY APPROACH TO BUDGET POLICY* 152 (Elizabeth Garrett et al. eds., 2007) [hereinafter Boskin, *Federal Deficits*].

ground between heedless, narrow-minded policy-making that causes serious ancillary damage to other important social values, on the one hand, and miring important social initiatives in the complexities of extraneous issues, on the other. Applying these principles to the present debate, it finds strong reasons to include distributional and fiscal considerations in the climate change debate.

Part IV explores the extent to which climate change regulation can address this country's long-term fiscal imbalances. It also offers principles to guide the design of a program to offset higher energy costs' impact on low-income people. It then draws lessons from existing anti-poverty programs to suggest specific terms for such a program.

Part V concludes briefly.

II. Climate Change Policy in Context

To date, most media coverage of the climate change debate has focused on science. This choice reflects in part industry's and the Bush Administration's dogged denial of the broad scientific consensus on the issue and in part the availability of compelling images: collapsing ice shelves, vanishing islands, and anxious polar bears. The complexities of formulating a policy to reduce carbon emissions may be less photogenic but are equally pivotal to achieving change. This Part provides a broad overview of climate change regulation, focusing on those aspects producing its distributional and fiscal effects. Section A describes the two main competing regulatory structures for reducing carbon emissions. Section B examines how restricting carbon emissions could exacerbate the growing income inequality in the U.S. It also assesses the large, structural federal budget deficit. Section C then explores and rejects economic, political, and moral arguments for including large subsidies for current emitters in climate change legislation, as most current proposals do.

A. Market-based Emissions Reduction Legislation

In the past, when government wanted to control consumption of a scarce commodity, it often would resort to rationing. It commonly imposed price controls to prevent "profiteering" while limiting the quantities individuals and businesses could purchase with ration cards. This put the government into the costly, inefficient, and thankless position of allocating consumption. It also spawned illicit markets, with high prices, in which the commodity could be purchased in excess of a consumer's assigned ration. This was inevitable because the controlled prices kept demand for the commodity higher than the available supply.

Apart from a few small groups that regard excessive carbon emission as a moral wrong that should not be licensed, no one is proposing to reduce carbon emissions through old-fashioned rationing. Instead, all major plans would discourage consumption through price increases. This could be arranged in either of two ways. First, the government could tax carbon emissions directly. Second, the government could require permits for emissions and set a finite cap on the number it would issue. Recipients of these permits then could sell them to others desiring to generate more emissions than their present stock of permits would allow. In this "cap-and-trade" system, the government would specify the

total amount of emissions but the market would determine how those emissions would be distributed, with the most economically productive users presumably outbidding and supplanting low-value emitters.

A cap-and-trade system can be designed to mimic a carbon tax. Both systems reduce consumption while allowing the market to clear by raising the cost of emitting (and of the goods and services an emitting activity produces) to reduce demand. If the government auctions permits in a cap-and-trade system, the proceeds of those price increases will come to it to roughly the same degree they would under a carbon tax. Economic models can project the level of emissions reductions a carbon tax of a given amount is likely to achieve; a cap-and-trade system could issue the same number of permits. Regulators can approximate the carbon tax's flexibility by auctioning more permits when the price of its initial offering exceeds one specified level and by refusing to sell even the full intended number of permits should the auction price fall below another set figure.

A carbon tax has significant advantages over a cap-and-trade regime as a strategy for addressing climate change. It is likely to have lower administrative costs and raise fewer definitional issues. It also may be less subject to evasion: the marginal savings from avoiding the carbon tax will be lower, and hence create weaker incentives for fraud, than those of unpermitted emissions. It would provide continuous pressure for further emissions reductions rather than depending on an arbitrary decision about how many permits to issue. And it would allow emissions to rise during economic booms, when opportunities for highly productive activities abound, with offsetting reductions during recessions.

Nonetheless, the political fall-out from President Clinton's failed 1993 BTU tax proposal,¹⁶ and the Republican Party's strong anti-tax rhetoric, make carbon taxes less attractive to many politicians. The 2008 campaign proposals of John McCain and Hillary Clinton for a gas tax "holiday" during peak driving months illustrates the sensitivity of carbon taxes: both had among the strongest climate change proposals in their respective parties, yet price increases far less than those needed for meaningful emissions reductions spurred them to propose cutting the one modest carbon tax we have. Not surprisingly, then, cap-and-trade proposals have heavily dominated the debate to date.

B. Distributional and Fiscal Consequences of Emissions Controls

With the possible exception of sweeping health care reform, climate change control is likely to be the most important economic legislation in at least a generation. It will leave no sector of the economy untouched. This already has produced a flurry of rent-seeking and special-interest pleading. Carbon emissions regulation also will profoundly affect three aspects of macroeconomic performance: growth, the distribution of income and wealth, and fiscal balance. Only the first of those has received prominent attention to date. Subsection 1 identifies the peculiar vulnerability of low-income people and people of color to

¹⁶Clinton proposed to tax energy consumption, as measured by British Thermal Units (BTUs). After pressing House Democrats to cast politically unpopular votes in favor of this proposal, Clinton dropped it in the Senate. WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 485-508 (4th ed. 2007).

increases in carbon costs. Subsection 2 describes the severe long-term imbalance in the federal budget.

1. Emissions Restrictions' Impact on Low-Income People and People of Color

The gap between rich and poor in the United States is growing rapidly. This can be seen from changes at both ends of the income scale. The top one percent of households' income rose 61.8 percent during the last economic expansion, from 2002 to 2007; during the same four years, the income of the bottom ninety percent of households rose just 3.9 percent.¹⁷ That left the top one percent with the highest share of national income since 1928: fully one in five dollars of income went to these households.¹⁸ More than three-quarters of all income gains in the country went to the top ten percent of households.¹⁹ Income inequality has been growing for the past three decades, in sharp contrast to the thirty years after World War II, during which income gains were widely shared and inequality dropped.

Although poverty commonly drops during booms and rises during slowdowns, the poverty rate rose during 2007, the last year of the recent economic expansion. That year, 12.5 percent of the U.S. population, or 37.3 million people, lived in poverty.²⁰ The poverty rate for children was eighteen percent, with almost eight percent living below *half* of the poverty line.²¹ Fully one in five people living in a family with pre-school children was poor.²² The poverty rates for African Americans and Latinos both exceeded twenty percent.²³ More than fifty million people lived below 125% of the poverty line.²⁴ Last year, as the recession set in, the poverty rates jumped to 13.2 percent,²⁵ with almost fifty-four million people living below or near the poverty line.²⁶

Already, disproportionate energy costs are taking a heavy toll on low-income families. Families forced to prioritize heating bills are cutting back on food and other necessities.²⁷ When energy prices rose 42.1% from 2000 to 2005, families

¹⁷AVI FELLER & CHAD STONE TOP 1 PERCENT OF AMERICANS REAPED TWO-THIRDS OF INCOME GAINS IN LAST ECONOMIC EXPANSION: INCOME CONCENTRATION IN 2007 WAS AT HIGHEST LEVEL SINCE 1928 (2009), *available at* <http://www.cbpp.org/files/9-9-09pov.pdf>. All figures are adjusted for inflation.

¹⁸*Id.*

¹⁹*Id.* at 2.

²⁰CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, INCOME, POVERTY AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2007, at 13 tbl.3 (2008), *available at* <http://www.census.gov/prod/2008pubs/p60-235.pdf>.

²¹*Id.* at 16 tbl.4.

²²*Id.*

²³*Id.*

²⁴*Id.*

²⁵CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, INCOME, POVERTY AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2008, at 14 tbl.4 (2009), *available at* <http://www.census.gov/prod/2009pubs/p60-236.pdf>.

²⁶*Id.* at 17 tbl.5.

²⁷CHILDREN'S SENTINEL NUTRITION ASSESSMENT PROGRAM, FUEL FOR OUR FUTURE: IMPACTS OF

with annual incomes between \$15,000 and \$30,000 reduced their food spending by ten percent.²⁸ High energy costs have wide-ranging impacts on low-income families' well-being: children in homes where energy costs consume a high share of income are more likely to be in poor health, to have a history of hospitalization, to be at risk for developmental problems, and to have insufficient food.²⁹

Most proposals to reduce carbon emissions have regressive income as well as cost implications. A carbon tax, or an equivalent carbon permitting system, would raise the costs of some forms of economic activity, such as basic manufacturing, that disproportionately provide relatively unskilled jobs for which low-income people can compete. Higher carbon costs would have much more moderate effects on high-skilled workers and, indeed, would lead to job growth in many engineering and related fields.

In addition, research finds that African-Americans are especially vulnerable to increases in the costs of carbon emissions. Although African Americans as a group generate about one-fifth less per capita carbon emissions than whites,³⁰ on average they spend a higher proportion of their incomes on energy than does the rest of the population.³¹ Part of the reason is that energy costs consume a larger share of the incomes of impoverished households and, as noted, African Americans are much more likely to be poor.³² Even controlling for income, however, African Americans spend a higher share of their incomes on energy.³³ This may reflect wealth inequality, which is far greater even than income inequality:³⁴ African Americans are far more likely than whites to rent, and landlords are far less likely than homeowners to invest in weatherization and energy-saving appliances.³⁵

2. The Long-Term Fiscal Imbalance

Before the recent recession and financial crisis, the Bush Administration made much of reports claiming that the budget deficit was declining. The notion that the country was running *any* deficit so far into an economic recovery is troubling. Now that the worst recession since the 1930s has driven down revenues and led to automatic and discretionary spending increases to stimulate the economy, the deficit has reasserted itself at the center of public debates. According to the bipartisan Concord Coalition, balancing the budget in 2016 while continuing the

ENERGY INSECURITY ON CHILDREN'S HEALTH, NUTRITION, AND LEARNING 3 (2007) [hereinafter C-SNAP, FUTURE FUEL].

²⁸*Id.* at 2.

²⁹*Id.* at 4.

³⁰CONGRESSIONAL BLACK CAUCUS FOUNDATION, AFRICAN AMERICANS AND CLIMATE CHANGE: AN UNEQUAL BURDEN 68-69 (2004), available at http://www.cbcfinc.org/pdf/AAClim_chg_final.pdf [hereinafter CBC FOUNDATION].

³¹*Id.* at 79.

³²*Id.* at 36.

³³*Id.* at 70.

³⁴MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 91-125 (1995).

³⁵CBC FOUNDATION, *supra* note 17, at 74.

2001 and 2003 tax cuts would require cutting Social Security by 43%, cutting Medicare by 54%, cutting defense by two-thirds, or cutting every other program in the federal budget—from aid to education to food stamps to national parks to overseas embassies—by an average of 30%.³⁶

More recent estimates from the Office of Management and Budget (OMB) and CBO show budget deficits rising to near-record levels due to the economic slowdown.³⁷ Governments choose to run deficits during downturns to stimulate the economy, but much of these deficits result from policies adopted long before the recession rather than deliberate counter-cyclical interventions.

If anything, the longer-term budget outlook is even worse. Politicians wax dour about the fiscal impact of the baby-boomers' retirement, yet Social Security contributes a relatively modest amount to the long-term deficit picture, rising from the current four percent of gross domestic product (GDP) to a bit more than five percent by 2030, after which it stabilizes.³⁸ Far more serious is the impact of health care inflation on Medicare and Medicaid spending.³⁹

Deficits of this size are unsustainable. At some point, investors become unwilling to buy any more public debt, forcing the government to finance its operations by printing money and igniting inflation.⁴⁰ Even before that point is reached, government deficits crowd out private investment by consuming the available capital supply and slow the economy by raising interest rates.⁴¹

Any measures to narrow the deficit would increase drag on the economy. In addition, taxes inevitably have behavioral effects, raising the costs of some activities relative to others.⁴² Most affect socially desirable behavior, such as work and savings. A carbon tax, or an auction of emitting permits, offers a rare revenue-raising opportunity whose behavioral effects are desirable. It thus would mitigate the deflationary effects of deficit reduction better than other available means. These effects are not wholly benign: as noted above, they would dampen economic activity and cost jobs in many industries. Raising the cost of carbon emissions nonetheless is far superior to other plausible means of reducing the deficit.

By contrast, if the federal government spends or rebates the proceeds of a carbon tax or permit auction—either explicitly by giving away emitting permits at below-market rates—it will have to layer on an additional round of taxes or spending cuts to cope with the deficit. The Republican Party's defining opposition to taxes, and the Democratic Party's skittishness on the subject, make

³⁶CONCORD COALITION PLAUSIBLE BUDGET OUTLOOK: FISCAL YEARS 2007-2017 (2007); CENTER ON BUDGET & POL'Y PRIORITIES, BACKGROUND ON THE FEDERAL BUDGET AND THE RETURN OF BUDGET DEFICITS 8 (2007).

³⁷CONGRESSIONAL BUDGET OFFICE, THE BUDGET AND ECONOMIC OUTLOOK: AN UPDATE (August 2009).

³⁸CENTER ON BUDGET & POL'Y PRIORITIES at 11.

³⁹CONGRESSIONAL BUDGET OFFICE, THE LONG-TERM OUTLOOK FOR HEALTH CARE SPENDING (2007), available at <http://www.cbo.gov/ftpdocs/87xx/doc8758/11-13-LT-Health.pdf>.

⁴⁰Boskin, *Federal Deficits*, *supra* note 15, at 153.

⁴¹*Id.* at 154-55, 159-62.

⁴²*Id.* at 161.

a second round of tax increases unlikely. And if the proceeds of carbon emissions regulation are to be spent at the same time other spending is being cut to reduce the deficit, the net effect will be to shift spending from existing programs to those climate change legislation favors.

This country's massive structural deficits have important distributional implications. In the simplest terms, deficits transfer wealth from the nation as a whole to bondholders, a disproportionately affluent group. More broadly, low-income children's lack of political power typically means that programs that serve them suffer disproportionately in budget cut legislation;⁴³ budgetary procedures ensuring that this is the case have won bipartisan support.⁴⁴ One of the major political priorities is doggedly defending almost all tax preferences for the affluent; its opponent supports many of those tax preferences, too, and is far more ambivalent and selective in its defense of spending programs that benefit low-income people. The one large new tax sometimes discussed in the context of deficit reduction—a consumption or value-added tax—would be sharply regressive. This dynamic ensures that, if left alone, low-income people are likely to be asked to pay a disproportionate share of the costs of deficit reduction.

Large deficits also transfer wealth between generations. The standard political rhetoric about “burdening our children with debt” is too simplistic;⁴⁵ of course we also bequeath them all of the good things in our civilization. Accumulating debt so that we can cure disease or make other productive social investments is entirely consistent with a conscientious regard for future generations; most obviously, future generations depend upon us for their educations, which are costly.⁴⁶

Passing on huge debt incurred to finance contemporary consumption is another matter. Our forebears produced much of our current wealth, likely intending it to benefit all of their successors rather than just us. Leaving future generations an economy incapable of rewarding their efforts to the same degree that it did ours breaches a fiduciary duty we owe to our descendants on behalf of our ancestors. Many environmentalists rely on similar arguments of intergenerational equity to criticize wasteful exploitation of natural resources.⁴⁷

C. The Weak Case for Large Corporate Subsidies

The stampede to include large corporate subsidies in any climate control legislation is unwise and unnecessary. This section shows why. Subsection 1

⁴³ROBERT GREENSTEIN, CENTER ON BUDGET & POL'Y PRIORITIES, HOUSE CHILD CREDIT LEGISLATION NOT FISCALLY RESPONSIBLE: BILL MORE LIKELY TO HARM CHILDREN THAN TO ASSIST THEM 3 (2003), available at <http://www.cbpp.org/6-11-03tax.pdf>.

⁴⁴ROBERT GREENSTEIN & ISAAC SHAPIRO, CENTER ON BUDGET & POL'Y PRIORITIES, PUTTING THEIR CARDS ON THE TABLE: SENATE BUDGET BILL INDICATES INTENTION TO PAY FOR TAX CUTS BY SWEEPING CUTS IN PROGRAMS FOR MIDDLE- AND LOW-INCOME HOUSEHOLDS (2006).

⁴⁵Boskin, *Federal Deficits*, *supra* note 15, at 165.

⁴⁶*Id.* at 164.

⁴⁷Michael Wallack, *The Minimum Irreversible Harm Principle: Green Inter-Generational Liberalism*, in LIBERAL DEMOCRACY AND ENVIRONMENTALISM: THE END OF ENVIRONMENTALISM? 167, 177 (Marcel Wissenburg & Yoram Levy eds., 2004) [hereinafter ENVIRONMENTALISM'S END]; EDWARD A. PAGE, CLIMATE CHANGE, JUSTICE, AND FUTURE GENERATIONS 50-96 (2006).

rebuts the perceived political inevitability of including large corporate subsidies in climate change legislation. Subsection 2 demonstrates that compensating business owners for their losses due to carbon emissions regulation is neither possible nor desirable and that any attempt to do so could seriously distort laudable economic signals.

1. The Politics of Corporate Subsidies

Including large corporate subsidies in climate change legislation is politically unnecessary. Although opponents of regulating greenhouse gases will seek to retain leverage over the final policy by refusing to concede formally, they have decisively lost the public debate, and they know it. They do not need to be bought off: no meaningful climate change regulation has been possible under President Bush, but both of his possible successors are committed to finding a way to come to grips with this issue. In this regard, a crucial distinction exists between issues that can only be addressed during fleeting periods of public salience—such as poverty, which quickly dropped from the public consciousness after Hurricane Katrina—and those with an entrenched place in the public agenda. Because global warming’s effects are so numerous and widespread, and because they implicate numerous widely shared middle-class values, it faces little risk of receding from the political agenda. The political explosion that rising gasoline prices ignited counsels a measured phase-in of the new regulatory regime, but it also is likely to transform attitudes toward conservation: within a few years, the number of voters with Hummers and SUVs will shrink to political insignificance.

Procedurally, proponents of climate change regulation have little need to fear obstructionism from a minority loyal to rent-seeking business interests. Thus, they need not offer business subsidies to purchase the supermajority in the Senate that other progressive initiatives commonly require. Once they have cost estimates from CBO and the Joint Committee on Taxation for climate change legislation—without corporate subsidies—a majority supporting that legislation can reflect those increased revenues in the targets in the congressional budget resolution.⁴⁸ They similarly can include a “reconciliation instruction” in the budget resolution that requires the committees with jurisdiction over the legislation to produce additional revenues in that amount.⁴⁹ The budget resolution is immune to Senate filibusters and requires only a simple majority to pass.⁵⁰ Once such a budget resolution is adopted, any amendments that would lower the legislation’s revenue yield below the specified levels by diverting funds to subsidize emitters would be subject to a point of order that only sixty

⁴⁸2 U.S.C. § 632(a)(2), (b)(2) (2006).

⁴⁹*Id.* § 641(a)(2).

⁵⁰*Id.* § 636(b)(1). This discussion focuses on the Senate because only its rules permit filibusters that require a supermajority to extinguish. The House leadership can limit debate by special rule, passing both the rule and the underlying legislation by a simple majority. Except in the case of the budget resolution and budget reconciliation legislation discussed in the text, however, Senate rules almost always allow senators to postpone votes indefinitely with extended debate, which require sixty senators’ votes to terminate.

senators' votes could overrule.⁵¹ Moreover, the reconciliation instructions would compel the committees of jurisdiction to report out legislation achieving the specified revenues or subject themselves to a privileged amendment by the chair of the Budget Committee to modify their bill to correct any shortfall.⁵² The resulting "reconciliation" bill is itself immune from filibusters, requiring only a bare majority of the Senate.⁵³

The failure of climate change legislation on the Senate floor in 2008 does not change this calculus. With the House leadership showing no interest in considering the bill should it pass, and President Bush poised to veto it, senators had no reason to expend political capital on a merely symbolic vote.

In fact, excluding large corporate subsidies could actually improve the prospects for meaningful legislation to control climate change. A fiscally prudent and distributionally sensitive proposal could broadly expand the coalition of support. Since the end of the New Deal era, the progressive agenda in this country has become increasingly fragmented, divided between those with domestic and international orientations, between those with substantive and proceduralist programs, and across a plethora of issue areas. Environmentalism has secured a justifiably privileged place on that agenda, but diversifying its support to include the anti-poverty movement and "good government" advocates of fiscal rectitude could significantly reduce competition for progressive political capital and financial support. A key to strengthening political environmentalism is establishing its relevance to low-income people feeling hard-pressed by problems that seem more immediate.⁵⁴ Conversely, environmentalism needs to avoid the perception that it is a socially or racially insensitive agenda of the affluent.⁵⁵

2. The Economics of Corporate Subsidies

The economic case for building large corporate subsidies into a regime of climate change regulation is startlingly weak. It thus is a worthy companion to the junk science that the same industries have funded to dispute the relationship between greenhouse gas emissions and climate change.

First, increasing prices for carbon-based energy consumption through a carbon tax or a cap-and-trade permitting regime will only modestly impact emitters' profitability. These regimes reduce demand for this form of energy and thus the sales of the companies producing it. The extent of the profits foregone on these sales is, however, a complicated question. Many producers may have marginal costs that rise at such a rate that the last several units sold provide almost no profits. For example, the new regime may cause companies to

⁵¹*Id.* §§ 641(d)(2), 642(a)(2)(B), 644(b)(1)(B).

⁵²*Id.* § 641(b)(2).

⁵³*Id.* § 641(e)(2).

⁵⁴John Barry, *From Environmental Politics to the Politics of the Environment: The Pacification and Normalization of Environmentalism?*, in ENVIRONMENTALISM'S END, *supra* note 47, at 179, 183-84.

⁵⁵Andrew Light, *The Urban Blind Spot in Environmental Ethics*, in POLITICAL THEORY AND THE ENVIRONMENT: A REASSESSMENT 7, 20-21, 27 (Mathew Humphrey ed., 2001) [hereinafter POLITICAL REASSESSMENT].

abandon marginally profitable efforts to extract oil and gas from the sea bed. CBO estimates that fully compensating existing emitters for losses under a carbon emissions control regime would require less than fifteen percent of the proceeds of a carbon tax or of the emissions permits issued under a cap-and-trade system, a small fraction of what they would receive under most current proposals.

Even this estimate, however, likely is considerably overstated. Many companies producing energy from fossil fuels also have large holdings in non-carbon-based energy sources or in technologies to increase energy efficiency. These holdings will appreciate significantly in the new regime, offsetting any losses from the companies' carbon-based businesses.⁵⁶ Even those companies not currently active may be well-positioned—e.g., with distribution and marketing networks—to seize commanding positions in those markets. Depending on a particular company's portfolio, the new regulatory regime may bring it net gains, net losses, or little change at all in value. Subsidizing all existing emitters with free permits or tax cuts thus would provide windfalls to some companies that already are profiting from the change. Yet any effort to limit subsidies to those companies actually losing money would punish other firms for making prudent, and socially beneficial, investments.

Moreover, compensating those actually losing money due to climate change policy is quite impossible. As scientific evidence, public concern, and political will around global warming strengthened, the chances of regulation increased and the markets reduced the value of emitters' stocks accordingly. Those that sold stock since this process begun have already absorbed some of the emitting company's expected losses before the regulatory regime was even in place. Identifying them and calculating their losses would be infeasible and pointless: the risk of government regulation, like the risk of changing consumer tastes, increased competition, and, indeed, environmental catastrophe is just one more factor affecting profitability that the markets handle quite efficiently. Indeed, markets can handle regulatory risk with particular efficiency because regulatory regimes take shape relatively gradually and transparently, allowing investors plenty of opportunity to respond.⁵⁷ Risk-averse investors protect themselves by

⁵⁶For example, Chevron's slogan is "The Power of Human Energy: Finding Newer, Cleaner Ways to Power the World." Chevron, <http://www.chevron.com/> (last visited Sept. 12, 2009). It reports that "[o]ne of our companies, Chevron Energy Solutions, helps institutions and businesses use energy more efficiently and generate power from renewable sources such as solar, wind and biomass" and boasts of extensive research into a wide range of alternative energy sources and carbon capture technologies. Chevron, Climate Change, www.chevron.com/globalissues/climatechange/actionplan (last visited Sept. 12, 2009). Similarly, BP reports that "[i]n response to increasing demand for energy with a lower-carbon footprint we have made a major commitment to develop low-carbon sources of energy." BP, SUSTAINABILITY REPORT 2006 (2007), available at http://www.bp.com/liveassets/bp_internet/globalbp/STAGING/global_assets/downloads/B/bp_sustainability_report_2006.pdf.

⁵⁷By contrast, most people have difficulty comprehending low probabilities of great harm, such as the risk of sudden natural disasters. RICHARD A. POSNER, CATASTROPHE: RISK AND RESPONSE 9 (2004); Cass R. Sunstein, *Probability Neglect: Emotions, Worst Cases, and Law*, 112 YALE L.J. 61,

diversifying their portfolios; risk-loving investors stand to make windfalls if events turn out to favor their investments and have no special claim to sympathy when the winds blow the other way.

Conversely, those holding shares in a given emitter at the time the regulations take effect will include many that bought in at discounted prices after the prospect of regulation became clear. They have no plausible claim to compensation when the expected regulatory regime does in fact come about: the prospect of that regime allowed them to buy into the company cheaply. Providing free permits to historical emitters would give these investors unmerited windfalls. As suggested above, some of the companies that stand to lose the most are those that have failed over the years to diversify into cleaner energy sources. All current stockholders in such companies either owned stock when those decisions were made—and may have benefited in the form of larger dividends—or bought in later after the companies’ policies were established (and presumably reflected in market prices). Neither group has any claim to be rescued from the effects of its investment decisions.

More generally, distributing valuable commodities free of charge to businesses puts the government in the position of picking winners in the market. That rarely is a prescription for an efficient result. Corporate subsidies that a national government allocates arbitrarily among its businesses distort competition both domestically and internationally:⁵⁸ even if our trading partners also give away permits, they will be doing so with different stringency or through different systems altogether. Legislation inevitably will distribute permits based on what companies’ emissions *were* in the past (because that amount is known), not what they *would have been* in the affected years absent regulation. Some emissions permits will prop up inefficient companies that were failing in the market. Conversely, some fast-rising, highly innovative companies will be placed at a competitive disadvantage with an allocation of permits that fails to reflect their trajectories. To be sure, they can purchase additional permits to sustain their growth, but requiring them to pay for what their less efficient competitors get for free will distort the results of market competition.⁵⁹

Perhaps most importantly, establishing the political precedent that polluters must be held harmless in any new regulatory regime will do long-term harm to environmental quality. The economics of climate change regulation make that feasible; in other important environmental contexts, it may not be. At a time when the Court’s expanding definition of regulatory takings of real property is frustrating environmental land use controls,⁶⁰ it is difficult to understand why

63 (2002) (describing many people’s inability to comprehend and respond to low probabilities of harm as “probability neglect”).

⁵⁸Dietrich Brockhagen, *Inhomogeneous Allocation and Distortions of Competition in the Case of Emissions Trading in the EU*, in CLIMATE CHANGE POLICY 309, 309-15 (Michael Bothe & Eckhard Rehbinder eds., 2005).

⁵⁹*Id.* at 315-21.

⁶⁰*E.g.*, *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1025-26 (1992); *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987).

environmentalists would want to establish a de facto principle of compensation for profits lost due to emissions limits. Even in the land use context, amortization—allowing a prior usage a number of years to phase out—is accepted as obviating the need for just compensation, despite the financial losses that remain. All serious proposals would phase in restrictions on carbon emissions, providing the same sort of relief to current emitters that takings law offers to those losing important interest in land. International climate control regimes similarly would have little prospect of effectiveness if they had to compensate current high-emitting countries for potential limitations on their lifestyles.⁶¹

In fact, the contrary principle—that environmentally damaging lines of business risk regulatory interventions—is a far more desirable one. The political process's limits ensure that many significant environmental hazards will go unregulated, under-regulated, or belatedly regulated. Industry and investors, however, cannot predict reliably which will be regulated and, if so, how. If regulation would bring uncompensated costs, this uncertainty will reduce the expected profitability of environmentally damaging activities. A company deciding between two possible fields for expansion, one of which engenders environmental harms, one of which does not, will become more likely to pursue the “greener” line of business because it faces less risk that its investment will prematurely cease producing returns. Similarly, the market will reduce the value of the securities of firms engaged in environmentally problematic activities. The effect is similar to that which causes companies to hesitate to put money into countries with recent histories of violent insurrections because they fear losing their investments.

Deterring environmentally unsound investments is highly efficient, both economically and politically. It weeds out environmental harms with the fewest offsetting benefits. This incremental degradation of the value to reflect regulatory risk is not contingent on the arbitrary line-drawing in any specific regulatory regime, thus escaping both a common source of economic inefficiency in regulations and the dangers of industry capture of a particular regulatory agency. And by clearing away the harms with the least compelling economic rationales, this deterrence frees the environmental movement to focus its political capital on restricting hazards associated with more economically productive activity. Holding current emitters harmless for economic losses under any climate change policy dissipates this desirable regulatory uncertainty: companies and investors can continue to pursue environmentally hazardous practices in the expectation that they either will be allowed to continue those activities or will be compensated—perhaps even over-compensated—for any required cessation.

The adverse consequences of carbon emissions long have been well-known. If one were to approach this problem as one of corrective justice, surely the argument that past emitters should bear the costs of the environmental harm they

⁶¹Raúl A. Estrada-Oyuela, *Equity and Climate Change*, in *ETHICS, EQUITY AND INTERNATIONAL NEGOTIATIONS ON CLIMATE CHANGE* 36, 37-38 (Luiz Pinguelli-Rosa & Mohan Munasinghe eds., 2002) [hereinafter *ETHICS, EQUITY*].

caused is far more compelling than any that they should be compensated for being restrained from doing still more harm in the future.

III. Determining the Scope of the Climate Change Debate

Discrediting the currently popular arguments for corporate subsidies does not guarantee that distributional and fiscal considerations will help shape climate change policy. Any legislation likely to win enactment inevitably will neglect many important issues with clear connections to climate change. No policy initiative can respond even to all legitimate and important social problems. Bills that seek to address numerous, marginally related concerns are derided as “Christmas trees;” they often aggregate the complexities, side disputes, and enemies of their various pieces and collapse. On the other hand, we hear increasingly about the supposed “law of unintended consequences,” typically when someone devises an initiative focusing myopically on only a subset of its implications.

For example, vast sums are needed to repair the nation’s bridges, tunnels, rail beds, schools, and other physical infrastructure. Climate change likely is exacerbating this problem, subjecting structures to stresses their designers did not anticipate. Devoting the proceeds of a carbon tax or permit sales to infrastructure repair will rule out significant deficit reduction and could crowd out low-income offsets. Advocates need some principle on which to convince sincere policy-makers sympathetic to claims for infrastructure spending to nonetheless privilege protecting low-income people and the public fisc in climate change legislation. In other words, this article’s proposals must not only establish their cardinal merit as worthy public policies but must also show their ordinal superiority to other worthy policies in a competition for scarce space on the climate change agenda. Resolving this kind of ordinal question requires tools beyond those commonly employed in analysis of public law problems.⁶²

This problem will not solve itself. Some environmentalists have embraced addressing fiscal rectitude and, in particular, distributional justice in climate change legislation. Others, however, may have little interest in privileging these social concerns because they adhere to a non-anthropocentric ethic,⁶³ whatever the political cost.⁶⁴ Pragmatic environmentalists have learned from hard experience the importance of compromising with industry⁶⁵ and are loath to walk away from such a strategy. Still others see climate change legislation as a once-in-a-lifetime source of dedicated support for a host of projects that would struggle for funding in the appropriations process. Absent a clear, principled

⁶²Of course, private law is no stranger to ordinal questions. Commercial law and bankruptcy routinely weight the relative priorities of parties all of whom have valid claims. In prototypical case of ordinal competition in public law, crafting funding priorities, courts apply one of the most deferential versions of minimum rationality analysis. Commentators are not so meek, yet even they typically limit their arguments to extolling their proposal’s virtues or denigrating its competitors; public law discourse only rarely seeks to assess the relative strengths of meritorious claims.

⁶³Light, *supra* note 55, at 8-12.

⁶⁴Avner de-Shalit, *Ten Commandments of How to Fail in an Environmental Campaign*, in *POLITICAL REASSESSMENT*, *supra* note 55, at 111, 118-19.

⁶⁵*Id.* at 112-17.

basis for privileging the protection of low-income people and deficit reduction over these important claims indigenous to the environmental advocacy community, low-income people and the public fisc are unlikely to receive meaningful attention.

This Part seeks a principled basis for determining whether climate change legislation's sponsors and other supporters should privilege admission of distributional and fiscal considerations into that debate. This inquiry into political joinder will attempt to discern defensible norms without becoming unconnected from actors' practice in the actual world.⁶⁶ This avoids the difficulties inherent in making the case for a particular arrangement without offering a theory of how entrenched interests can be compelled to submit to the redistribution necessary to achieve it.⁶⁷ Section A seeks to understand the process by which the political system decides which arguably related issues to admit to a political debate, such as that concerning climate change, and derives normative rules to guide those decisions. Section B applies those criteria to show that concerns about distributive justice have a powerful claim for inclusion in climate change policy debates in particular. Section C then applies these principles again to demonstrate that fiscal probity, too, ought to play a major role in designing climate change regulation.

A. Policy Issue Joinder in a Complex World

In recent years, students of the political process have paid increasing attention to questions of framing. Proposals framed in one manner may draw broad acclamation even though, presented slightly differently, they might be ignored or actively scorned. Kenneth Arrow demonstrated that association with other proposals is one of the most important forms of framing, showing that the inclusion of a third option can shift the results of a debate between two alternatives.⁶⁸ Proponents of the original legislation may legitimately fear inclusion of any new proposals in the debate may generate a different outcome even if preferences on the original proposal do not change.⁶⁹

This section analyzes conflict over which issues may be joined with which others, either formally in a legislative body or informally as part of a public debate. It seeks to derive broadly acceptable principles both from analysis of the politics of issue joinder and from analogous bodies of law. Subsection 1 begins with an examination of groups' motives for seeking to join two public policy proposals into a single initiative. Subsection 2 explores the forms that groups' conflict over joinder of policy proposals can take. Subsection 3 surveys

⁶⁶RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 7-11 (1977).

⁶⁷ROBERT PAUL WOLFF, UNDERSTANDING RAWLS: A RECONSTRUCTION AND CRITIQUE OF A *THEORY OF JUSTICE* 202-10 (1977).

⁶⁸Three children seeking a new pet should always be able to reach a majority preference between a dog and a cat. On the other hand, if their parents offer them a third option—a bird—the children may become incapable of reaching a stable preference. Two may prefer a bird to a cat, a different two may prefer a cat to a dog, and still another two may prefer a dog to a bird. KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 2-3 (2d ed. 1963).

⁶⁹WILLIAM H. RIKER, LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE 188-93 (1982).

legislative bodies' rules on issue joinder, finding most conceptually underdeveloped and normatively unappealing. Subsection 4 seeks to draw analogies to joinder rules in litigation, particularly the Federal Rules of Civil Procedure. Subsection 5 looks at the reasons initiatives' sponsors commonly decline to broaden policy debates into directions they favor substantively. Finally, subsection 6 proposes a set of principles for issue joinder in public policy debates adapted from those in civil litigation to address the different motives for and consequences of joinder in the policy arena.

1. Motives for Seeking to Join Policy Issues

Sometimes political actors' reasons for seeking to merge a second issue with one already under consideration have nothing to do with the merits of the proposed amendment. An initiative's sponsor may insert an unrelated provision to expand its popularity. This is the essence of log-rolling. Conversely, legislation's opponents may seek to add a "poison pill" that will destroy its political viability.⁷⁰ Both of these strategies depend on reaching a point at which the forum's rules will force an up-or-down decision and the entire package either advances or fails; without such decisional rules, neither would accomplish much. As a result, where either of these motives is at work, joinder of policy issues looks fundamentally different from joinder in civil or criminal litigation, whose rules generally allow for split judgments. To the extent that the theoretical literature has considered issue joinder in the policy world at all, it has largely been with regard to these two motives. Legislative bodies' joinder rules largely address the degree to which members may logroll or insert poison pills.

Two other motives, however, may animate joinder efforts. One relates only to the merits of the proposed amendment; the other concerns the interrelationship between the two. These raise much more complex issues. Both are more important to determining the scope of climate change legislation.

a. The Struggle for Salience

A large number of issues arise in our complex social and economic environment, but only a tiny fraction have the characteristics to achieve political salience.⁷¹ The competition among nascent issues is akin to Darwinian competition for scarce resources.⁷² Issues typically have extremely short life spans within which to affect social change or face extinction.⁷³ Issues also fail when they lose public attention, either immediately or after achieving modest gains.⁷⁴ Only the rarest of issues is able to reorder the political system to give itself long-term salience.⁷⁵

⁷⁰“Sometimes the enemies of a measure seek to amend it in such a way as to divide its friends, and thus defeat it.” HENRY M. ROBERT, ROBERT'S RULES OF ORDER § 56, at 108 (Rachel Vixman ed., 1967).

⁷¹Edward G. Carmines & James A. Stimson, *On the Evolution of Political Issues*, in AGENDA FORMATION 151, 152 (William H. Riker ed., 1993).

⁷²*Id.*

⁷³*Id.*

⁷⁴*Id.* at 157.

⁷⁵*Id.* at 157-58.

Four processes give issues salience: important external disruptions of the established order (such as crises or watershed elections), the energetic sponsorship of prominent politicians, adaptation from old issues that have lost their salience, and the resolution of persistent tensions within the established order.⁷⁶ Although change sometimes comes in a single transformative moment, such as an election, it more often occurs in a gradual process of evolution, or in an alternation of between periods of gradual and sudden change.⁷⁷

Because the means of achieving salience are scarce, those that have been unable to garner prominence on their own may become desperate. Attaching their initiative to another that has achieved salience may seem vital to avoid political oblivion. Riding along with an already-viable proposal may require less political capital, both because the amendment can enter the policy-making process in mid-stream⁷⁸ and because the underlying proposal's champions are likely to continue working to move it forward.

On the other hand, the sponsors of the initiative subject to amendment have strong reasons to resist amendments that lack logrolling potential. Issues fail to move public policy when they become associated with, and mired in, longstanding conflicts that have no clear winner.⁷⁹

b. Responding to Externalities

A great deal of policymaking inevitably is unidimensional. The health department inspects restaurants with single-minded determination to prevent food-borne illnesses; the inspector does nothing to ensure that the restaurant is paying its taxes. We ticket motorists running red lights to prevent collisions but do not inspect stopped motorists' emissions control equipment. We require truthful labels on products to prevent consumers from being deceived; only occasionally do those enforcement efforts extend to the value of truthfully-presented contents.

In our increasingly complex and interconnected world, however, more and more policies have multiple effects. The value of these policies is the sum of their many effects, which may include both positive and negative ones. A major focus of several contemporary legal intellectual movements has been to highlight previously neglected ancillary effects of policies.⁸⁰ Failing to address those side-effects in the same legislation gives them a head start causing harm and risks having the political process lose interest before enacting a corrective.

⁷⁶*Id.* at 153.

⁷⁷*Id.* at 158-60.

⁷⁸For example, a successful floor amendment avoids the committee process altogether. Even an amendment in committee frees its sponsor from the need to motivate the chair to call a meeting on the proposal. Some legislative bodies have rules seeking to deny initiatives the opportunities of late entry into the deliberative process. Congressional rules prohibit conference reports from including items that appeared in neither House nor Senate bill. Some states have deadlines for introducing bills that are to be considered in a given legislative session.

⁷⁹Carmines & Stimson, *supra* note 71, at 156-57.

⁸⁰For example, economists highlight rent control's consequences for the rental housing stock's maintenance; feminists identify the subjugating effects of policies built around male models of interpersonal relations.

Yet even if an initiative's supporters recognize its problematic side-effects, they may nonetheless oppose incorporating corrective measures. The more complexity they admit into their initiative, the more risk of political or procedural problems. A fair measure of the strength of someone's commitment to particular goals is which the other claims that she or he is willing to allow to override those goals.⁸¹ Recognizing too many claims as sufficient to override an asserted right largely vitiates that right.⁸² Accordingly, champions of a particular cause tend to resist admitting new claims into political debates on that cause. Thus, for example, climate change concerns' salience can be discerned from their success in trumping other important policies. These can include directly countervailing concerns, such as the purported reliance interests of current emitters or trade-based objections to state subsidization of renewable energy sources.⁸³ The policy concerns environmentalists seek to subordinate to carbon emissions reductions also may include causes that are not intrinsically antagonistic⁸⁴ but whose recognition could slow the achievement of carbon emission reductions.

To date, most critiques of heedless policymaking have focused on its inefficiency: selecting policies based on an incomplete accounting of their consequences is likely to yield a significant number of miscalibrations or even erroneous adoptions. Oblivious policymaking also is likely to raise significant inequities. Not all political actors are equally capable of inducing the political process to think exclusively about their concerns. Majoritarian democracy tends to favor weak claims held by large numbers over strong claims held by small numbers. Interest group politics often reverses that preference, favoring the claims of small, cohesive groups whose individual stakes are strong enough to prompt organizing. Claims held by small groups that do not have the means to function as an effective interest group, however, are disadvantaged in both systems. Thus, results that fall far short of Caldor-Hicks optimality are possible when small, weak groups are strongly affected. Public interest policymaking should take into account these likely aggregate distortions in the political process.

2. Patterns of Political Conflict over Issue Joinder

A normative framework for deciding questions of issue joinder in policy debates is not absolutely necessary. The difficulty of designing a universally applicable and normatively compelling rule of joinder is possible could justify adopting a laissez-faire position. Those initiating a proposal would invite joinder with others that they support on the merits or expect to help their ideas prevail. Initiatives' opponents conversely would seek to join it with divisive or embarrassing ideas but keep it apart from popular ones. Those fearing

⁸¹DWORKIN, *supra* note 66, at 91-92.

⁸²*Id.* at 92.

⁸³Mercedes Fernández Armenteros, *State Aid Issues Raised by Implementation of Climate Change Policy Instruments*, in CLIMATE CHANGE POLICY 219, 229-36 (Michael Bothe & Eckhard Rehbinder eds., 2005).

⁸⁴Some environmentalists have expressed concern that offsetting the effects on low-income people of carbon cost increases could reduce conservation and thus undermine their initiative's goals. As Part IV demonstrates *infra*, however, a well-designed low-income offset program need not have that effect.

unpleasant externalities, and policy entrepreneurs struggling to achieve salience, could try to claw their way into the debate. Coalition partners, policymakers, journalists, and the public might join or sever issues to improve efficiency of consideration, although they also might manipulate joinder to conceal their choices on the merits. This would lead to considerable ad hoc political bargaining. For example, if an initiative's sponsors' resistance to joining another proposal to theirs sufficiently alienates late-arriving allies, the latter could threaten to withdraw support.

In practice, this is likely to lead to considerable miscalculation, with some initiatives failing despite clear majority support due to solvable joinder disputes and others causing preventable negative side effects because their supporters feared triggering an internecine battle if they "opened up" the legislation. More generally, political actors seek to assess one another's good faith when building relationships; the paucity of standards for issue joinder in policy debates frustrates that process.

Complicating the problem of determining the scope of a particular debate is the likelihood that an initiative's originators may disagree with, or value much more lightly, the concerns underlying proffered additions to their proposal. The originators may feel some sweat equity in their initiative and regard efforts to broaden the debate as an illegitimate redistribution of political capital they have earned. Even if it could somehow be established that expanding the initiative's scope would increase the aggregate wealth of society as a whole, or of a broad political community with which the originators may identify—progressives, conservatives, libertarians, or whatever—they are likely to vigorously reject any duty to seek that end.⁸⁵ People that are highly altruistic in their personal lives—and whose altruism drives their political activism—may feel justified or even compelled to act as egoistical hedonists on behalf of their cause. Arranging cooperation thus can be most difficult.

In such a case, one might imagine some sort of Coasean bargaining in which the would-be intervenors would rebate to the originators some portion of the benefit their cause receives from being admitted to the debate.⁸⁶ Such bargaining, however, is impractical, both because the diffuse coalitions on both sides make transaction costs prohibitively high and because the benefits the joining cause receives come in a form difficult for its advocates to transfer.⁸⁷ And even if such a bargain could be struck, it would largely preserve the preexisting distribution of political capital.⁸⁸ In some instances, that prior arrangement may strike policy-makers as sufficiently unjust to call for a forced redistribution, either by their own hand or by allowing the intervenors to exercise

⁸⁵RONALD DWORKIN, *LAW'S EMPIRE* 286-88 (1986).

⁸⁶As in more conventional applications of Coase's Theorem, this sort of bargaining without transaction costs ultimately would lead to the same results whether initiatives' sponsors or would-be intervenors were given initial control over joinder.

⁸⁷See DWORKIN, *supra* note 85, at 287-88 (discussing the difficulty of organizing such bargaining to resolve typical common law problems).

⁸⁸*Id.* at 288.

self-help. More generally, although a policy initiative's authors may claim proprietary rights, its success depends on a broader array of supporters whose interests and preferences have some claim to recognition.

Further complexity arises when several groups wish to join their proposals with a single initiative. That initiative may be able to survive the additional complexity and controversy resulting from inclusion of any one of the proffered amendments but not the cumulative weight of them all. Any that are not added, however, will have difficulty gaining salience on their own. As Table 1 suggests, the interaction between advocates seeking inclusion

Table 1: Strategies for Determining Scope of a Public Policy Initiative (pay-offs listed for strategy in row first)		
	Pursue Separate Initiative	Insist on Inclusion
Pursue Separate Initiative	4,4	2,6
Insist on Inclusion	6,2	0,0

of different issues in a policy initiative with apparent momentum can be loosely modeled as a game of chicken.⁸⁹ The best outcome for each group is for it to win inclusion in the initiative while its counterpart goes off to attempt to mount a new initiative of its own. Each group's worst nightmare, however, is that both tie their fates to the existing initiative and, in so doing, overload and collapse it. If a group is going to pursue an independent initiative, it generally prefers that the other group do the same, allowing the prior initiative to win approval more easily and leaving more capital unspent in the broader community of shared political interests in which the two groups operate. As a result, each group has a strong interest in misleading the other about its intentions: if one group can persuade the other that it is determined to insist on inclusion, it can scare off the competition and enjoy an easy path to enactment. This process obviously is prone to miscalculations. It also may produce distributionally undesirable results, with groups in more desperate straits less willing to risk certain defeat by continuing to struggle for inclusion.⁹⁰

A common means of obtaining more cooperative outcomes to political games is repeated playing.⁹¹ Many social causes and political organizations, certainly those concerned with the environment, with poverty, and with fiscal discipline, are repeat players. The vagaries of politics make it difficult for many groups to predict whether they will wear the originator's or intervener's hat the next time the scope of an initiative must be determined. This might seem to provide each an incentive to follow the course that would maximize aggregate well-being if universally pursued over the long term, acting selfishly only when the expected

⁸⁹For simplicity, this assumes only two would-be interveners, no difference between the political appeal of their respective proposals, a political climate in which all parties know that the initiative can bear one, but only one, new issue without collapsing, and no role for the originators of the initiative. Relaxing these assumptions would yield a more complex model but not a fundamentally different result.

⁹⁰See RALPH D. ELLIS, JUST RESULTS: ETHICAL FOUNDATIONS FOR POLICY ANALYSIS 124-28 (1998) (discussing the consequences of diminishing marginal utility for distributive justice).

⁹¹ERIC A. POSNER, LAW AND SOCIAL NORMS 15-18 (2000); ROBERT AXELROD, THE EVOLUTION OF COOPERATION 118-20 (1984).

gains of doing so exceed the expected costs of others acting similarly in future encounters.

In practice, this approach is likely to produce only modest results. First, many groups find themselves in one or another position a disproportionate share of the time. A group that originates politically powerful initiatives most of the time will not sacrifice much to accommodate those that habitually struggle for salience. Second, the stakes of each interaction are not constant. Varying stakes, and varying degrees of transparency, tend to undermine the corrective benefits of repeated interactions.⁹² The base initiatives' political strength, the prospective amendments' chances for achieving salience independently, and their relative importance to their respective sponsors all will vary considerably. Finally, some groups' accountability structures may place a higher premium on visibly "trying" than on actually achieving success.⁹³

Aggregation of preferences among many diverse interest groups is likely to be difficult. Neither extreme position may be stable: those with significant additional concerns will unite to oppose a "clean" bill, while none will want it weighed down with so many extraneous items that the bill sinks. Which combination of proposals are admitted will depend on the order in which they are advanced and various groups' strategic judgments about which proposals to tolerate and which to oppose.⁹⁴ Even if a stable equilibrium exists, the participants are unlikely to be aware of it, allowing other outcomes to prevail depending on how the agenda is manipulated.⁹⁵

Metaphors of community also are unavailing. Analysis of coalition dynamics among multiple players typically assume that the most salient issues can be specified.⁹⁶ When that is not the case, interactions may become more chaotic. Discrete political bodies and communities typically have leaders who set their agendas with reference to agreed criteria of fairness.⁹⁷ Agenda-setting is much more complex for the nation as a whole, for the set of interest groups that lobby Congress, and that subset of interest groups that plausibly claim to be pursuing a progressive or altruistic agenda (whatever that may be). The national electorate has relatively clear bounds, identified leaders, and some limits to its agenda set the Constitution. Interest groups, on the other hand, can form any number of combinations, are unlikely to have consensus leaders, and may not interact enough to have established meaningful criteria for fairness in agenda formulation. Communities maintain norms through complex systems of signaling that require repeated interactions among the same individuals.⁹⁸ These break down when membership in the community becomes transient.⁹⁹ Perhaps

⁹²ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 165 (1991).

⁹³This is likely to be true both of membership organizations and on those depending on donors of modest political sophistication.

⁹⁴RIKER, *supra* note 69, at 137-43.

⁹⁵*Id.* at 170-72.

⁹⁶DENNIS C. MUELLER, *PUBLIC CHOICE III* 285-89 (2003).

⁹⁷RIKER, *supra* note 69, at 170.

⁹⁸MUELLER, *supra* note 96, at 119-20; ELLICKSON, *supra* note 92, at 164-66.

⁹⁹ELLICKSON, *supra* note 92, at 169.

some interest groups work with one another so regularly that they may evolve agreed practices for amending one another's initiatives. Amendments seeking to contain initiatives' undesirable externalities, almost by definition, often will come from those outside the political community responsible for the initiative.

3. Explicit Legislative Regulation of Issue Joinder

Positive law generally offers little guidance on issue joinder in policy debates. Legislative bodies have a wide variety of joinder rules, few of which have much normative appeal. Most take one of four basic types: extremely permissive joinder,¹⁰⁰ extremely restrictive joinder,¹⁰¹ joinder subject to some test of germaneness,¹⁰² or joinder at the whim of the majority party.¹⁰³ These rules largely respond to attempts at joinder motivated by support for or hostility to the underlying proposal.¹⁰⁴ They thus reflect little considered thought about amendments offered to gain salience or to control externalities in the underlying bill. Moreover, those regimes that depend on germaneness—the only ones that attempt to balance the interests of the sponsors of the original bill and of the amendment—have had great difficulty devising a generally applicable

¹⁰⁰For less partisan legislation, the U.S. House occasionally operates under “open rules,” allowing any amendments Members wish to offer as long as they are in the first or second degree. For most types of legislation, the U.S. Senate ordinarily allows any amendments at all. This allows minority senators to force the majority to cast uncomfortable votes on wholly unrelated issues or simply to bog down deliberations, as an informal filibuster. Robert requires a two-thirds vote to suppress a proposed amendment. ROBERT'S RULES OF ORDER, *supra* note 70, § 15, at 39.

¹⁰¹Both House and Senate rules prohibit conference reports from joining any new issues to those each chamber passed. RULES OF THE HOUSE OF REPRESENTATIVES, 110th Cong., R. XXVIII(3), at 53 (2008), available at <http://www.rules.house.gov/ruleprec/110th.pdf>; STANDING RULES OF THE SENATE, S. DOC. NO. 110-9, at XXVIII(2), at 39 (2007), available at <http://rules.senate.gov/senaterules/Rules091407.pdf>. As its calendar becomes more crowded, the U.S. House does a substantial amount of business under suspension of the rules, which allows no amendments at all. JEFFERSON'S MANUAL § 903, at 675-76 (William Holmes Brown ed., 1991). Similarly, special legislation prohibits amendments in either house of Congress to resolutions approving the closing of military bases. Senators skilled in the chamber's procedures “fill the tree” of amendments by offering meaningless first- and second-degree amendments to their own legislation, blocking any amendments their opponents might have.

¹⁰²When considering appropriations legislation or after invoking cloture against a filibuster, the Senate allows only amendments that meet arcane germaneness standards, which have more to do with clever drafting than substantive interrelationships. Many state constitutions prohibit legislation from embracing more than one object, leading to voluminous but not especially useful debates about what constitutes a single object. *See Harbor v. Deukmejian*, 742 P.2d 1290 (Cal. 1987) (striking down legislation for violating this requirement).

¹⁰³The U.S. House increasingly relies on closed rules, which allow only those amendments that the majority party's leadership favors. House and Senate committees typically have rules allowing only “germane” amendments. In practice, those on which partisan relations are relatively good operate under informal norms allowing much broader joinder. Their chairs, however, can invoke the rules at any time and, in the absence of a system of recorded committee precedents, can decide what is germane arbitrarily and self-servingly.

¹⁰⁴Jefferson noted the British parliamentary practice of allowing amendments so antithetical to the underlying bill that its sponsors would vote against it themselves. JEFFERSON'S MANUAL, *supra* note 101, § 467, at 230. The House's germaneness requirements sought to block this strategy. *Id.* Conversely, states' single-purpose requirements seek to prevent log-rolling. *Harbor*, 742 P.2d at 1299.

definition.¹⁰⁵ Indeed, the normative basis and practical utility of the germaneness standard is unclear: under some definitions, it may tend to favor amendments that address externalities springing from the underlying proposal, but it offers only limited protection against logrolling and almost none against cleverly designed poison pills.

Perhaps the most thoughtful are the U.S. Senate's rules regulating consideration of budget reconciliation legislation. Recognizing that the goal of fiscal rectitude may motivate votes for broad packages but provide senators insufficient cover to support particular tax increases or spending cuts, the rules generally obstruct the disaggregation of legislation on the floor.¹⁰⁶ On the other hand, cognizant of the dangers of broad joinder, the rules generally prohibit non-budgetary matters from riding along.¹⁰⁷ These rules make sense for single-mindedly accomplishing deficit reduction in that they deliberately inhibit consideration of unintended consequences. Thus they, too, are difficult to generalize to the broad range of policy debates in which most participants are willing to consider more than one set of consequences.

4. Learning from Joinder Rules for Litigation

The vast majority of policy analysis focuses on the merits of questions in a manner analogous to a trial. Questions of evidence's admissibility and persuasiveness dominate their factual side, with norms instead of rules of law driving the decision. A far smaller but still substantial literature has developed over questions of institutional competency: arguments that a particular unit of government should not adopt a substantively meritorious policy because it cannot implement it effectively, because another public entity has primary responsibility for the problem, or because the initiative would violate some broader principle of restraint. These debates are closely analogous to those over courts' jurisdiction to decide pieces of litigation. Also familiar are controversies over governmental transparency, the public policy counterpart to discovery battles. More subtly, attempts to drive public policy with compelling anecdotes, and complaints that the cited cases are too rare or atypical, bear more than a passing resemblance to efforts to certify class actions. As noted, however, the literature gives relatively little systematic attention, however, to the problem of joinder in public policy debates: which issues must be decided with which others.¹⁰⁸

¹⁰⁵See, e.g., JEFFERSON'S MANUAL, *supra* note 101, §§ 794-800, at 551-75 (struggling to reconcile subject matter, fundamental purpose, and jurisdictional tests, declaring that still other tests may govern, and propounding numerous special rules for particular situations).

¹⁰⁶2 U.S.C. § 641(d)(2) (2006). These rules do allow simple motions to strike provisions, but voting for such a motion, with no offset permitted, would force a senator to be seen "busting the budget."

¹⁰⁷*Id.* § 644(b)(1)(A), (D).

¹⁰⁸The other aspect of how civil and criminal procedure control the scope of litigation—joinder of parties—has no direct analogue in public policy debates because interest groups generally need no permission to enter a policy debate the way they do a lawsuit. As a result, existing participants address concerns about the number of parties contending in a policy debate by expanding or shrinking the scope of issues.

A laissez-faire approach to joinder, allowing raw political power to determine admission to debates without criticism, would be a sharp departure from civil litigation's practice. "The impulse is toward entertaining the broadest possible scope of action, consistent with fairness to the parties; joinder of claims, parties, and remedies is strongly encouraged."¹⁰⁹ Equity jurisprudence, too, has long recognized the injustices that can result from considering only one of a set of related problems: "He who seeks equity must do equity."¹¹⁰

Although these rules offer valuable insights into fair principles of joinder, litigation differs from policymaking in four crucial respects. First, in any system, someone must make a set of default choices about joinder. The obvious choice is the initiator of the debate. Prosecutors enjoy broad power to shape the indictment or information. Civil plaintiffs have sweeping authority to frame and amend the complaint. And the initiators of proposals in the public policy arena make the first bid for media attention and, in many fora, enjoy broad discretion what to include in bills. In the legislative process, however, the role of initiator often changes hands, from a bill's lead sponsor to a subcommittee chair, then a full committee chair, then a floor manager, and then members of the legislature's other chamber. Each of these successive initiators can and do revise their predecessors' joinder decisions.

Second, many public policy processes lack a clear equivalent to the judge in litigation.¹¹¹ This could make the default power almost absolute unless clear norms, with widely accepted legitimacy, dictate otherwise. Thus, litigation rules' insights about which factors affect the strength of an argument for joinder are helpful; their highly discretionary structure is less so absent a unitary, impartial entity to exercise that discretion. Other members of a broader political community, sympathetic to both combatants but beholden to neither, can play this role to a point; absent clear norms, however, their decisions are likely to be fragmented and confused.

Third, the Federal Rules of Civil Procedure's joinder rules rely heavily upon party status, a concept with no clear analogue in public policy debates. To be sure, those involved with a particular issue know with whom they are interacting. The First Amendment, however, prohibits entry barriers of the kind Rule 24¹¹² imposes on would-be intervenors in civil litigation. Thus, adoption of a principle comparable to Rule 18,¹¹³ allowing any "party" to assert any claim against another party, would stimulate many pro forma "interventions" for the purpose of expanding that debate. On the other hand, a group's on-going engagement in a

¹⁰⁹United Mine Workers v. Gibbs, 383 U.S. 715, 724 (1986).

¹¹⁰EDMUND H.T. SNELL, THE PRINCIPLES OF EQUITY 15 (John D. Lawson ed., 1st Am. ed. from the 6th Eng. ed. 1885).

¹¹¹Many legislative bodies have parliamentarians, who advise the presiding on procedural matters. The respect afforded parliamentarians, their degree of political independence, and their authority to make clearly subjective determinations, vary considerably. Even if their stature and independence approach that of a judge, however, they enter the process quite late, after media coverage and committee consideration have made many crucial joinder determinations.

¹¹²FED. R. CIV. P. 24 (2009).

¹¹³FED. R. CIV. P. 18(a) (2009).

debate would strike many as conferring some tentative sweat-equity legitimacy on its proposals to broaden that debate.

Fourth, the denial of a litigant's effort to join a claim to an on-going dispute does not typically prevent the litigant from receiving a decision on the merits.¹¹⁴ In the public policy arena, by contrast, most claims never receive a hearing or decision on the merits. Exclusion from one debate may mean the claim will never be heard at all.

Finally, and most importantly, joinder decisions in litigation are generally partial and provisional. A court may try two claims, or two defendants, together, but it renders judgments separately. Joinder may slow a claim or party's adjudication, and may risk the adjudicator confusing two claims or parties, but judgments remain distinct.¹¹⁵ In litigation, unlike policymaking, the decision-maker never has to make an all-or-nothing choice concerning joined claims.

One of the most fundamental principles of the Federal Rules, and a revolutionary contrast to their predecessor codes, is that the scope of civil litigation should depend on the scope of the dispute in the real world rather than on legal categories.¹¹⁶ Legislative procedure, like common law pleading, takes the opposite position: artificial limits on committees' jurisdiction largely predetermine the scope of resulting legislation. Broader public policy debates occupy a somewhat intermediary position: influenced, but not absolutely controlled, by preconceptions about which issues "go together."

Rule 13(a) requires joinder of most counterclaims that "arise[] out of the transaction or occurrence that is the subject matter of the opposing party's claim".¹¹⁷ This seeks to include defensive counterclaims in the same case as the claims to which they respond. Thus, parties whom litigation might harm are heard on their pleas for palliatives at the same time as the claims against them.¹¹⁸ As discussed below, convention in public policy debates is that groups at risk of focused losses have a preferred right to participate in those debates to redirect or ameliorate those burdens. In practice, however, courts often have had great difficulty distinguishing between defensive and affirmative counterclaims in any principled way.¹¹⁹ Similarly, identifying those potential legislative harms that are sufficiently focused to convey a preferential right to legislative joinder has proven quite difficult.

¹¹⁴Scholars have debated whether failure to join "indispensable" parties is a "jurisdictional" failing. Howard P. Fink, *Indispensable Parties and the Proposed Amendment to Federal Rule 19*, 74: YALE L.J. 403, 417-21 (1965). In rare circumstances, failure to join will bring down otherwise viable litigation.

¹¹⁵Indeed, even before judgment, the court has plenary power to sever a party or claim. FED. R. CIV. P. 21 (2009).

¹¹⁶Geoffrey C. Hazard, Jr., *Forms of Action under the Federal Rules of Civil Procedure*, 63 NOTRE DAME L. REV. 628 (1988).

¹¹⁷FED. R. CIV. P. 13(a) (2009).

¹¹⁸Thomas F. Green, Jr., *Federal Jurisdiction over Counterclaims*, 48 Nw. U. L. Rev. 271, 277-78 (1953).

¹¹⁹*Id.* 279-81.

Because the Federal Rules tie the right to raise new issues to party status, and make achievement of party status contingent on the claims one would assert or defends, the rules on joinder of parties provide a fair starting point for analyzing issue joinder in public policy debates. Rule 24(a)(2) gives the right to intervene when a prospective party “claims an interest relating to the property or subject matter of the action, and is so situated that disposing of the action may as a practical matter impair or impede the intervenor’s ability to protect its interest, unless existing parties adequately represent that interest.”¹²⁰ This implies a kind of germaneness analysis built around a vision of litigation’s primary function as characterizing transactions and property. The functions of policymaking are more diverse, and more plastic to the whims of initiators. Rule 24(a)(2) also suggests strong deference to claims of necessity: where an interest is unrepresented in litigation, and cannot effectively be asserted later, it should be admitted. Rule 24(b)(2)(B) authorizes the court to allow intervention by any party whose claim or defense “shares . . . a common question of law or fact” with the main case—an extremely thin connection. Rule 24(b)(3) directs the court to consider undue delay or prejudice to the original parties but does not identify the interests of the prospective intervenor to balance against those concerns.

Rule 19’s treatment of mandatory joinder offers considerably more insight.¹²¹ It even more directly overrides the rules’ usual deference to the plaintiff on joinder questions.¹²² It seeks to balance three interests, which have analogues in public policy debates: the interests of the present parties, the interests of those currently excluded from the process, and the public interest in a decision-making process that does not become hopelessly bogged down.¹²³ This last interest may take on a quite different cast in civil litigation, where the system’s rewards and penalties are skewed heavily to favor the broadest possible agglomerations.¹²⁴ Public policy debates have no such bias in favor of large, complex arrays of issues; to the contrary, the primary means of advocacy – media accounts of a few hundred words at most – do not lend themselves to sorting out multiple, partially overlapping claims. This difference may reflect different points of departure: the common law forms of action gave limits on joinder in civil litigation a bad odor¹²⁵ while joining too many sets of claims to a single public policy debate

¹²⁰Rule 24(a)(1) ratifies statutes giving unconditional rights of intervention. Some statutes effectively do the same thing. *See, e.g.*, 7 U.S.C. § 2014(h)(1) (2008) (requiring consultation with FEMA on matters relating to natural disasters). In both litigation and public policy debates, however, these statutes address too few situations to affect the general practice much.

¹²¹FED. R. CIV. P. 19 (2009).

¹²²4 JAMES W. MOORE, MOORE’S FEDERAL PRACTICE § 19.02[1] (3d ed. 2008); Richard D. Freer, *Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court’s Role in Defining the Litigation Unit*, 50 U. PITT. L. REV. 809, 822-26 (1988); John C. McCoid, *A Single Package for Multiparty Disputes*, 28 STAN. L. REV. 707, 717 (1976).

¹²³John Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 MICH. L. REV. 327, 330 (1957).

¹²⁴John B. Oakley, *Joinder and Jurisdiction in the Federal District Courts: The State of the Union of Rules and Statutes*, 69 TENN. L. REV. 35, 36 (2001).

¹²⁵Mitchell G. Williams, *Pleading Reform in Nineteenth Century America: The Joinder of Actions at Common Law and under the Codes*, 6 J. Legal History 299, 300-06 (1985).

multiplied the risk of consistent ideological cleavage, widely viewed as inconsistent with the American political system.

The present Rule 19 is the successor to the concepts of necessary and indispensable parties, in whose absence the litigation might reach a result against “equity and good conscience.”¹²⁶ Scholars criticized that formulation for relying on subjective assessments of the desirability of the litigation’s result;¹²⁷ the resulting reformulation offers a clearer analogue to the policy realm by focusing on the unfairness of excluding parties from debates that vitally concern them.

The present Rule 19(a)(1)(B)(i) forces the original parties to accept the joinder of any person who “claims an interest relating to the subject of the action” if excluding that person’s claims or defenses would, “as a practical matter impair or impede the person’s ability to protect the interest”. The “impair or impede” standard falls well short of necessity; it only requires tangible prejudice. Rule 19(a)(1)(B)(ii) also requires joinder of interested parties if their exclusion creates a “substantial risk” of subjecting one of the existing parties to “inconsistent obligations”. This is the other side of the coin: just as parties have a right to joinder if they might be unable to obtain separate consideration of their claims, they also must be joined if they could obtain a later hearing but might unsettle the result of the present litigation in the process. Where a party whose joinder is mandatory cannot be joined for whatever reason, Rule 19(b) requires the court to consider dismissing an otherwise proper action. It requires the court to consider prejudice to the absent party, the ability to narrow the resolution of the litigation to reduce that prejudice (and whether doing so would prevent the meaningful resolution of the litigation), and whether the original plaintiff “would have an adequate remedy if the action were dismissed”. This is a familiar balancing of the equities, but one of a special kind: the focus is on the various parties’ ability to obtain relief rather than on the burdens of proving their entitlement to that relief. The rule’s list is not exclusive, but its list strongly implies that the substantive prejudice of not being able to obtain relief overrides any procedural burdens that joinder or non-joinder might entail.

Once joined, a party may assert any claims it has against other parties, regardless of their relevance to, or impact on the resolution of, the underlying litigation.¹²⁸ This honors the principle that parties may not be drawn into litigation to serve the interests of others without being given the chance to vindicate their own interests.

5. Evaluating the Harm Joinder Can Cause in the Policy Arena

Opponents of policy issue joinder commonly assert that circumstances “simply will not allow consideration” of other factors. This claim could mean any of several quite distinct things. First, the need for exclusivity may reflect limits of administrative capacity. The military often invokes this ground when it insists on a clear set of operational objectives. Destroying an opponent’s weapons or tak-

¹²⁶Shields v. Barrow, 58 U.S. (17 How.) 130, 139 (1855).

¹²⁷Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure I*, 81 HARV. L. REV. 356, 361-62 (1967).

¹²⁸FED. R. CIV. P. 18 (2009).

ing contested ground may be feasible; doing so while avoiding this or that common side effect of the use of force is far more difficult. This objection is most likely to have weight where individuals must make nearly instantaneous decisions or where the proposed amendment would add responsibilities to an agency that lacks the practical ability to expand accordingly. It has no force against proposals that some other entity would carry out.

Second, the argument to exclude other factors may imply limitations of long-term deliberative capacity. Adding more factors to policy deliberations may prevent achievement of a consensus. The likelihood of an impasse rises significantly as the number of alternatives under consideration increases.¹²⁹ Indeed, floating alternatives to confuse and divide the coalition behind the dominant proposal is a major method by which a sophisticated opponent may organize opposition.¹³⁰ Objective standards for identifying poison pills, however, are elusive: even die-hard members of a coalition may differ as to whether an amendment improves or politically debilitates their initiative. And absent such standards, this principle justifies keeping down the total number of amendments but offers little guidance on which leaders ought to be compelled to accept.

Third, leaders may exclude a valid policy claim because of limited short-term deliberative capacity. Expanding the set of constraints under which policy is to be formed may sufficiently complexify deliberations to prevent the achievement of a consensus in a timely manner. Here again, the gravamen is to reduce the number of complicating amendments, with little guidance as to which ones.

Fourth, leaders may exclude a valid claim if it is insufficiently distinguishable from other claims *and* the cumulative effect of considering the like claims would be to overtax the system's legal, long-term deliberative, or short-term deliberative capacity. This is the time-honored principle on which a teacher refuses to give cookies to any children because he or she does not have enough for all: each child's claim for a cookie is reasonable enough, but the teacher cannot them all. This concept militates in favor of a "clean bill"; once leaders accept some claims to inclusion, they have difficulty excluding others. It applies, however, only if the many claims presented are largely indistinguishable. If one child is about to faint from low blood sugar, the teacher can and should give that child a cookie without worrying about the rest of the class. Thus, even if leaders exclude all claims proffered in search of salience, they nonetheless could consistently admit claims that seek to mitigate externalities from their initiatives.

Fifth, leaders occasionally exclude a valid claim if they cannot advance it without hindering vindication of another, more important claim. This is particularly likely if they can achieve the same relief that the excluded claim sought by succeeding on the priority claim. Thus, counsel in class action litigation typically designate as class representatives plaintiffs whose claims are especially compelling, denying individual attention to class members whose claims would be less likely to win on their own. And although some segregated

¹²⁹STEVEN J. BRAMS, PARADOXES IN POLITICS: AN INTRODUCTION TO THE NONOBVIOUS IN POLITICAL SCIENCE 41-43 (1976).

¹³⁰*Id.* at 168-70.

schools were dramatically worse than others, the NAACP Legal Defense Fund declined to try to enforce the “separate but equal” doctrine, tying the fate of students in the worst segregated schools to that of all other victims of segregated education. This idea has little applicability to amendments that benefit a different class from that whom the base initiative would serve.

Finally, and most problematically, leaders occasionally reject a valid claim if they believe it would be too divisive. They declare that “we are all in this together” and resist any assertions to the contrary. Rather paradoxically, they privilege the value of social solidarity over the interests of those making the rejected claim. Not surprisingly, such expressions of indifference for others’ well-being, coming just as we ask them to commit to ours, often fail. To keep these appeals to community spirit from exhausting their credibility, leaders should endeavor to invoke it as little as possible, to avoid repeated invocations against the same interests, and to provide relief in another form to mitigate the harm from being denied joinder.

6. Principles for Allowing Joinder of Policy Claims

The foregoing discussion suggests four principles for overriding a sponsor’s preferences to exclude an issue from consideration with her or his initiative. These identify the most compelling types of appeals for joinder; many of these also are among those whose joinder would do the least damage to underlying initiatives. The wider political community—those broadly open to both proposals on the merits but not specifically aligned with either—will need to weigh these arguments for joinder against the costs it could impose, as outlined above. Inevitably, these judgments cannot be entirely independent of substance. For example, if joining an additional issue seems to threaten to bring down the base initiative with decisional overload (the second, third, and fourth concerns in the preceding subsection), cabining debates on regulatory matters is much easier than containing those on fiscal affairs.¹³¹

a. Reciprocity or Estoppel

Initiatives’ sponsors positions rarely will be symmetrical with those of people seeking admission to the debate. A narrow, mechanical application of norms of reciprocity therefore will provide little guidance. Nonetheless, asking them to do equity as they seek equity can resolve several kinds of joinder problems. If an initiative’s sponsors have invoked a group’s interests to advance their cause, they may seem hypocritical to turn that group away when it seeks to protect its interests. Similarly, when those sponsors have tied their cause rhetorically to the one seeking joinder, they may be estopped from objecting to making that conjunction permanent. The base initiative’s sponsors’ appeals to a political or geographic community to unite to solve a significant problem also may estop them from rejecting the urgent needs of that community’s other members. More broadly, when joinder would bring some benefit to the base initiative, even if it also brings some risks or complications, joinder seems far less parasitic.

¹³¹David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544, 2560-61 (2005) [hereinafter Super, *Fiscal Federalism*].

b. Necessity

The strength of would-be interveners' need for their issue's inclusion in the present policy debate obviously should weigh in any calculations. As in determinations under Rule 19 of which parties' presence is required for litigation to proceed, however, the original initiative's sponsors need only consider *procedural* necessity. Assertions of substantive necessity—arguments that the proposed amendment is vital public policy—depend on personal norms and priorities about which no consensus is likely. Thus making substantive necessity the determinant of which issues a policy debate includes effectively leaves joinder questions for resolution based on raw political power.

On the other hand, the likelihood that a related set of concerns cannot otherwise ever receive a decision on the merits is a powerful argument for joinder. This inability could result either because the base initiative's enactment creates irremediable obstacles¹³² or because the proffered amendment could never gain salience on its own.¹³³ In the latter case, other political actors can assess whether this is the case through an examination of past efforts to press similar concerns. In assessing past failures, they must seek to distinguish between proposals considered and rejected on the merits, on the one hand, and those that never drew substantive consideration, on the other: a procedural necessity doctrine need not be concerned with each excluded proposal's success but rather with its consideration on the merits. If claims like those seeking admission to a debate never gain the political process's attention on their own but do not face particularly strong opposition on the merits, they have a good case for joinder.¹³⁴

c. Defensive Claims

A particularly strong claim for admitting a new concern to a debate arises where the base initiative is not only germane to the proffered amendment but causes affirmative harm to the interests that amendment champions. For the most part, this means that amendments seeking to contain the base initiative's externalities would receive preference over those seeking salience. Some of the latter, however, are in fact responses to *political* externalities: although the base initiative does no harm to the substantive interests the proposed intervention seeks to advance, it would prevent the would-be interveners from gaining a decision on the merits. This could be because the political process is unlikely to

¹³²For example, if the plans for a construction project do not mitigate its environmental effects, no subsequent efforts may restore the lost ecosystems.

¹³³Thus, Congress commonly addresses the special problems of Haitian immigrants together with those of Cubans. If it passed Cuban-only immigration legislation, Haitian immigrants likely would never achieve the salience to win similar relief themselves.

¹³⁴Proposals to protect small areas of habitat of individual species that are threatened but not photogenic have difficulty gaining salience on their own but might not arouse much opposition if they did. Their arguments for joinder with another environmental initiative that has achieved salience therefore seem strong. By contrast, gun control proposals' problem is not the lack of salience but the lack of support; denying them joinder with an omnibus anti-crime bill does not deny them a hearing on the merits.

give salience to two similar proposals in succession¹³⁵ or because the deals that must be struck to pass the first will leave insufficient political capital to prevail.

Whatever the nature of the harm the base initiative would do to the interests the proffered amendment seeks to protect, ameliorating that harm may be seen as a special case of necessity. Norms of reciprocity also may support inclusion of defensive amendments. Myopic champions of a cause facing a setback might be tempted to oppose the base initiative; the fact that they do not, whether because of community spirit or self-interested political calculations, confers a benefit on the base initiative that has some claim to reciprocation. Such amicable displays of deference also advance the broader political community's interest in avoiding contention. Community-regarding norms are more likely to take root if those following them often reap rewards.

d. Spreading Political Losses

If the same group continuously finds consideration of its interests subordinated to the greater good, its claims for inclusion become stronger. Inefficiencies in the political process, and often systematic undervaluation of some kinds of interests, are inevitable. The concentration of the resulting losses on one group often is not. A group previously asked to subordinate its interests to the greater good has a better argument for joinder than one that generally has received decisions on the merits of its proposals. Compelling the base initiative's sponsors to endure some losses—greater complexity and an increased risk that their effort will fail—seems fairer than again wiping out the outside group's concerns. Rule 19 embodies this notion of shared burden by asking the trial judge to consider ways of narrowing the relief to the parties present in litigation as an alternative both to dismissing the litigation—fully protecting the absent party—or granting all the relief the active parties seek.

B. Reasons to Admit Distributional Justice to Climate Change Debates

Attempting to determine whether climate change legislation should offset the effects on low-income people of increased carbon costs by identifying which claims are logically or morally superior will be unavailing. For example, some argue that ecological claims are ethically superior to political, social or economic ones because society's continuation depends on avoiding ecological calamity.¹³⁶ Others would leave the question for open political conflict, arguing that liberal democracy is a necessary precondition to ecological or distributional claims gaining any traction.¹³⁷ Still others might argue that severe poverty is inconsistent with the creation of durable ecological policies or a stable liberal democracy because desperate people necessarily have short time horizons and are

¹³⁵Congress might not be inclined to move two public lands bills in rapid succession. If a sensitive parcel cannot gain inclusion in a conservation bill moving through Congress, it is unlikely to win protection later.

¹³⁶John Ferris, *Ecological Versus Social Rationality: Can There Be Green Social Politics?*, in *THE POLITICS OF NATURE: EXPLORATIONS IN GREEN POLITICAL THEORY* 145, 146-47 (Andrew Dobson & Paul Lucardie eds., 1993) [hereinafter *NATURE POLITICS*]; *but see id.* at 154-55 (making an ecological argument for income redistribution).

¹³⁷BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 27-58 (1980) [hereinafter *ACKERMAN, SOCIAL JUSTICE*].

vulnerable to cooptation by illiberal or rapacious forces.¹³⁸ No consensus is likely that any one of these assertions is superior to the others.

The principles developed in section A, however, strongly support including anti-poverty concerns in climate change debates. First and foremost, claims for low-income offsets are defensive in nature, unlike most other claims seeking inclusion in climate change legislation. Those other claims, ranging from compelling proposals to fund basic science research and habitat adaptation to appeals for infrastructure reconstruction, seek to enhance the response to the underlying problem of climate change, not mitigate harm that rising carbon prices would cause.¹³⁹ The other three principles dictate the same result. As subsection 1 shows, the environmental movement has relied heavily on similar moral principles to those at the heart of arguments for distributional justice, and climate change legislation would benefit substantially from low-income offsets in both the near- and long-term. Subsection 2 makes the case for necessity, showing that if climate change legislation excludes distributional justice concerns, those concerns are unlikely to win a hearing through other means. Finally, subsection 3 notes that climate change legislation cannot prevent some adverse effects on low-income people, strengthening the case for addressing those that are within reach.

1. Reciprocity and Estoppel

Ideals of distributive justice have much to offer the environmental movement in general and the campaign to check climate change in particular. Their philosophical roots are similar to those of important strains of environmental ethics. Addressing distributive justice effectively would enhance the political legitimacy of the effort to check climate change, which is vital to its success. Vast wealth inequalities promote environmental waste by the affluent and impoverished alike while complicating regulators' tasks. Thus, the stakes go beyond distributive justice. Some redistributions also improve allocative efficiency.¹⁴⁰ As explained in Part IV *infra*, a properly designed system of low-income offsets would do just that. Finally, the environmental community's reliance on environmental justice arguments estops it from denying distributive justice's centrality to environmental concerns such as climate change.

To be sure, the reverse is also emphatically true: action on climate change is very important to low-income people. They disproportionately bear the burden of environmental degradation in general.¹⁴¹ More specifically, poverty both reduces the ability to adapt to climate change and increases vulnerability to its effects.¹⁴²

¹³⁸See MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 145-46, 280-84 (1996) (discussing the view that extreme poverty leads to lawlessness and civic disengagement).

¹³⁹One major exception is the proposal for subsidies to existing emitters. As *supra* Part II shows, however, those claims lack cardinal merit, making their ordinal status irrelevant.

¹⁴⁰MUELLER, *supra* note 96, at 51-53.

¹⁴¹Mohan Munasinghe, *Analysing Ethics, Equity and Climate Change in the Sustainability Trans-Disciplinary Framework*, in *ETHICS, EQUITY*, *supra* note 61, at 47, 62-63.

¹⁴²Rodney G. Peffer, *World Justice, Carbon Credit Schemes and Planetary Management*

a. Shared Political and Ethical Foundations

The environmental movement's early ancestors showed remarkable insensitivity to racial oppression,¹⁴³ even when environmental interests and those of racial minorities were closely intertwined.¹⁴⁴ The modern environmental movement, however, built itself on the foundations of movements for racial and economic justice in the 1960s and 1970s.¹⁴⁵

Environmentalism and distributive justice also share important normative premises.¹⁴⁶ Both place great ethical weight on Locke's assumption that the right to acquire property is limited by the ethical need to leave enough for others.¹⁴⁷ Each seeks to correct Locke's assumptions of abundance to reflect life in modern economies, one with respect to natural resources and the other with respect to individual opportunity.¹⁴⁸ Both seek to reform the early liberal suspicion of government to put it to work in creating the conditions of individual freedom.¹⁴⁹ Not surprisingly, then, a number of environmental theorists make arguments about distributive justice. Many of them focus on harms done to future generations¹⁵⁰ or to other species,¹⁵¹ but some seek to identify ecological preservation as either a form of justice in itself or as a necessary precondition to the functioning of a society capable of doing justice in all other respects.¹⁵² Just as John Rawls suggested that, in the original position, each individual should prefer whatever allocation of wealth does best by the least well-off (accepting only those differences in wealth that are advantageous for all, including the

Authorities, in *POLITICAL ECOLOGY: GLOBAL AND LOCAL* 141, 233 (Roger Keil et al. eds., 1998).

¹⁴³MICHEL GELOBTER ET AL., *THE SOUL OF ENVIRONMENTALISM: REDISCOVERING TRANSFORMATION POLITICS IN THE TWENTY-FIRST CENTURY* 8-9 (2008), available at http://www.envirojustice.org/docs/Soul_of_Environmentalism.pdf.

¹⁴⁴The most striking case of this was the displacement of Native Americans from their lands in the nineteenth century. The Native Americans were far better and more respectful stewards of nature than the settlers that replaced them; helping them enforce their treaty rights to hold onto more land could have done far more good than the creation of a few relatively small national parks. In the South as well, true liberation of the former slaves would have yielded a class of small family farmers far less rapacious than the massive plantations revived after Reconstruction's collapse.

¹⁴⁵GELOBTER ET AL., *supra* note 143, at 10.

¹⁴⁶To be sure, the environmental movement "draws its force from a range of arguments whose ethical underpinnings are really quite divergent and difficult to reconcile." KATE SOPER, *WHAT IS NATURE?* 254 (1995).

¹⁴⁷DAVID WELLS & TONY LYNCH, *THE POLITICAL ECOLOGIST* 107 (2000).

¹⁴⁸"No Man's Labour could subdue or appropriate all; nor could his enjoyment consume more than a small part; so that it was impossible for any Man . . . to intrench upon the right of another, . . . who would still have room for as good and as large a possession . . ." JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* § 35, at 119 (Rod Hay ed., Thomas Tegg, W. Sharp & Son, 2000) (1690); WELLS & LYNCH, *supra* note 147, at 127.

¹⁴⁹WELLS & LYNCH, *supra* note 147, at 117.

¹⁵⁰Terence Ball, *New Ethics for Old? Or, How (Not) to Think About Future Generations*, in *POLITICAL REASSESSMENT*, *supra* note 55, at 89, 89-108.

¹⁵¹TIM HAYWARD, *POLITICAL THEORY AND ECOLOGICAL VALUES* 146-56 (1998); Marcel Wissenburg, *The Idea of Nature and the Nature of Distributive Justice*, in *NATURE POLITICS*, *supra* note 136, at 1, 8-14.

¹⁵²Wouter Achterberg, *Can Liberal Democracy Survive the Environmental Crisis? Sustainability, Liberal Neutrality, and Overlapping Consensus*, in *NATURE POLITICS*, *supra* note 136, at 81, 95-99.

poor),¹⁵³ some of these environmental ethicists effectively argue for selecting policies from a still more basic original position in which none of us knows what species we will be.

b. Distributive Justice and Political Legitimacy

Environmental interests and those of low-income people tend to be underrepresented in political debates for similar reasons.¹⁵⁴ For both, the harms they seek to avert fall largely outside the view of mainstream middle-class society and its media outlets. Both groups depend on the uncertain, and largely episodic, support of altruists, many of whom have other commitments.¹⁵⁵ Both therefore share a strong need for political legitimacy: without it, some of their supporters that also believe in “good government” might defect while others might engage sufficiently for the cause to achieve salience.

Improving social equity can strengthen society and better equip it to handle the stresses of profound changes of the kind involved in climate change regulation.¹⁵⁶ Regulation addressing climate change will work one of the most profound transformations on society of any public act in recent times. A deliberative process in which environmental groups seek consensus among themselves is likely to “further marginalization of disadvantaged groups and perspectives.”¹⁵⁷ If that regulation is crafted without reflecting the interests of large numbers of low-income people, political legitimacy is likely to be lacking.¹⁵⁸

Pragmatically, a comprehensive response to climate change is impossible without addressing distributive justice concerns. Effective action against climate change requires international cooperation, and no international agreement that obstructs poorer nations’ economic development will win their assent. Indeed, Article 4.7 of the 1992 United Nations Framework Convention on Climate Change recognizes that economic and social development, and eradicating poverty, are developing countries’ primary priorities.¹⁵⁹ Long-term sales of carbon credits arranged by contemporary elites in developing countries may prove unsustainable when those elites lose power if the terms are perceived as locking the country into poverty.¹⁶⁰ On the other hand, allowing those nations to increase their per capita emissions to the current levels of affluent countries would doom efforts to restrain climate change. The political legitimacy that careful attention to distributional justice brings is therefore crucial.

Domestically, environmentalists depend on a broader appreciation of distributional justice’s importance. Although “greater efficiency can go some way toward the goals of saving the environment, and slowing resource depletion,

¹⁵³JOHN RAWLS, *A THEORY OF JUSTICE* 154-58 (1971).

¹⁵⁴GRAHAM SMITH, *DELIBERATIVE DEMOCRACY AND THE ENVIRONMENT* 54-55 (2003).

¹⁵⁵See David A. Super, *Laboratories of Destitution*, 157 U. PA. L. REV. 1221, 1247-49 (2008) (attributing instability in anti-poverty law to the unreliability of altruistic support).

¹⁵⁶Munasinghe, *supra* note 141, at 56-57, 61.

¹⁵⁷SMITH, *supra* note 154, at 59.

¹⁵⁸*Id.* at 65.

¹⁵⁹FARHANA YAMIN & JOANNA DEPLEDGE, *THE INTERNATIONAL CLIMATE CHANGE REGIME: A GUIDE TO RULES, INSTITUTIONS AND PROCEDURES* 93 (2004).

¹⁶⁰*Id.* at 152.

. . . all but the genuinely poor in the North will be required to consumer less resources.”¹⁶¹ Any successful international regime, whether based on the Kyoto Protocol or not, therefore will have to require emissions reductions in affluent countries while allowing some, presumably moderated, growth in emissions in poor countries. That system will face the same nationalistic attacks that the Kyoto Protocol has. Apart from the realpolitik of international relations—which is both normatively unappealing and all but impossible to convey to the lay public—distributive concerns are the main justification for such arrangements. Accordingly, environmentalists need to find their collective voice on issues of distributive justice.

c. The Environmental Benefits of Reducing Wealth Inequality

Strategically, even narrowly focused environmentalists should care about the distributional impact of climate change and resulting regulatory regimes. Huge wealth disparities overall are not good for the environment. With highly concentrated wealth typically goes highly concentrated political power, which is likely to be wielded selfishly to defend lucrative practices despite harm to the environment.¹⁶² At the other end of the distribution, dire necessity motivates many environmentally destructive practices, from slash-and-burn agriculture to over-lumbering and poaching endangered species. When someone’s family’s survival is at stake, only the most repressive—and costly—enforcement regimes will have any chance of achieving compliance with environmental rules. Elites’ environmental initiatives that threatened low-income people’s well-being have been perceived as oppressive and spawned sharp resistance.¹⁶³ Put in more affirmative terms, low-income people are likely to have among the highest marginal expected rate of return from additional expenditures, such as those on education or safer housing; the pursuit of these returns will motivate them to subordinate compliance with environmental regimes.¹⁶⁴

A single regime of incentives will have difficulty working across a broad income distribution: additional costs that the affluent shrug off may devastate impoverished families. This raises both political and humanitarian obstacles to effectively deterring the affluent’s environmentally destructive conduct. Offsetting much of their impact on low-income people therefore allows calibration of incentives to change the behavior of affluent people, who typically consume far more.

Moreover, low-income people may lack the resources to make environmentally desirable investments even when policy succeeds in making those investments financially advantageous. A family might save considerable money over the next decade by insulating its house, buying a new, greener heating system, or a more energy-efficient car is simply not an option if it lacks the funds to make those investments and is too poor to have access to affordable credit.

¹⁶¹Peffer, *supra* note 142 at 143.

¹⁶²Wissenburg, *supra* note 151, at 5.

¹⁶³Niraja Gopal Jayal, *Balancing Political and Ecological Values*, in *POLITICAL REASSESSMENT*, *supra* note 55, at 65, 72-82.

¹⁶⁴Wallack, *supra* note 47, at 173.

d. Institutional Estoppel: The Environmental Justice Movement

Over the past couple of decades, the environmental movement has received significant support from low-income people's allies through the environmental justice movement. This group has natural interests in the distributional aspects of carbon emissions regulation. While the mainstream environmentalists seek to reduce aggregate pollution,¹⁶⁵ the environmental justice movement's focus is distributional: the disproportionate concentration of polluters in low-income communities and, even more, communities of color.¹⁶⁶ It has attacked both siting procedures that exclude vulnerable communities' voices and the disparate impacts flowing from those procedures.¹⁶⁷ In doing so, it has brought democratic values and the terms of the social contract to the fore in environmental discourse.¹⁶⁸ Although the environmental justice movement's place within the broader environmental community is by no means uncontroversial, most of that community has welcomed this alliance. Having accepted distributional arguments that strengthen their agenda, a group could seem hypocritical objecting to these concerns' inclusion in climate change debates.

The U.S. Environmental Protection Agency (EPA) has defined environmental justice as preventing disproportionate effects of negative exposures.¹⁶⁹ Higher prices are a necessary but negative consequence of carbon emissions regulation, and they will consume a disproportionate share of low-income people's resources. That negative exposure thus would seem to make this an issue of environmental justice. To date, however, the environmental justice movement has remained largely silent. Instead, it has continued to focus on geographically distinct communities rather than on people of color and low-income people generally. Cap-and-trade systems' focus on aggregate emissions arouse deep submissions among environmental justice advocates, who have seen past aggregate limits met by reducing pollution in affluent, white areas.¹⁷⁰ More generally, they have become convinced that market-based regulation systematically disadvantages vulnerable communities¹⁷¹ and advocate a command-and-control model.¹⁷² Many environmental justice groups therefore have opposed the basic regulatory

¹⁶⁵LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT 7 (2000).

¹⁶⁶CLIFFORD RECHTSCHAFFEN & EILEEN GAUNA, ENVIRONMENTAL JUSTICE: LAW, POLICY AND REGULATION 4 (2002).

¹⁶⁷*Id.* at 3.

¹⁶⁸*Id.* at 4.

¹⁶⁹Robert R. Kuehn, *A Taxonomy of Environmental Justice*, [2000] 30 *Envtl. L. Rptr.* (Envtl. Law Inst.) 10,681.

¹⁷⁰To be sure, the effects of carbon dioxide emissions are identical regardless of their geographic source. Environmental justice advocates believe, however, that many of the largest sources of carbon dioxide also produce "hot-spots" of other pollutants with strong local effects; shutting down these sources thus would improve the affected communities' environments.

¹⁷¹Lynn E. Blais, *Environmental Racism Reconsidered*, 75 N.C. L. REV. 75 (1996); Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 YALE L.J. 1383 (1994).

¹⁷²Stephen M. Johnson, *Economics v. Equity: Do Market-Based Environmental Reforms Exacerbate Environmental Injustice?*, 56 WASH. & LEE L. REV. 111 (1999).

concept,¹⁷³ leaving them ill-positioned to influence the design of particular legislation.

Yet while the environmental justice movement is not engaged, its critics may react similarly to proposals to offset the regressive effects of higher carbon costs. Some traditional environmentalists have rejected the environmental justice agenda as a special interest displacing core environmental concerns;¹⁷⁴ they could argue that addressing the distributional and fiscal consequences of carbon regulation could slow progress toward the goal of reducing greenhouse gas emissions either politically, by complicating the enactment of legislation, or practically, by attenuating incentives to conserve. Legislation often depends on “unholy alliances” between environmentalists and industry;¹⁷⁵ bringing more interests to the table threatens to disrupt those deals. The sweep of the concerns the environmental justice movement has espoused—including opposition to military occupation and oppression and broad support for political, economic and cultural self-determination¹⁷⁶—has increased traditional environmentalists’ concern that it would draw them far afield from their core concerns and embroil them in most contemporary political debates. These fears are likely to work against admitting the consequences for low-income people and the federal fisc into climate change debates.

On the other hand, some critiques of environmental justice have little applicability to low-income offsets in climate change legislation. Both the direct costs of the consultative processes and uncertainty about their outcomes make industry more resistant to regulation,¹⁷⁷ possibly necessitating concessions on the substantive level of emissions reductions.¹⁷⁸ Directing the proceeds of carbon regulation to low-income offsets and deficit reduction would not affect the underlying regulatory structure or, as a result, industry’s costs. Others see bureaucratic review processes as dampening citizen activism;¹⁷⁹ an efficient system of low-income offsets need not provide such distraction. Debates about whether to emphasize ex ante chances or ex post results¹⁸⁰ also are irrelevant to these economic subsidies.

2. Necessity of Legislative Response

Carbon cost increases’ impacts on low-income people are far too great to be resolved without legislation. Aid to low-income people in general requires

¹⁷³Richard Toshiyuki Drury et al., *Pollution Trading and Environmental Injustice: Los Angeles Failed Experiment in Air Quality Policy*, 9 DUKE ENVTL. L. & POL’Y F. 231 (1999).

¹⁷⁴RECHTSCHAFFEN & GAUNA, *supra* note 166, at 5.

¹⁷⁵Richard J. Lazarus, *Pursuing “Environmental Justice”: The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787 (1993).

¹⁷⁶PRINCIPLES OF ENVIRONMENTAL JUSTICE, PROCEEDINGS OF FIRST NAT’L PEOPLE OF COLOR ENVIRONMENTAL LEADERSHIP SUMMIT (1991), available at <http://www.ejnet.org/ej/principles.pdf>.

¹⁷⁷RECHTSCHAFFEN & GAUNA, *supra* note 166, at 5.

¹⁷⁸CHRISTOPHER H. FOREMAN, JR., THE PROMISE AND PERIL OF ENVIRONMENTAL JUSTICE 64-67 (1998).

¹⁷⁹*Id.* at 115-21.

¹⁸⁰Vicki Been, *What’s Fairness Got to Do with It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001 (1993).

legislation¹⁸¹ because the satisfaction of helping the less fortunate is a public good that cannot effectively be confined to those that pay.¹⁸² And just as collective action problems doom significant private redistributions of money, so too they hamper redistributions of the political capital needed to win salience for anti-poverty legislation.¹⁸³

The proceeds from regulating carbon emissions could all too easily dissipate in the manner of past programmatic windfalls obtained without simultaneous requirements to redistribute the proceeds. The tobacco companies' vast settlement of their liability to Medicaid for tobacco-caused illnesses touched off budgetary feeding frenzies at both the federal and state levels. At both levels, both executive officials and legislators struggled to find principles for adjudicating the numerous proposals with clear, dubious, and no relationship to health. In the end, Congress ducked the issue, ceding its share of the settlement to the states despite the fact that it had paid three-fifths of the costs giving rise to the settlement (as well as half of states' litigation costs). State allocations of tobacco settlement funds ranged from the visionary to the embarrassing.

Similarly, states realized large savings from the deinstitutionalization of the mentally ill and people with developmental disabilities. Assisted living in the community, habilitation, and outpatient mental health services would have cost only a modest fraction of the savings and could have made deinstitutionalization an unqualified success. Instead, the savings from the closed facilities disappeared into states' general funds, divided among myriad spending and tax initiatives with stronger political support. Community-based services lacked capacity to handle the influx of deinstitutionalized people, and many ended up living on the streets.¹⁸⁴

3. Frequent Disregard of Low-Income People's Interests

Heedless policymaking disproportionately disadvantages low-income people and people of color. All too often, they lack the political power to block policies that disregard their interests. Little policymaking is heedless of the interests of the affluent. Moreover, because most policymaking begins from the baseline of current policy—current law, last year's funding level, the results of past political battles—the historical disadvantages in policymaking that low-income people and people of color have experienced means that they are much less likely to be

¹⁸¹Redistribution commonly arises as a form of insurance, to protect those currently comfortable against the risk of destitution, or in response to norms of fairness. MUELLER, *supra* note 96, at 45-47, 49-51. In this model, greater risk aversion can lead to greater redistribution. *Id.* at 604. Low-income offsets for rising carbon prices, however, are unlikely to succeed through an insurance model as the harm against which they guard is chronic rather than acute.

¹⁸²*Id.* at 47-49.

¹⁸³These difficulties in achieving salience should not be construed as failures on the merits. Amounts redistributed may be too small to be noticed by more affluent people. *Id.* at 575-76.

¹⁸⁴The much-anticipated "peace dividend" resulting from the end of the Cold War arguably is a third example, with programs to fund peaceful employment for Russian nuclear physicists going begging even as demands for defense spending plummeted. On the other hand, because the U.S. was running huge budget deficits at the time, reductions in defense spending did not literally free up any funds so much as they reduced unsupported spending.

protected in the baseline. They thus have less to offer in trade for any new accommodations they seek. They also enjoy no counter-majoritarian protection from the Takings Clause, but their interests may be subject to counter-majoritarian threat from tax limitation rules at the state and local level and from federal budget process rules that disfavor progressive fiscal policies.

The process of negotiating climate change policy could easily follow, and compound, this pattern. Such regulation is, in a broad sense, a public good.¹⁸⁵ Although providing of a new public good financed in a distributionally neutral manner does not affect the need for redistribution if the public good is a perfect substitute for private consumption,¹⁸⁶ moderating climate change is unlikely to be such a substitute.

Moreover, increasing the cost of energy is likely to adversely affect many low-income people in powerful but indirect ways for which no ready response is possible. Over the past six decades, the affluent have moved to suburbia, abandoning central cities to low-income people. As the costs of commuting increase, many wealthier workers are likely to find homes closer to the city center more attractive, bidding up housing costs and driving low-income people out of neighborhoods where they have lived much of their lives. Shortening commutes and increasing population density are important enough means of reducing carbon emissions that government policy will not intervene on low-income communities' behalf. Even identifying which particular low-income people suffered from this sudden gentrification would be difficult, meaning that these and other indirect losses are likely to receive no offset. This makes all the more urgent the offsetting of direct losses that all low-income people will feel when energy costs rise.

C. Admitting Fiscal Concerns to the Climate Change Debate

The case for including major deficit reduction in climate change legislation is more complex. Like aid to low-income people, deficit reduction suffers from severe collective action problems in the political arena: many people support it in principle, but few do so with enough fervor to engage in concerted political action. It therefore has little chance to muscle its way into climate change legislation politically. The principles developed in section A, however, offer a compelling ethical case for its inclusion.

A claim for deficit reduction is not defensive in the simplistic sense: no one is proposing climate change legislation that would add to the federal deficit.¹⁸⁷ Climate change legislation could, however, badly undermine deficit reduction politically. With one of the major political parties defining itself by its opposition to taxes and the other treating the topic gingerly, two major rounds of tax increases are unlikely to pass within a few months, or even years, of one another.¹⁸⁸ Enactment of a carbon tax, or a cap-and-trade system perceived to be

¹⁸⁵LOUIS KAPLOW, PUBLIC GOODS AND THE DISTRIBUTION OF INCOME 1 (2003).

¹⁸⁶*Id.* at 14-15.

¹⁸⁷Without offsetting transfers, increasing carbon costs could devastate state and local governments.

¹⁸⁸Even if a second round of tax increases was politically feasible, those might well be devoted to broadening health care coverage rather than deficit reduction.

the equivalent of a tax, therefore will eliminate one of the two main tools for deficit reduction. Eliminating a structural deficit of the kind this country had built even before the financial crisis with spending cuts alone would be difficult or impossible and in any event would almost certainly be highly regressive.¹⁸⁹

Estoppel arguments for deficit reduction, too, will be controversial. Some environmentalists resist attempts to compare environmental and other values; this concern becomes especially acute with regard to monetized non-environmental values.¹⁹⁰ On the other hand, the environmental movement's effectiveness depends on its ability to reconcile elements with sharply differing worldviews,¹⁹¹ and in important respects many environmentalists share ethical assumptions with deficit hawks. Both emphasize ethical duties to future generations¹⁹² and the risk of bequeathing them problems much easier solved in our time. Both groups are broadly critical of unbridled consumption. Thus, devoting most of the proceeds of carbon emissions regulation to reducing the deficit reinforces important themes on which the environmental movement depends; declining to do so could cause some to question the sincerity of the movement's commitment to future generations.

Including significant deficit reduction in the legislation also would bring political benefits, helping to win support among conservative Democrats with weak environmental credentials but strong concern for fiscal probity. This support may well not compare with what the legislation could garner spreading its proceeds around to myriad interest groups. It would be enough, however, for deficit hawks to claim legitimately that they are bringing something to the table.

Deficit reduction cannot be had without legislation. And as noted above, the lack of a large, committed constituency for deficit reduction contributes to the legislative process's chronic passivity even as politicians and the media give deficits great rhetorical salience. In deficit reduction packages, the appeal of the whole far exceeds that of the sum of its parts. The long odds of passing legislation, coupled with the political costs of proposing specific spending cuts or tax increases, even absent enactment, keeps most legislators from offering specific deficit reduction proposals. Thus, gaining a decision on the merits of deficit reduction outside of the climate change legislation, while possible, remains quite unlikely.

Finally, deficit reduction has repeatedly been subordinated to other interests, including environmental ones. President Bush repeatedly won for tax cuts that he argued would stimulate the economy, eliminating a substantial budget surplus and creating large deficits. He and Congress approved dramatic increases in spending for homeland security and wars overseas; arguments about the importance of environmental programs played a significant part in blocking offsetting domestic spending reductions. Most recently, congressional leaders won House passage of the \$700 billion bail-out bill for the financial industry by

¹⁸⁹To the extent this was the result, this analysis converges with that in section B, *supra*.

¹⁹⁰SMITH, DELIBERATIVE DEMOCRACY, *supra* note 154, at 37-40.

¹⁹¹*Id.* at 21-24.

¹⁹²*See supra* note 150 and accompanying text.

incorporating over one hundred billion dollars of popular tax cuts in the package. Among these were environmental measures such as tax credits for developing alternative fuels. Postponing deficit reduction again in passing carbon emissions legislation would only confirm its status as a political punching bag.

IV. Accommodating Environmental, Distributional and Fiscal Concerns

Even if distributional and fiscal concerns are admitted to the climate change debate, their success is far from assured. Both compete with numerous other claims for the available funds, many of which also have legitimate claims to consideration under these same criteria. Because of this country's massive long-term fiscal imbalance, if deficit reduction cannot defeat most other claims for the proceeds of a carbon regulatory regime, a fiscally responsible climate change policy is impossible. Low-income subsidies are comparatively affordable but are conceptually, administratively and politically more complex. A subsidy system must reach all, or at least the vast majority of, people most at risk and must do so without undermining the larger legislation's incentives for carbon emissions reduction, without creating a new bureaucracy that could become a lightning rod for criticism, and without reopening any of the emotional political battles that have surrounded anti-poverty policy.

This Part asserts that a fiscally responsible and distributionally sensitive climate change policy can meet those demands. Section A shows how many of the supposedly targeted subsidies competing for the money climate change legislation will make available are in fact inefficient to the point of futility. Section B shows that the low-income subsidies in major proposals also are woefully inefficient. Moreover, existing anti-poverty programs' design is too brittle to be able to assimilate these new subsidy funds effectively. Nonetheless, it shows how those programs can be reorganized and consolidated to provide an effective and well-targeted response to the burdens climate change regulation will impose on low-income people.

A. Fiscally Responsible Climate Change Policy

A carbon tax makes as much sense fiscally as it does environmentally. The federal budget faces severe structural imbalances. Six years into the recent economic expansion—at a point in the business cycle when the federal government ought to be accumulating large surpluses to pay down the national debt, it was still running large deficits. As the economic slowdown reduces revenues and increases claims for unemployment compensation and for need-based benefits such as food stamps and Medicaid, these deficits have started to spiral. These structural deficits result primarily from the huge tax cuts enacted in 2001 and 2003 and the debt they engendered. Even more ominously, the confluence of demographic changes and exploding health care costs are projected to overwhelm the federal budget once the baby boomers begin retiring in large numbers beginning less than five years from now.

Whether Congress addresses these deficits through tax increases, spending cuts, or a combination of the two, the effect will be deflationary. Put another way, the federal government's current hyper-stimulation of the economy is unsustainable. If increasing the drag on the economy is inevitable, doing so in a

way that steers us toward lower carbon emissions is logical. Conversely, manipulating climate change policy to avoid macroeconomic effects only to recreate those same effects a few years later would accomplish little.

A carbon tax with much of its revenues dedicated to deficit reduction and debt retirement therefore would be well-timed. A cap-and-trade system can be designed to achieve similar effects. If the federal government auctions off, rather than giving away, emissions permits, the resulting revenues should be equivalent to those under a carbon tax achieving a comparable level of CO₂ reductions. In each system, the market will reach equilibrium when prices rise to a level that limits aggregate demand to the specified, reduced levels. Under a carbon tax, the government will increase those prices directly with its tax.

A significant part of a fiscally responsible climate change policy is fending off the countless suitors for funds raised. The deficiencies of claims to subsidize existing emitters, under the guise of compensation, are discussed above. Another major claim on these resources is for funding a wide variety of state, local, and private sector activities related to climate change. Some involve research and development into cleaner energy technologies, techniques for sequestering carbon, or methods for helping humans or wildlife adapt to climate change that is not now preventable. Others involve operating subsidies for state, local, and private sector efforts at mitigation of or adaptation to climate change. These claims' cumulative effect seems more than capable of consuming all resources raised. These claims reportedly are being adjudicated and granted at a rapid pace in private negotiations among environmental advocacy groups, industry, state and local governments, and others seeking to influence climate change legislation. Beyond the aesthetic defects of this interest-group feeding frenzy, serious procedural and substantive concerns counsel against granting many of these claims, particularly in this forum.

Procedurally, the present spending negotiations are taking place among too constrained a universe of interests. The burdens of climate change regulation will not be limited to ecological interests; decisions about how to manage its fiscal and economic consequences similarly should not be so limited. Issues this fundamental are proper subjects of society-wide dialogue.¹⁹³ Climate change regulation itself will be, but these spending decisions are being addressed very much in the fine print of this legislation.

An important feature coming out of these on-going negotiations, reflected in the House bill and the 2008 Senate bill, appears to be the creation of dedicated funds devoted to one or another environmental purpose. Alas, dedicated funds tend to skew public priority-setting. They foster the artificial sense that spending up to the amount in the fund is costless. This hinders comparisons between the value of projects eligible for the special fund and either other public uses for the funds or simply leaving the funds in the private sector. The reduced political competition can engender sloppy inefficient public management, even where a

¹⁹³See ACKERMAN, *SOCIAL JUSTICE*, *supra* note 137, at 4-19 (locating open, mutually respectful dialogue at the core of liberal democracy).

well-designed project would have been warranted. Rarely is the amount of money raised by the segregated revenue stream a good proxy for the sums needed for the designated activities. In practice, these funding arrangements can operate as floors; they ensure that spending will at least equal receipts from the specified source but impose little political barrier to the pursuit of more from the general fund. Attempts to divert funds for other priorities are denounced as “raids,” almost as if they were takings of private property.¹⁹⁴ Some state governments in particular have found their ability to meet public needs without taxing at egregious levels hampered by permanent earmarks within their budgets, often enacted by voter initiatives. Dubious spending from the highway trust fund, and public confusion about the meaning of the Social Security and Medicare trust funds, show that the federal system is not immune from these problems.

A general substantive concern about many claims for the proceeds of a carbon tax or permit sale is that the claims’ justification assumes an unrealistically static baseline. Proposals for the federal government to fund an activity naturally and appropriately give rise to the question of why the private sector or other levels of government are not doing so. Absent obvious cases of impossibility (e.g., funding national defense or foreign policy), the most common answer is that, for whatever reason, no one else is in fact providing the needed funding. This is a reasonably persuasive response in most static policy environments. Here, however, the policy environment is emphatically *not* stable. That is both the essence of climate change and the purpose of legislation to restrict greenhouse gas emissions. For example, although emissions reduction clearly would benefit from more research on alternative energy sources than is now being funded, emissions regulation will make that research far more remunerative.¹⁹⁵

Similarly, although some may argue that state and local governments could usefully increase their planning for climate change mitigation and adaptation, their failure to do so to date likely reflects the salience of climate change as a public concern. State and local governments focus their efforts on activities important to their electorates; as climate change proceeds and emissions restrictions intensify their impact, these issues will command more public concern and will consume greater shares of state and local planning budgets, perhaps at the expense of road-building or opulent holiday lighting. None of the three major justifications for federal subsidization of state and local governments apply broadly here. For the most part, state and local governments as a group have a weak case for fiscal compensation as they are not losing a major source of support and the burdens of climate change and emissions regulations do not fall

¹⁹⁴At times, skillful interest groups have managed to enshrine these limitations into contracts with private parties, making them enforceable under the Contracts Clause. ROBERT A. CARO, *THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK* 617-26 (1974).

¹⁹⁵A technique for reducing consumption that would cost five dollars for every gallon of gasoline saved might not seem worth developing in the U.S. if economic conditions were likely to remain as they are but is likely to draw eager corporate attention with emissions regulations sure to raise the cost of gasoline well above that threshold.

so disproportionately on them.¹⁹⁶ The federal government enjoys no particular comparative advantage in funding these activities relative to state and local governments (beyond its possession of a generally more efficient revenue structure).¹⁹⁷ And no special need for federal leadership in the design of state and local programs is evident; if anything, many states and localities have been well ahead of the federal government in responding to climate change.¹⁹⁸

This is not to say that all proposals for spending on climate change mitigation and adaptation are premature. Some market failures are predictable even in a world addressing climate change far more forcefully than ours. For example, private businesses have great difficulty capturing the beneficial effects of basic scientific research that could lead to breakthroughs in conservation or clean energy. Similarly, improving science education at all levels will facilitate mitigation and adaptation in the future generations, but its benefits will not accrue particularly to the states or localities that provide it. These cases seem more the exception than the rule.

An additional substantive concern with many of these proposals is that they would have the federal government support activities already underway or likely at the state or local government levels or in the private sector. Shared financing schemes, although having considerable aesthetic and even ethical appeal, tend to be extremely inefficient in practice. When a new donor contributes to an existing activity, existing donors will tend to withdraw some of their funds. This is true as between committees in Congress, between the various levels of government, and between the public and private sectors. Thus, devoting proceeds from carbon regulation to many research activities is likely to crowd out other funding sources, wasting most of the new federal funds and yielding only a small expansion of the desired activities.

At least once initial start-up costs have been covered, the benefit derived from each increment of funding in most public activities declines as funding increase. In a research program, for example, the first dollars go to the most promising investigations; additional funding allows a second, tier of somewhat less valuable projects, to proceed, and so on. Each donor contributes to a worthwhile activity until the marginal value it places on the next increment of that activity ceases to exceed the marginal value it places on competing uses for those funds.

Table 2: Donors' Valuation of Activities of Jointly-Funded Program (Ordinal Consensus)

¹⁹⁶See Super, *Fiscal Federalism*, *supra* note 131, at 2571-74 (2005) (describing the compensatory model of fiscal federalism). An exception may be regions heavily dependent on coal mining. Both the states of the coal belts and the people economically dependent on coal mining may need funds to adjust to these economic changes.

¹⁹⁷See *id.* at 2574-77 (describing the superior capacity model). For example, most costs associated with climate change mitigation and adaptation are either pro-cyclical—becoming worse when the economy is strong and consumers have more money to spend on emissions-producing activities—or non-cyclical. The federal government's superior capacity to engage in counter-cyclical spending thus is not implicated.

¹⁹⁸See *id.* at 2577-79 (describing the leadership model).

When multiple donors contribute to the same project, each will have a different set of competing uses for the funds. Even as between two seemingly identical donors—two cities of equal size and wealth confronting a shared, regional problem or two wealthy individuals arranging their charitable donations—they are likely to value those choices differently.¹⁹⁹

Project	Value to Original Donor	Value to Second Donor
A	25	30
B	20	24
C	15	18
D	10	12
E	5	6

Therefore, each will place a different value on what could be accomplished by an additional contribution to their shared project *and* each will have a different threshold that such contributions must be able to meet in order to out-compete other uses for the funds. When a new donor begins to contribute to a project, its funds support activities that existing donors had deemed insufficiently valuable to support. If the original donor then reduces its contributions, it can divert those funds to other activities that it values more highly than the newly-funded activity of the shared program. The original donor may reduce its contributions by the entire amount that the new donor provided or may allow the shared program to experience some increase in income, either to induce continued support from its funding partner or because it has a limited number of appealing competing priorities for the money that it could withdraw.

Consider a simple example in which two donors are weighing five projects, each of which costs the same. Table 2 suggests how the respective donors might value the projects' likely results. Suppose the original donor funded activities A, B, and C.²⁰⁰ The original donor does not fund project D—valued at 10—because it has another, unrelated activity it can support with the same funds that is worth 13 to it. When the second donor appears, with its different valuations of the possible projects, its only question is whether to fund projects D and E—the other three already are underway. If it has no options worth more to it than 12, it will find it advantageous to provide funds sufficient for one additional activity, namely project D. When the original donor sees this, however, it may consider cutting its funding by one-third. This will reduce total program funding to the level sufficient to support three projects, which surely will be A, B, and C. Its withdrawal of funding will sacrifice project D, but it will enable the original donor to fund the unrelated project that it values more.

The original donor's withdrawal of one-third of its funding then poses a dilemma for the new donor. Project D is, again, unfunded. The new donor may still be spending money elsewhere on activities it values less than 12 and hence may be inclined to transfer their funding into the joint program to resuscitate project D. Doing so, however, may induce the original donor to withdraw further funds if that donor still has other, outside activities it prefers to project D. If the second donor resents this, or measures the cost-effectiveness of its funding

¹⁹⁹One may think an additional production at the opera company is more important than another visiting exhibition at the art museum; the second may reverse these priorities or may be wholly indifferent to the arts.

²⁰⁰For simplicity, this model assumes that the cost of each project is identical. Dropping this assumption adds an additional step to the calculations but does not change the results.

relative to the program's operations before it became involved, it will withhold additional funding and may even abandon the program altogether. On the other hand, it may not understand the dynamics of the original donor's behavior or it may use a more recent baseline. If so, this see-saw process of the new donor increasing its contributions while the prior one withdraws funding will continue until either one donor has completely exited the program or both donors thresholds for additional contributions lie between the value to it of the last funded activity and that of the first unfunded function.

This example assumes that both donors apply the same *ordinal* ranking to the program's activities, even if they assign different *absolute* values to those activities. This assumption will hold in many kinds of programs, such as research efforts in which a scientific consensus exists about which it the most promising toward a common end or a humanitarian program serving people of varying levels of deprivation. On the other hand, two donors can come to a program of common interest with different priorities. Both, for example, may support expanding access to health care, but one may think primarily in terms of people with disabilities while another may emphasize children. Table 3 provides a simple example of this: one project (perhaps covering children with disabilities) is a consensus top priority, another (perhaps serving adults without disabilities) is lowest on both donors' lists, but the two donors rank the three intermediate options quite differently. If we again assume that the original donor finds it beneficial to fund projects A, B, and C but not D, the new donor will have a strong incentive to contribute so that project D, its second priority, can get under way. If the first donor is uninformed or naïve, it may again seek to withdraw funds, on the assumption that project D will be the loser. If it does, the program's managers will face a dilemma. Dropping project D may or may not fit their personal priorities, but it certainly seems the best way to induce the second donor to replace the funds the original donor has withdrawn. On the other hand, doing so may incense the second donor. If the second donor understands what is going on, it may earmark its contributions for project D. If the first donor is similarly aware, it may then earmark its contributions for projects B and C, reasoning that project A will be in no real jeopardy as the second donor, like it, assigns project A top priority. At the end of the day, the allocation of funding may be seriously suboptimal from all participants' perspectives as one or another player miscalculates the other's moves and intentions. The program's funding also is likely to be heavily earmarked, leaving its managers little ability to respond to changing needs or new opportunities.

Negotiation may ameliorate some of these problems. Perhaps the two donors will agree to split the cost of project A and then each to fund some other activities in shares reflecting the priority each assigns to it. The incentives for dissembling in such negotiations, however, are quite strong. In addition, each

Project	Value to Original Donor	Value to Second Donor
A	25	30
B	20	12
C	15	18
D	10	24
E	5	6

donor may continually be endeavoring to reduce its real contribution surreptitiously—for example, arranging to contribute over-valued assets in-kind or to double-count moneys it is giving the program’s operators for other purposes as its contributions under this agreement. This tendency will create the need for unusually burdensome accounting and a periodic need for renegotiations to address new financial gimmicks that one or the other donor has devised. Moreover, any pact is likely to collapse any time either donor experiences a substantial increase or decrease in available resources or major changes in priorities or competing candidates for its funds.

In translating this model into the real world, additional difficulties arise in arranging negotiations and enforcing the results. When two sets of congressional committees try to pool their resources to support a common priority, the more nimble is generally able to leave its partner holding most of the bag. Thus, when authorizing committees seek to supplement with mandatory funds an activity that receives a substantial appropriation, the appropriations committees reduce the program’s discretionary funding.²⁰¹ Because the appropriations committees act every year and most mandatory programs are reauthorized or reviewed only at several-year intervals, they have little immediate fear of a tit-for-tat response by the authorizers whose contributions they purloined.²⁰² Authorizing committees that wish to increase funding for an activity receiving discretionary appropriations may have to convert the entire program, or at least clearly definable portions of it, to mandatory funding; this is very costly for them and provides a large windfall to the appropriators unless they can persuade the budget committees to reduce the appropriators’ allocations correspondingly.²⁰³

When the federal government shares fiscal responsibility with other levels of government, it typically tries to prevent state and local governments from withdrawing resources to offset federal funding.²⁰⁴ Matching or maintenance-of-effort requirements are common means to this end. These devices are only

²⁰¹Alternatively, the appropriators can cancel the mandatory money each year and count the savings to increase their net allocation for discretionary spending: a so-called ChIMP (Change In Mandatory Programs). This, for example, was the fate of the agriculture committees’ 1998 efforts to supplement funds for research into sustainable farming beyond the existing level of discretionary appropriations. ChIMP savings have been growing in recent years’ appropriations.

²⁰²Shared responsibility between two equally nimble committees, such as two appropriations subcommittees, have somewhat better prospects of yielding stable results.

²⁰³See 2 U.S.C. § 633(a)(1) (2006) (directing the budget committees to allocate spending power among the committees in the conference report to the annual budget resolution). The budget committees, with OMB’s concurrence, also could make a technical readjustment of the appropriators’ baseline to reflect the latter’s no longer having responsibility to fund the activity in question. Needless to say, the appropriators—who have several seats on the budget committees and vast power generally—vehemently resist such changes.

²⁰⁴The reverse, of course, is also true. Suspicions that policymakers rely on support that a program receives from other sources to limit federal contributions in turn can deter some state, local, and private support for programs. Cf. *Quattlebaum v. Barry*, 671 A.2d 881 (D.C. 1995) (rejecting claim that welfare cuts imposed after debate in which resulting food stamp increases were discussed violated federal law prohibiting state and local governments from counting food stamps as income to reduce other benefits).

moderately effective and often engender considerable conflict.²⁰⁵ Alternatively, the federal government can attempt to target its funding to one narrowly defined component of an activity and leave state and local governments to pay for the rest of the program.²⁰⁶ The effectiveness of this strategy depends on the precision with which the federal function can be defined, whether state or local governments regard the federal function as a substitute for the activities they fund, and whether accounting systems can be defined that will expose efforts to cross-subsidize other state and local activities from the one with federal support.

Preventing supplantation when government subsidizes activities that have received private support is even more difficult, in part because of the greater number and variety of private actors and in part because accounting restrictions that are politically acceptable when applied to other levels of government may be seen as overly intrusive if imposed on the private sector.²⁰⁷ An additional difficulty with sharing financing with private for-profit entities—and some public and non-profit ones—is preventing them from expropriating many of the benefits that motivated the public financing. The federal government would be unlikely to subsidize an art museum open only to members of an exclusive private club. Yet it funds a considerable amount of research whose outcomes, and resulting intellectual property, is closely held by private firms or universities.

B. Protecting Low-Income People from Regressive Cost Increases

Once a decision is made to attempt to offset the impoverishing effects of carbon emissions controls on low-income people, a host of important philosophical and design questions remain. Although some may seem quite technical, they are essential to ensuring the effectiveness of the offset program, to making that program politically viable over the long-term, and to preventing it from undermining the goals of climate change regulation itself.

Subsection 1 seeks lessons on program design from the uneven history of energy assistance efforts over the past several decades. Subsection 2 synthesizes those lessons and considerations peculiar to climate change regulation into three principles that should guide any system of low-income offsets. Subsection 3 then offers such a program, hewing to those principles but departing substantially from the vague, and likely ineffectual, nods to distributional concerns in climate change bills to date.

1. Lessons from Prior Efforts to Relieve Energy Costs

Considerable insight can be gained from existing policies for helping low-income people cope with high energy costs. Although this country has no coordinated response to this problem, it does have four programs worthy of note. These programs vary widely as to mission, administration, financing, coverage, benefits, and incentive structures. Comparing these efforts provides valuable

²⁰⁵Super, *Fiscal Federalism*, *supra* note 131, at 2568-79, 2586-88.

²⁰⁶*Id.* at 2568-71, 2589-91.

²⁰⁷Although not directly pertinent to the public policy issues discussed in this paper, sharing financial responsibility among private donors also is often complicated by the sheer numbers of donors to be coordinated and by the diversity of their preferences, financial capacity and sophistication.

insights for the design of a new system for offsetting the regressive effects of climate change regulation.

First, the energy crisis of the early 1970s prompted Congress to establish the Weatherization Assistance Program (WAP).²⁰⁸ WAP is a relatively small program in the U.S. Department of Energy funded with annual discretionary appropriations. State and local human services agencies administer WAP, making major decisions about program eligibility and benefits within fixed federal allocations. Assistance includes installation of storm windows, sealing gaps around windows and doors, replacing inefficient heaters and air conditioners, and insulating attics and walls.²⁰⁹ Because of funding constraints, WAP has served only sixteen percent of the more than twenty-seven million households eligible for aid.²¹⁰ Federal administrators have sought contributions from states and utility companies, with very limited success.²¹¹

Second, the energy crisis of the late 1970s spawned the Low-Income Home Energy Assistance Program (LIHEAP).²¹² Congress created what became LIHEAP in 1979 as a temporary stop-gap with the proceeds of the windfall profits tax it enacted on oil companies.²¹³ Congress subsequently reauthorized LIHEAP as an ongoing block grant to states funded through annual appropriations. States have no particular expertise in designing means-tested programs, as the results in LIHEAP demonstrate. Some provide thin, almost irrelevant, subsidies to large numbers of people; others offer more substantial aid but only to a tiny fraction of low-income families.²¹⁴

Because of this wide state variability, federal appropriators have little idea which kinds of families are likely to benefit from an increment in funding. Whether for that reason or because the appropriations process has a notoriously short memory for commitments made to those without political capital, LIHEAP's purchasing power has eroded badly over the years (adjusting for changes in home energy costs and the number of people living below the poverty line). Real per-poor-person funding averaged about 90% of the 1980 level through 1987 but then began to fall precipitously, averaging 60% from 1989 to 1992 before bottoming out at just 37% in 1996.²¹⁵ Despite the attention high

²⁰⁸Energy Conservation and Production Act of 1976, Pub. L. No. 94-385, §§ 411-422, 90 Stat. 1125, 1151-58 (codified in scattered sections of U.S.C.).

²⁰⁹U.S. Department of Energy, Energy Efficiency and Renewable Energy, History of the Weatherization Assistance Program, *available at* <http://apps1.eere.energy.gov/weatherization/history.cfm> (last visited Sept. 13, 2009).

²¹⁰U.S. Department of Energy, Energy Efficiency and Renewable Energy, Weatherization Assistance Program: Reducing the Burden on Needy Families, *available at* <http://apps1.eere.energy.gov/weatherization/reducing.cfm> (last visited Sept. 13, 2009).

²¹¹*Id.*

²¹²42 U.S.C. §§ 8601-8612 (2000) (repealed 1981).

²¹³Department of the Interior and Related Agencies Appropriations for Fiscal Year 1980, Pub. L. No. 96-126, 93 Stat. 954 (1979). The windfall profits tax responded to the combined effects of deregulation of oil prices and OPEC's decision to raise crude oil prices forty percent that summer.

²¹⁴DIVISION OF ENERGY ASSISTANCE, DEPARTMENT OF HEALTH & HUMAN SERVICES, LOW INCOME HOME ENERGY ASSISTANCE REPORT TO CONGRESS FOR FY 2003, at 37 (2003).

²¹⁵Author's calculations based on federal budget authority by fiscal year, Census Bureau estimates

energy costs have received since the outset of the second Gulf War, LIHEAP's appropriations have rebounded to only 45% of their 1980 purchasing power.²¹⁶ Since 1981, the number of low-income families meeting federal LIHEAP eligibility standards has risen from nineteen million to more than thirty-five million while the number actually receiving aid has actually *dropped*, from seven million to five million.²¹⁷ Although the LIHEAP statute seeks to create incentives for states to contribute to the program, such contributions provide only a trivial portion of the program's resources. This may reflect states' sense that energy assistance has historically been a federal responsibility or the fact that the sweeping flexibility they enjoy under LIHEAP's block grant structure allows them to address their priorities without spending their own funds.

A third major form of low-income energy assistance in this country comes from the federal rental housing subsidy programs. These programs, the largest and most important of which are public housing, project-based Section 8 subsidies, and Section 8 housing vouchers,²¹⁸ provide relatively deep subsidies to about five million households, a small minority of eligible low-income families with children, elderly persons, and persons with disabilities.²¹⁹ Beginning in the late 1960s, Congress required these programs to limit tenants' housing costs to not more than thirty percent of their incomes. Because HUD had defined housing costs to include utilities, this made these programs guarantors against high energy costs to those low-income people fortunate enough to gain subsidies. As the number of people living in poverty has increased, the purchasing power of appropriations for assisted housing has decayed. The number of low-income families HUD determined had severe housing affordability problems increased 33% from 2000 to 2006, yet beginning in 2004, federal deficit pressures led to 8%, or \$3.3 billion, in real cuts in the budget for assisted housing, resulting in a loss of more than 150,000 vouchers.²²⁰

In response to the energy crisis of the late 1970s, HUD ordered public housing authorities (PHAs) to convert as many units as possible to individual metering. This was intended to give tenants incentives to conserve energy. To

of the poverty population by calendar year, and the seasonally-adjusted home energy costs component of the Consumer Price Index for All Urban Consumers (CPI-U) for October of each year.

²¹⁶This figure is for 2006, the most recent year for which estimates of the poverty population are available.

²¹⁷C-SNAP, FUTURE FUEL, *supra* note 27, at 4.

²¹⁸U.S. Housing Act of 1937, 42 U.S.C. §§ 1437-1437z-7 (2000). USDA's Farmer's Home Administration operates similar, but far smaller, programs, primarily in rural areas. This housing operates on a utility allowance system closely paralleling that in HUD's programs.

A separate program, the Low-Income Housing Credit, provides ten-year tax subsidies to developers of low-income housing. Because it focuses on initial capital costs, it has less relevance to energy costs specifically and is of questionable effectiveness overall. CONGRESSIONAL BUDGET OFFICE, THE COST EFFECTIVENESS OF THE LOW-INCOME HOUSING TAX CREDIT COMPARED WITH HOUSING VOUCHERS: A STAFF MEMORANDUM (1992); Janet Stearns, *The Low-Income Housing Tax Credit: A Poor Solution to the Housing Crisis*, 6 YALE L. & POL'Y REV. 203, 206 (1988).

²¹⁹DOUGLAS RICE & BARBARA SARD, CENTER ON BUDGET & POL'Y PRIORITIES, THE EFFECTS OF THE FEDERAL BUDGET SQUEEZE ON LOW-INCOME HOUSING ASSISTANCE 3 (2007).

²²⁰*Id.* at 4-5.

maintain compliance with the thirty-percent limit on overall housing costs, PHAs gave each household a “utility allowance” as a credit against its rent. HUD required the utility allowance to represent the “reasonable” utility costs for units in a given class. Roughly three in five public housing residents and four in five housing voucher holders are in the utility allowance system;²²¹ the remainder live in buildings that have central heating systems or are otherwise not suitable for individual metering.

These allowances calculations’ have posed persistent problems.²²² PHAs have differed in their definition of “reasonableness,” in how reliably they update allowances for changes in utility rates, and in which factors they consider when determining the allowance for a particular unit.²²³ Even when a PHA endeavors to set utility allowances properly, doing so requires difficult calculations about what rates of energy consumption are achievable for various kinds of units. In theory, they should adjust utility allowances for as many factors as possible *other than* individual effort at conservation. Merely accounting for the number of rooms in a unit and whether it is detached, semi-detached, or bracketed by other units will ignore several important sources of variability. For example, a wasteful family in a well-maintained, well-insulated apartment may use far less energy than a frugal one in a drafty, decrepit unit with the same number of rooms.²²⁴ This seems especially inequitable because PHAs assign tenants to particular dwelling units and are responsible for the repair and insulation of those units. Unusually warm winters can vitiate the utility allowance system’s incentives for conservation; unusually cold weather can leave most tenants’ allowances insufficient.²²⁵ Because the housing assistance programs operate under fixed appropriations, PHAs generally lack the means to supplement allowances when severe weather strikes.

Seasonal variations can cause serious problems for low-income tenants even when their PHA established an appropriate utility allowance. To avoid having to recomputed tenants’ rents every month, PHAs generally provide a flat utility allowance every month throughout the year.²²⁶ This requires tenants to save, and to continue to conserve energy, during the summer months in order to be able to afford their winter bills. Low-income people, by definition, face numerous pressing expenses that make saving difficult.²²⁷ As a result, many risk utility terminations each year. In theory, budget plans—providing equal monthly bills throughout the year based on estimates of usage—can eliminate this imbalance. In practice, these plans’ reliance on estimates mimicking those the PHAs make, are error-prone and can present tenants with large supplemental bills after the

²²¹GENERAL ACCOUNTING OFFICE, PUB’N NO. GAO-RCED-91-40A, ASSISTED HOUSING: UTILITY ALLOWANCES OFTEN FALL SHORT OF ACTUAL UTILITY EXPENSES 18 (1991).

²²²*Id.* at 18-51.

²²³*Id.* at 40-48.

²²⁴*Id.* at 36.

²²⁵*Id.* at 36-37.

²²⁶*Id.* at 39-40.

²²⁷*Id.*

year-end reconciliation.²²⁸ They also attenuate tenants' incentives to conserve energy and may confuse some tenants about how effective their efforts have been.

The fourth major federal effort to help low-income families meet energy costs is even less well-known, although it serves by far the largest number of low-income families. It is the Food Stamp Program's excess shelter cost deduction. The Food Stamp Program bases benefit levels on household size and income.²²⁹ In computing a household's income, the program deducts certain largely non-discretionary expenses that can affect the ability to purchase food. One of these deductions is for shelter costs exceeding half of the household's income after all other deductions.²³⁰ Almost seventy percent of food stamp households' shelter costs exceed this threshold; seven million households receive more than \$6 billion per year in additional food stamps because of this deduction.²³¹

Like the HUD programs, the Food Stamp Program defines shelter costs to include utilities as well as rent or mortgage payments.²³² Like the HUD programs but unlike WAP and LIHEAP, it provides the same level of assistance to households whose utility costs are included in their rent. Unlike HUD but like LIHEAP, the food stamp excess shelter deduction provides a very shallow subsidy, offsetting only a small fraction of energy costs for participating households: its value generally is equal to about thirty percent of that fraction of a household's shelter costs that exceed half of its income.²³³ Paradoxically, it provides little or no aid to the very poorest households: their incomes entitle them to the maximum food stamp benefit without the shelter deduction.²³⁴

Unlike any of the other major federal energy assistance programs, the food stamp excess shelter deduction is both a budgetary entitlement and a responsive entitlement,²³⁵ guaranteeing that funding will be sufficient to meet the claims of all eligible people seeking benefits.²³⁶ Because it only offsets a minority fraction of marginal housing costs, the excess shelter deduction has a relatively modest impact on households' incentives to conserve.²³⁷ In addition, all states calculate

²²⁸ *Id.*

²²⁹ 7 U.S.C. §§ 2012(o), 2017(a) (2006).

²³⁰ *Id.* § 2014(e)(6).

²³¹ Author's calculations, based on data in KARI WOLKWITZ, U.S. DEP'T OF AGRICULTURE, CHARACTERISTICS OF FOOD STAMP HOUSEHOLDS: FISCAL YEAR 2006, at 42-45 (2007).

²³² 7 C.F.R. § 273.9(d)(6)(ii)(C) (2008).

²³³ 7 U.S.C. § 2016(a) (2006).

²³⁴ Some 561,000 households with no gross income receive no benefit from the shelter deduction. Most of the 2,271,000 households with high shelter expenses that receive the maximum food stamp allotment benefit from only part of the deduction for which they qualify. WOLKWITZ, *supra* note 231, at 42.

²³⁵ David A. Super, *The Political Economy of Entitlement*, 104 COLUM. L. REV. 633, 654-55, 672-78 (2004) [hereinafter Super, *Political Economy*].

²³⁶ 7 U.S.C. § 2014(a) (2006).

²³⁷ The excess shelter deduction also has an absolute cap that was imposed in 1977 to prevent relatively prosperous households from getting food stamps by devoting almost all of their funds to housing. *Id.* § 2014(e)(6)(B). This cap lost its policy rationale in 1981 when Congress eliminated food stamp eligibility for most households with gross incomes above 130 percent of the poverty

the utility portion of households' shelter costs with a "standard utility allowance" (SUA), which approximates reasonable usage patterns. SUAs are far less individualized than PHAs' utility allowances: some states differentiate only between households with and without responsibility for primary heating or cooling costs; at most, they may vary by the number of people in the household and the region of the state.²³⁸ This imprecision has aroused less criticism than PHAs face, in part because of the excess shelter deduction's lower profile and in part because its status as a very partial subsidy lowers the stakes. Of greater concern has been states' non-compliance with federal regulations requiring them to update their SUAs annually to reflect changing utility rates.²³⁹ In any event, because few food stamp households' benefits depend on their actual usage, the SUA further reduces the deduction's impact on incentives to conserve or to seek energy-efficient housing.

Four House and three Senate committees write these programs' authorizing legislation; three different appropriations subcommittees oversee their funding. Each of these four programs is administered by a different federal department; typically state and local administration is fragmented as well. No overarching federal law prohibits households from benefiting from more than one of these programs, although households receiving HUD subsidies will rarely have shelter costs high enough to qualify for the food stamp excess shelter deduction. Questions about the interrelationship of these programs have spawned considerable controversy.²⁴⁰

2. Principles for Designing Low-Income Subsidies

Although accepting the importance of offsetting the regressive effects of increased energy costs is a crucial first step, it is far from sufficient to guard against those effects. As the abundant critics of social welfare programs never tire of reminding us, many existing programs suffer from serious design limitations. Even if legislation sets aside an appropriate amount for aid to low-

line unless those households have an elderly member or one receiving major public disability benefits. *Id.* § 2014(c)(2). Congress has subsequently raised the cap to a level at which it impacts only fifteen percent of food stamp households.

²³⁸Food & Nutrition Service, U.S. Department of Agriculture, Standard Utility Allowances (SUA) Charts, *available at* <http://www.fns.usda.gov/fsp/rules/Memo/SUAAAlpha.htm> (last visited Sept. 13, 2009).

²³⁹*See id.* (showing that many states are one or two years behind in updating their allowances); 7 C.F.R. § 273.9(d)(6)(iii)(B) (2008) (requiring such updating).

²⁴⁰*See, e.g.,* West v. Sullivan, 973 F.2d 179 (3d Cir. 1992) (permitting limitation of food stamp SUA to households whose utility costs exceeded any rebated PHA utility allowances they received); Rodriguez v. Cuomo, 953 F.2d 33 (2d Cir. 1992) (permitting denial of LIHEAP to recipients of HUD subsidies); West v. Bowen, 879 F.2d 1122 (3d Cir. 1989) (prohibiting counting PHA utility allowances as income in determining food stamp benefits); Dep't of Health & Welfare, State of Idaho v. Block, 784 F.2d 895 (9th Cir. 1986) (prohibiting consideration of LIHEAP when computing food stamp shelter deduction); Clifford v. Janklow, 733 F.2d 534 (8th Cir. 1984) (prohibiting consideration of HUD subsidies when computing LIHEAP benefits); *cf.,* Maryland Dep't of Human Res. v. U.S. Dep't of Agric., 976 F.2d 1462 (4th Cir. 1992) (permitting counting of state energy assistance in computing food stamp benefits).

income people, if it lacks an appropriate delivery mechanism that aid either will fail to survive the political process or will be misdirected.

This subsection offers three principles to guide the design of a low-income subsidy program. These principles reflect a combination of political, administrative, and aspirational considerations. Subsection a identifies the basic requirements for any new low-income energy cost offset program to win initial enactment and to survive in future years when the political process's attention inevitably turns to other concerns. Subsection b focuses on how to match subsidy funds both with their specific purpose and with the general goals of climate change legislation. Subsection c then addresses the administration of the new offset program, recognizing that administrative shortcomings have been major sources of both substantive failure and political attacks in existing social welfare programs.

a. Political Efficiency

The challenges of winning a program's initial enactment and of preserving it over time are quite different. Conventional political science emphasizes the advantages flowing to the party defending the status quo on an issue: that it is easier to block changes than to initiate them. This lesson is only partially applicable to spending programs, whose supporters need continued affirmative actions from the government. At each juncture, the program's health depends on leveraging funds with available political support. Initiating a program requires a great deal of funding, but it also comes at a time when attention to, and support for, the program's mission are at their apogee. The amounts of funding at issue in any particular battle over preserving a program's effectiveness are far smaller—absent a political sea change, few programs lose more than a few percentage points of their nominal funding in any given year—but bringing political support to bear is far more difficult. This is particularly true of programs whose support depends on the general public's altruism: maintaining the public's consistent focus on most issues, certainly including low-income people's well-being, is difficult to impossible. These programs rarely have natural support from powerful interest-groups and must compete with programs that do. Thus, a program's designers must consider both what they can enact initially and what they can maintain under very different political conditions in the future.

i. Initiating a Program

The keys to converting strong but transient public sympathy into legislation are speed and simplicity. Speed is crucial because the public's altruism will remain not remain focused on a particular cause for long. Although altruistic concerns are not wholly fungible, if delays prevents public-spirited voters from achieving satisfaction through addressing one social ill, they are likely to move on to another.²⁴¹ Anti-poverty advocates discovered this in the 1970s when they

²⁴¹In economic terms, one can conceive of the public-spirited electorate as seeking to trade attention and funding for satisfaction. If it cannot close the deal with one "vendor"—one social cause—a competitor is likely to enter the market, offering better a "price"—less sustained attention required—to achieve a sense of accomplishment.

helped to defeat first President Nixon's welfare reform plan and then President Carter's: in each case, they imagined they would advance to a better deal but in fact received no deal at all.

Simplicity, in turn, is important because an altruistic electorate is unlikely to have the inclination or capacity to engage in detailed policy analysis. If voters do not understand the proposal easily, they may either doubt that it addresses the identified problem or suspect their good will is being manipulated for unclear ends. The 1993-94 Clinton health care proposal's greatest weakness was not any particular design defect but rather the fact that, at more than 1,500 pages and built to defy simple explanations, the public could not understand it. Non-wonks had no basis on which to distinguish the Clinton plan from its competitors or to adjudicate the merits of the many accusations about its contents. A proposal need not be simple on its face as long as the public can be given a clear, simple, credible version of what the legislation does. The need to present such a picture explains the appeal of bipartisanship even when the majority party does not immediately need the opposition's votes: voters seeing supporters from both parties are more likely to accept that a simple account of the proposal is an accurate one.

Speed and simplicity are closely related. The more time a proposal lingers, the more opportunities interest groups have to lobby for provisions increasing its complexity (or cost) and the more opportunities critics have to raise doubts about the simple explanation its sponsors have offered. Simpler proposals, in turn, can be drafted, costed, and negotiated more quickly.²⁴²

ii. Maintaining a Program

A program's designers can pursue several different strategies for ensuring its future durability. One is to try to develop a self-interested constituency for the program that can defend it when the public's attention wanes. For a variety of reasons, social welfare programs' front-line administrative staff have not proven formidable champions of the programs' funding.²⁴³ Utility companies have lent some political support to LIHEAP and the EITC because they help recipients pay bills. Once climate change regulation begins, however, those companies' political agendas are likely to fill with matters more central to their profitability.

Providing benefits to higher-income people, who tend to be more politically active, is another oft-discussed approach. Certainly the strength of the most important single redistributive program in this country—Social Security—springs from its strong self-interested support from middle-income voters. Medicaid, too, may have avoided being block-granted in the 1995-96 because its long-term care component serves large numbers of middle-income families.

Nonetheless, designing programs to be universal—to provide benefits without regard to claimants' means—faces several obstacles. Middle-income Americans are very selective in what benefits they want to receive from the government. If they do not feel a strong need for a benefit, they are likely to resent the taxes that

²⁴²Simpler proposals also can be implemented more quickly, reducing the dangers of a quick repeal.

²⁴³William H. Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 *YALE L.J.* 1198, 1254-69 (1983).

fund it more than they appreciate the benefit itself. The fate of the all-too-aptly named “catastrophic health care” plan of 1988—public insurance against the otherwise unreimbursed costs of a major illness that Congress quickly repealed after Medicare beneficiaries rebelled against the required premiums—shows the divergent political valences of taxes and benefits. Many regard cash and near-cash transfers as acceptable only if they can be understood as social insurance. Ongoing offsets for higher prices resulting from carbon emissions regulation fit that model badly and thus cannot be expected to win strong middle-income support.

A common reflex both to the political weakness of low-income people and to middle-income people’s disdain for wealth transfers is to rely on the tax system. Tax expenditures receive far less analytical and political scrutiny than spending programs.²⁴⁴ The tax system, however, tends to be a rather inefficient tool for these purposes. First, most devices for transferring wealth to low-income people also spend significant sums on higher-income individuals. These reduce the subsidies that can be provided at any given funding level. Because these amounts are spread across large numbers of people, even a badly leaking tax preference is unlikely to benefit any particular middle-income taxpayer enough to increase its political support appreciably. Second, the IRS’s administrative structure limits the ability to design the preference to target benefits to need most efficiently.²⁴⁵ Third, the most prominent device for offsetting costs through the tax code—the deduction—is regressive. A \$1,000 deduction translates into far more tax savings for an affluent person in a high tax bracket than for a family of modest means.²⁴⁶ Finally, reaching low-income people at all through tax policy requires an additional, often difficult, political step: making the preference refundable for those with no net tax liability. This largely rules out deductions, but even redistributive credits often are not fully refundable. For example, the child credit is only partially refundable and the dependent care tax credit is not refundable at all. House Republicans harshly criticized efforts to accelerate portions of the 2001 tax cuts that primarily benefited households through refundability. President Bush’s recent economic stimulus proposal would not be refundable and thus would not help the poorest households.²⁴⁷

Without little realistic prospect of enlisting politically powerful self-interested backers, the preservation of any low-income offset program will depend on mobilizing altruistic public opinion. Because the electorate’s future responsiveness is uncertain—some other cause may be occupying its attention at the pivotal juncture—minimizing the number of challenges is far more important for this

²⁴⁴JACOB S. HACKER, *THE DIVIDED WELFARE STATE: THE BATTLE OVER PUBLIC AND PRIVATE SOCIAL BENEFITS IN THE UNITED STATES* 16 (2002).

²⁴⁵David A. Super, *Privatization, Policy Paralysis, and the Poor*, 96 CAL. L. REV. 393, 433-41 (2008) [hereinafter Super, *Privatization*]; Anne L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533, 547-57 (1995). Subsection b, *infra*, discusses in some detail what that might involve.

²⁴⁶Lily L. Batchelder et al., *Efficiency and Tax Incentives: The Case for Refundable Tax Credits*, 59 STAN. L. REV. 23 (2006).

²⁴⁷JASON FURMAN, BROOKINGS INST., *PRESIDENT BUSH’S PLAN FOR ECONOMIC STIMULUS* (2008).

sort of program than for those with reliable rent-seeking constituencies. Thus, establishing the program as a budgetary entitlement²⁴⁸—independent of annual appropriations battles—is pivotal: few discretionary programs for low-income people have avoided steady erosion.²⁴⁹ Similarly, if the program is not designed to adjust automatically for inflation, its supporters are unlikely to mobilize effectively for annual battles to protect its real value.²⁵⁰

To mobilize sympathetic voters to help fend off periodic challenges, simplicity of concept also is almost as important to preserving a program as it is to creating one. A gangly program with many features whose interrelationship is difficult to fathom can be dismembered piece by piece without the public comprehending what is happening. These silent reductions can affect either the number of people receiving benefits or the amount of assistance beneficiaries receive. By far the best security against the former danger is to design a program as a responsive entitlement: a program in which participation depends solely on the number of applicants meeting eligibility criteria, not the amount appropriated.²⁵¹ This requires any reductions in eligibility to be achieved through relatively transparent designations of those affected. A program's architects can guard against benefit erosion by establishing it as a functional entitlement,²⁵² specifying its benefits not as an arbitrary amount but as whatever is sufficient to accomplish some specific function. Thus, for example, a carbon regulation offset established in dollar terms might become frozen, thus causing its real value to erode over time.²⁵³ By contrast, basing benefits on the estimated cost increase for the average family of a specified type would allow benefit levels to adapt automatically to changes in the regulatory regime.²⁵⁴ It also would force those

²⁴⁸Super, *Political Economy*, *supra* note 235, at 652-53.

²⁴⁹The Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) is an exception, but the extraordinary qualities that have allowed it to do so highlight the difficulty of this task. WIC delivers an exceptionally appealing commodity (high-nutrition foods) to exceptionally sympathetic people, it competes for funding in an exceptionally unsympathetic appropriations bill (agriculture), and it is one of the few social programs with compelling research evidence that it is cost-beneficial even under a stringent definition of that term. Some other programs, such as LIHEAP, erode most years but occasionally regain prominence and receive one-time increases—only to begin to shrink again.

²⁵⁰The cost of adding adjustments for inflation compounds in future years, making it very difficult to offset. Even a proposal as popular as adjusting the threshold for the alternative minimum tax has so far proven impossible to pass on an ongoing basis.

²⁵¹See *supra* note 235 and accompanying text.

²⁵²Super, *Political Economy*, *supra* note 235, at 655-58, 678-80.

²⁵³Even if this amount is indexed in the initial legislation, indices in low-income benefit programs have proven fairly easy politically to repeal, perhaps due to the electorate's lack of quantitative sophistication and indices' lack of dramatic impact in any given year. David A. Super, *The Quiet "Welfare" Revolution: Resurrecting the Food Stamp Program in the Wake of the 1996 Welfare Law*, 79 N.Y.U. L. REV. 1271, 1287 (2004) [hereinafter Super, *Quiet Revolution*].

²⁵⁴See 7 U.S.C. § 2012(o) (2006) (defining the maximum food stamp benefit in such terms). To be sure, an unsympathetic and determined administration could attempt to change the formula by which carbon regulation's impact is estimated. This, however, is fairly portrayed as "cooking the books": the Reagan Administration's attempt to reduce school meal subsidies by counting ketchup as a vegetable, and its contemporaneous exploration of a similar strategy directed at the Food Stamp Program, collapsed at a considerable political cost to that administration.

that would cut benefits to explain why that principle should no longer apply, triggering a debate that should be relatively transparent to the media and voters.

b. Target Efficiency

One of the most common criticisms of a public program is that it wastes public resources by failing to deliver them where they are most needed. Another common complaint is that legislation creates perverse incentives. Unfortunately, these problems are very difficult to avoid simultaneously: measures taken to address targeting concerns often create at least the appearance of undesirable incentives, and vice versa. Subsection i considers this trade-off as it applies to legislation offsetting the effects of higher carbon costs on low-income people.

In several important respects, however, targeting can be improved without seriously undermining either the practical or the expressive effects of incentives. Subsections ii through iv explore these possibilities.

i. Balancing Targeting and Incentives

Debates about the design of major mean-tested programs in this country long have been dominated by debates between the largely inconsistent goals of targeting and incentives. Unlike many debates in anti-poverty law, this one does not break down on families left-right grounds: Ronald Reagan and Daniel Patrick Moynihan advocated targeting; Newt Gingrich and David Ellwood focus on incentives. Targeters maintain that limited public funds available for social programs can be spent most efficiently—can do the most good—if concentrated on those in greatest need. Some conservatives also may justify an emphasis on targeting by disputing the appropriateness of public interventions absent any but the direst deprivations and by arguing that receipt of direct public aid is demeaning and should be confined to as few people as possible. Thus, President Reagan justified his sweeping cuts of low-income programs as an effort to limit them to the “truly needy,” who, he said, would retain a “safety net.” Pragmatic progressives may see targeting as protection against critics’ efforts to induce taxpayers’ jealousy by portraying recipients of benefits as better-off than some of those whose taxes fund that aid. Those with direct experience working in low-income communities may favor targeting both because it eliminates the most wrenching crises and because they are skeptical that incentives built into public benefit program rules have much practical effect.

Incentivizers, by contrast, see public benefits programs in more economic terms, taking a dynamic view of low-income people’s relationships with those programs. They want to give more aid to those engaged in certain socially desirable activities. To the extent that that activity makes the claimant better-off financially, rules that reward that activity produce results precisely opposite to those targeting benefits on need. Work has long been the main, although not the exclusive, focus of incentives in public benefits programs. David Ellwood advocated making work pay better than welfare by increasing supports to the working poor; Newt Gingrich sought to achieve the same goal by cutting welfare. Even where evidence calls into question recipients’ actual responsiveness to programs’ incentives, they may dislike the expressive effects of a program treating people engaged in desirable behavior better than those that are not.

Conservatives that see financial poverty as a consequence of behavioral poverty favor strong incentives; some suggest that eliminating means-based programs altogether provides the strongest possible work incentive. Pragmatic progressives may prefer programs with strong behavioral incentives because they attract recipients whose actions arouse more sympathy among middle-class voters distrustful of the poor.

The tension between targeting and incentives takes on an additional dimension in remedying the distributional effects of climate change policy. High energy costs are both an important determinant of need for subsidies and sometimes the result of behavior the policy seeks to discourage. Price increases cause the sharpest reductions in consumption among low-income families,²⁵⁵ which is just what climate change policy desires but which could cause severe hardship if the families cannot manage the costs.

In addition, the income effects of subsidies on low-income people can be difficult to predict. At the margins, it would seem that more income would allow low-income people to spend more on energy and emit more. Sufficient energy price increases, however, could make many forms of energy usage an inferior good: one whose consumption declines with rising incomes. Specifically, as low-income families gain modest amounts of discretionary income, they may apply that to reducing their need for energy consumption by weatherizing, purchasing a more fuel-efficient car, or paying the higher rents required to live near work or public transit lines.

Incentives in public benefit programs inevitably are crude instruments.²⁵⁶ They almost inevitably fall on some individuals who lack the capacity to act in the preferred manner, such as work incentives applied to households in which all members are children or adults having to care for seriously infirm individuals.²⁵⁷

Any system of incentives implies a judgment about which conditions should be taken as givens and which should be treated as the result of individual choice. Badly insulated dwellings have higher heating and cooling costs, which increase need for subsidies. Many badly insulated units have relatively affordable rents, due to ill-repair or simply because of the higher expected utility bills. Thus, low-income people probably live disproportionately in such units. Yet adjusting subsidies on this basis would undermine conservation incentives.

A more difficult question is whether to adjust for the household's location of residence. Urban areas have dramatically lower per capita fuel consumption than rural ones.²⁵⁸ Various federal subsidies help keep alive many rural communities in states with harsh winters on the Great Plains. Significant savings thus could be achieved if more people moved to cities. Nostalgia for rural America, and those states' strong representation in the Senate, ensure that concept would never

²⁵⁵C-SNAP, FUTURE FUEL, *supra* note 27, at 2.

²⁵⁶See Alstott, *supra* note 245, at 545 ("Economic theory can establish the existence of disincentives to work or to marry, but empirical study is needed to establish whether and how those disincentives actually affect people's decisions to work or to marry.").

²⁵⁷*Beno v. Shalala*, 30 F.3d 1057, 1073 (9th Cir. 1994).

²⁵⁸Light, *Urban Environment*, *supra* note 55, at 22-23.

gain traction in U.S. politics. Whether a low-income offset program would need to adjust its benefits for higher rural costs, however, is less clear.

Still more compelling is the claim of low-wage workers, many of whom must consume significant amounts of energy to commute. Failure to adjust the subsidies for these costs could reduce incentives to work. On the other hand, these costs encourage people to seek work near their residences, or at least on public transit lines, which is consistent with the goal of energy conservation. Adjustments for the cause of increased costs, rather than for the costs themselves, can avoid work disincentives while maintaining incentives to take jobs with modest or no commuting costs.

ii. Temporal Targeting

Separate targeting and incentives issues arise on very different dimensions: horizontal and temporal.²⁵⁹ Horizontal targeting compares different claimants, seeking to get more benefits to those in greatest need. Horizontal incentives, similarly, compare claimants and reward those acting more in the desired manner than their peers. Temporal targeting, by contrast, seeks to get aid to claimants during their greatest periods of need rather than waiting until the worst of a crisis has passed. Temporal incentives, by extension, activate or deactivate additional benefits whenever a claimant begins or ends compliance with desired norms.

Temporal targeting is especially important to low-income households because their impaired access to credit markets prevents them from moving funds cheaply from periods of relative plenty backward to those of exceptional deprivation. No comparable reason exists for matching incentives as closely with need: most people work for wages delivered substantially after the fact. Because incentive payments are not tied specifically to needs, even low-income families will be better able to await receipt of those payments if they cannot obtaining their present value. The expressive value of incentives is almost always perceived horizontally, separating “good” from “bad” individuals rather than tracking individuals over time. Thus, whatever balance is struck between targeting and incentives in the basic structure of the low-income offset program, every reason exists to endeavor to deliver those offsets as close to the time the a household experiences increased costs. PHA utility allowances’ failure to adjust to seasonal swings in households’ energy costs

This raises serious concerns about proposals to deliver relief from higher energy prices through the tax system.²⁶⁰ Already, a full-time, year-round minimum wage worker supporting a family of four derives more than twenty-two

²⁵⁹Super, *Quiet Revolution*, *supra* note 253, at 1327-29.

²⁶⁰*See, e.g.*, GILBERT E. METCALF, THE BROOKINGS INST. & WORLD RESOURCES INST., A GREEN EMPLOYMENT TAX SWAP: USING A CARBON TAX TO FINANCE PAYROLL TAX RELIEF 3 (2007), available at http://pdf.wri.org/Brookings-WRI_GreenTaxSwap.pdf (proposing refundable income tax credits having the effect of a rebate of part of federal withholding tax); ROBERT GREENSTEIN ET AL., CENTER ON BUDGET & POL’Y PRIORITIES, DESIGNING CLIMATE-CHANGE LEGISLATION THAT SHIELDS LOW-INCOME HOUSEHOLDS FROM INCREASED POVERTY AND HARDSHIP 13 (rev. ed. 2008), available at <http://www.cbpp.org/10-25-07climate.pdf> (proposing an EITC expansion as part of a low-income offset package).

percent of her or his annual income from the earned income tax credit (EITC).²⁶¹ Thus, the family goes through the year living at barely three-quarters of the poverty line, only to receive a lump sum a few months after the year is over that analysts commonly add to their prior year's income retroactively when comparing the household to the poverty line. About half the states have their own EITCs, many adding between 3.5 and 35 percent to the federal credit.²⁶² The fraction of their annual income that low-income families receive through the tax system is likely to rise if important tax expenditures benefiting middle-income families are extended to low-income people through conversion to refundable credits.

In practice, EITC recipient families commonly run up debts during the year, often incurring onerous interest payments, and then try to dig themselves out when their tax refund arrives the following spring. Regulators in some northern states prohibit utility companies from terminating service during the winter months; many families with large arrearages anxiously await their tax refunds, hoping they will arrive before the year's moratorium comes to an end. The temporal mismatch in PHA utility allowances is far less severe than that in an annual tax refund, yet it has resulted in many households falling seriously behind on their utilities and facing shut-offs.

In sum, the tax system is an inefficient method of delivering energy assistance. To the extent that we can plausibly increase the share of low-income families' annual income derived from the tax system, we should do so to reduce those families' implicit marginal tax rate. The tax system should be assigned new non-tax-related functions only as a last resort.

iii. Reaching All Affected Low-Income People

Trying to design a system for offsetting the increased costs of energy to low-income people highlights how badly damaged our social safety net has become. Because of this country's heavy reliance on the private sector for social provision,²⁶³ and its sharply moralistic approach to public provision,²⁶⁴ several large categories of low-income people have no contact with any major federal or federal-state means-tested public benefit program.

One large excluded group is non-elderly childless adults that do not have a disability sufficiently severe to qualify for Social Security. These people never

²⁶¹Author's calculations for tax and fiscal years 2008, both before and after the scheduled July 24, 2008, increase in the minimum wage. These calculations assumed that the worker is paid for fifty weeks' work (a realistic assumption given the scarcity of paid leave in minimum wage jobs), that the family pays federal withholding tax but no state or local income taxes, and that the household receives food stamps, which are calculated with a typical excess shelter cost deduction for a working family. See WOLKWITZ, *supra* note 231, at 43 (providing that value for two years earlier). The combined value of earnings (less withholding), EITC, and food stamps leaves the hypothetical family three percent below the poverty line before the July increase in the minimum wage and two percent above it after July 24.

²⁶²JASON LEVITIS & JEREMY KOULISH, CENTER ON BUDGET & POL'Y PRIORITIES, A MAJORITY OF STATES WITH INCOME TAXES HAVE ENACTED STATE EARNED INCOME TAX CREDITS (2007).

²⁶³HACKER, *supra* note 244, at 719.

²⁶⁴David A. Super, *The New Moralizers: Transforming the Conservative Legal Agenda*, 103 COLUM. L. REV. 2032, 2065-72 (2004).

qualified for federal cash assistance or Medicaid, but they could receive modest state cash aid—commonly called “general assistance” or “general relief”—in many states until these programs were abolished as states struggled to cope with the recessions of the early 1980s and the early 1990s. They also qualified for federal food stamps until the 1996 welfare law.²⁶⁵

Some may receive unemployment compensation (UC), although the UC system is ill-equipped to administer a low-income offset program because it does not collect information on individuals’ or households’ incomes. Thus, someone with large unearned income, or in a household with a high-salaried worker, can nonetheless collect UC. Conversely, the UC system’s coverage of relatively low-income workers has been declining steadily for decades as the low-end labor market has become increasingly contingent. UC therefore does not offer a viable mechanism for reaching low-income families needing subsidies.

iv. Preventing Supplantation

Whatever funds can be secured for low-income offsets will provide a low return on the political capital invested to secure them if other entities can effectively divert them. The most likely method for diversion is supplantation: the intermediary reduces its own contributions apace with the infusion of offset funds. Funneling offset funds into a discretionary program such as LIHEAP or Section 8 invites appropriators to reduce the contributions they otherwise would have provided.²⁶⁶ Similarly, block grants such as LIHEAP and TANF allow states sufficient flexibility to direct increased funding to replace their own spending, releasing money back to their general funds.²⁶⁷

Proposals to pay utility companies to aid low-income customers face a similar likelihood of leakage. The uncompensated care requirement of the Hill-Burton program²⁶⁸ provides a useful caution in this regard. The Hill-Burton Act conditioned federal funds for hospitals’ major capital investments on recipient institutions providing uncompensated care to low-income patients in specified amounts.

²⁶⁵Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 824, 110 Stat. 2105, 2323 (codified at 7 U.S.C. § 2015(o)). In theory, the welfare law allowed them to receive food stamps for three months every three years while unemployed and additional months while working at least twenty hours a week or working off their benefits in a workfare program. In fact, the law did not require states to establish workfare programs and most did not, despite strong financial incentives. See 7 U.S.C. § 2025(h)(1) (2006) (reimbursing all state costs of providing work slots to persons affected by the three-month time limit) (amended in 2002). Because most are alone or with only a spouse, childless adults qualify for relatively few benefits while employed and seldom bothers to apply. Denying them assistance during periods of unemployment effectively removes them from the program. Today, non-elderly childless adults participate in food stamps in substantial numbers only in areas where states have won waivers of the time limit due to exceptionally high unemployment.

²⁶⁶No doubt a promise could be extracted from them not to do so immediately. After a year or two, however, it will become impossible to know how they would have acted absent the offset program. Moreover, fashioning a remedy for such a breach would be most challenging.

²⁶⁷U.S. GENERAL ACCOUNTING OFFICE, PUB’N NO. GAO-01-828, WELFARE REFORM: CHALLENGES IN MAINTAINING A FEDERAL-STATE FISCAL PARTNERSHIP (2001), available at <http://www.gao.gov/new.items/d01828.pdf>; MILDRED REIN, DILEMMAS OF WELFARE POLICY: WHY WORK STRATEGIES HAVEN’T WORKED 145 (1982).

²⁶⁸42 U.S.C. § 291c(e) (2000).

Although some hospitals took this requirement to heart and welcomed uninsured low-income patients, others continued to rebuff patients who appeared unable to pay. These hospitals treated Hill-Burton as a bookkeeping requirement, charging off their unanticipated bad debts to it. Similarly, separating actions the utilities would have taken in the ordinary course of business from subsidies motivated by the carbon regulation offset program will be impossible. The reliance of the House bill, and other proposals, on having utility companies distribute energy assistance²⁶⁹ thus is badly misguided: few of those funds are likely to serve their intended purpose.

c. Administrative Efficiency

Administrative simplicity is important for several reasons. Most directly, funds spent on program administration are unavailable for benefits. In addition, an arduous, or simply unfamiliar, administrative process can compel claimants to spend the equivalent of a significant portion of their benefits to establish and maintain their eligibility.²⁷⁰ A program's administration is a relatively vulnerable political target for critics who may fear a backlash if they attack the program's core mission. Finally, setting up a complex administrative structure delays a program's implementation, which is both a substantive and a political problem: programs are easiest to cancel politically before anyone has begun receiving aid.

A low-income offset program for emissions regulation therefore should operate through a single agency, to avoid requiring duplicative applications and eligibility determinations.²⁷¹ Ideally, it would rely as much as possible on determinations already being made by existing programs. The major federal-state entitlement programs' administrative spending is relatively modest. In recent years, the Food Stamp Program's administration has hovered around 15 percent of overall program costs.²⁷² Medicaid's administrative costs in 2006 were 5.4 percent of the total.²⁷³

V. Conclusion

Climate change is no ordinary policy problem. Its regulation certainly is no ordinary policy initiative. No one should be surprised, therefore, that reaching principled choices about its substantive scope requires more than routine policy analysis. A purely political calculus likely will result in legislation that ignores urgent human needs while providing environmentally counterproductive subsidies to existing providers. On the other hand, a purely sentimental approach

²⁶⁹H. 2454, 111st Cong., 1st Sess., § 782(a)-(c) (2009).

²⁷⁰David A. Super, *Offering an Invisible Hand: The Rise of the Personal Choice Model for Rationing Public Benefits*, 113 YALE L.J. 815, 832-35 (2004); see Super, *Privatization*, *supra* note 245, at 393 (discussing tax preparation expenses required to claim EITC).

²⁷¹See Jon Michaels, *Deforming Welfare: How the Dominant Narratives of Devolution and Privatization Subverted Federal Welfare Reform*, 34 SETON HALL L. REV. 573 (2004)(showing how dividing responsibility can sabotage substantive goals).

²⁷²Author's calculations from Food and Nutrition Service data.

²⁷³Author's calculations from Centers for Medicare and Medicaid Services' data. This ratio is dramatically lower than that in the Food Stamp Program in part because Medicaid spends almost ten times as much on benefits: many administrative functions' cost does not vary with the value of the benefits delivered.

also will prove unavailing, wasting large sums on projects that, while appealing, are likely to receive adequate funding from elsewhere. Yet even if policymakers can resist these temptations, they nonetheless will face many more legitimately worthy and important claims than available funds can possibly satisfy. Policy analysis tools designed to assess proposals' cardinal merit, or at best compare a handful of similar approaches to a similar problem, offer little hope of sorting through this blizzard of policy proposals. No rational response is possible without effective, defensible principles for determining which ancillary claims ought to be joined with climate change legislation.

Reasonable principles can be derived from a combination of experience and widely accepted norms. Applying those principles suggests a strong case for including both distributional and fiscal concerns in climate change debates. Once this occurs, fiscal progress will depend, as it always does, on political will. The challenges of designing a program to offset the impoverishing effects of carbon emissions regulation without undermining its incentives to conserve is a formidable challenge that policymakers have failed in the past. This problem is not, however, insuperable.

Scientists tell us that we have little time. To date, however, we have had a still greater shortage of political will, both to face the daunting challenges of designing sound climate change legislation and to impose the pain required to achieve meaningful emissions reductions. To be sure, taking the steps this article recommends would require considerable political will. If such will remains in as short supply as it has been to date, however, we have no chance of slowing climate change meaningfully—or maintaining the environment we have come to take for granted.

Climate change cannot be checked on the backs of the weakest among us. Fortunately, it does not have to be.