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Response

More than Winners and Losers: The Importance of Moving Climate and Environmental Policy Debate Toward a More Transparent Process

Victor B. Flatt[†]

INTRODUCTION

Anyone examining the political economy surrounding climate change in 2012 might assume that the United States, or a significant number of our political elite, believes that we will emerge as some kind of “winner” in the climate change arena. How else to explain the actions of our own country in the international arena? But as a possible reason for delaying action on climate change, this idea may be more or less verboten in circles of environmental law scholars and policy thinkers. Are we environmentalists the deluded peaceniks of our time? To paraphrase Neville Chamberlain, in climate change, no matter “whichever side may call itself the victor, there are no winners, but all are losers.”¹ As in the discussion of war, “polite company” would rarely voice a sentiment celebrating winning while others lose tremendously, but not voicing the sentiment does not solve the problem.

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1. NEVILLE CHAMBERLAIN, IN SEARCH OF PEACE 140 (1939) (speech at National Government Rally, Kettering, England on July 2, 1938). Chamberlain was the Prime Minister of the United Kingdom from 1937 to 1940, during the time of negotiations with Nazi Germany and the build-up to World War II. ROBERT C. SELF, NEVILLE CHAMBERLAIN: A POLITICAL LIFE 2–3 (2006).

Professor J.B. Ruhl's article, *The Political Economy of Climate Change Winners*,² seeks to break down this wall of silence. In his article, Professor Ruhl sets out a case for the existence of "climate change winners," the importance of recognizing this phenomenon for purposes of crafting climate change policy, and policy proposals that he believes will be more effective in addressing climate change given this "winners" phenomenon.

This Article responds to Professor Ruhl's article. It agrees with the need to recognize the "climate change winners" perception phenomenon, but maintains that Professor Ruhl's argument both makes too much of it and too little. In particular, this Article shows that the phenomenon is less ignored than he thinks, but argues that it is also the tip of a bigger and more important iceberg concerning what environmental scholars and policy makers have debated in terms of climate change and environmental policy generally. This Article then more fully explores the bigger problem of the policy discourse concerning climate change and environmental law, and suggests that the "environmental community" needs to shift its approach to the discussion of these problems and their solutions.

In the environmental realm, we have come to a point where even broaching the subject of relative winners compared to losers seems like an immoral act. While I have routinely argued that environmental harms should be recognized as rights of the public and seen in terms of morality,³ I believe that this is an argument that stands on its own, without removing other discussions from the table. I am concerned that if we fail to have discussions with those who may not share our views, we will never progress (and indeed may fall backwards) in our analysis and policy of climate change and other environmental problems. We can no longer ignore this issue or others that may not be popular to discuss in the environmental movement. To make progress, all issues must be recognized, and we must be willing to engage in the discussion.

I. HIGHLIGHTING THE CLIMATE CHANGE WINNERS PHENOMENON

In *The Political Economy of Climate Change Winners*, Professor Ruhl sets out to demonstrate the dearth of discussion re-

2. J.B. Ruhl, *The Political Economy of Climate Change Winners*, 97 MINN. L. REV. 206 (2012).

3. See, e.g., Victor B. Flatt, *This Land Is Your Land (Our Right to the Environment)*, 107 W. VA. L. REV. 1 (2004).

garding what he terms “climate change winners,” and why this lack of discussion is important and problematic. The first part of the article seeks to set out the case that there is almost a conspiracy of silence about the concept that anyone could possibly benefit from climate change, and that there are indeed persons and communities who will benefit, at least relatively, from climate change in the near and medium term.⁴

Professor Ruhl’s discussion of the data on climate change effects is certainly convincing with respect to some benefits. As he notes: “Some impacts will open up opportunities for people and businesses to secure benefits in some areas, such as by increased rainfall, longer growing seasons, and more temperate weather.”⁵ And he also makes the very logical argument that, even assuming the net impacts of climate change are negative overall, this variance indicates that there will be some winners, particularly at local scales.⁶ He then connects this phenomenon to political actions at these scales and combinations of these scales that could influence large-scale policy, even to the point of undercutting efforts to try and reverse or mitigate climate change.⁷

Professor Ruhl’s thesis on climate change winners and how they could influence policy is certainly convincing. The data cited by Professor Ruhl itself comes from the Intergovernmental Panel on Climate Change (IPCC), and the logic concerning the political economy of variance in harms and benefits is unassailable.⁸ The longer time scales of probable massive climate impacts relative to short term phenomena also suggest how persons could approach climate change as something desirable even if the long term effects are negative. Given these facts, one must acknowledge how important Professor Ruhl’s article is in naming the phenomenon of climate change winners and focusing attention on it. I am convinced that he is correct that we must identify the phenomenon to avert more problems in crafting climate change policy. While I agree in general with his call to recognize climate change winners, and agree that doing so

4. Ruhl, *supra* note 2, at 208–14.

5. *Id.* at 207–08.

6. *Id.* at 208.

7. *See id.* at 214–15.

8. *See id.* at 207–08, 221–27 (citing the INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: SYNTHESIS REPORT (2007), available at http://www.ipcc.ch/publications_and_data/publications_ipcc_fourth_assessment_report_synthesis_report.htm).

can influence and improve policy, I think that in some ways he overstates the problem of lack of acknowledgement.

Professor Ruhl asserts that “scientific and policy analyses . . . pay little attention to . . . market and nonmarket benefits” of climate change.⁹ If recognized, these benefits are only “begrudgingly” acknowledged in discussion that “invariably qualif[ies them] with discussion of adverse impacts.”¹⁰

It is true that most official documents rarely solely discuss the benefits from climate change, but it is also true that they have not been routinely ignored. Professor Ruhl’s own data on climate change benefits in agriculture and other areas come from none other than the IPCC’s reports, which have doggedly examined all impacts of climate change, including possible benefits, at multiple levels and time scales.¹¹ In its most recent report, from 2007, concerning climate change impacts, the IPCC discusses positive and negative impacts from climate change over time and the given uncertainty of these impacts.¹² This includes increases in food productivity and timber production.¹³

Moreover, Professor Ruhl’s conclusion that there is already evidence that winners and losers will affect the political decision making of geographic areas supports the proposition that we are already aware of relative winners.

In addition, I don’t believe the evidence supports Professor Ruhl’s general conclusion that many persons who are climate change winners do not necessarily recognize these benefits.¹⁴ Certainly, Professor Ruhl is correct that “issue framing” matters in terms of perception; for example, someone who arguably benefits monetarily may not perceive benefits if he or she is worried about the impact on others.¹⁵ We certainly could use more studies on this particular question. But even without such surveys or much public discussion of winners and losers, most persons and certainly many businesses appreciate the ways in which even disasters can mean economic gain for some,¹⁶ and

9. *Id.* at 209–10.

10. *Id.* at 210.

11. *See id.* at 207–08 & nn.2–3, 216–19.

12. *See* WORKING GRP. II TO THE FOURTH ASSESSMENT REPORT, INTER-GOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY 11–18 (2007), *available at* http://www.ipcc.ch/pdf/assessment-report/ar4/wg2/ar4_wg2_full_report.pdf.

13. *Id.* at 11–12.

14. *See* Ruhl, *supra* note 2, at 269–76.

15. *See id.* at 236–37.

16. Joe Mont, *How They (and You) Make Money off Disasters*,

that relative gain may be perceived as better than net gain. As Professor Ruhl notes, official government documents have recognized opportunities in climate change,¹⁷ and surveys already show that some people believe they will benefit from such changes.¹⁸

More importantly, the persistence of entrenched groups and political positions that oppose action on climate change mitigation is just another version of persons who perceive a net short-term benefit from doing nothing to avert climate change, or at least a relative cost from performing actions to mitigate it. As Professor Ruhl notes, “[M]any people and businesses are generally dug in against investing in effective mitigation.”¹⁹ And I do not believe this is solely the result of selective information assimilation. As noted by Upton Sinclair almost a century ago, “It is difficult to get a man to understand something, when his salary depends upon his not understanding it!”²⁰ Stated more prosaically for today’s climate change discussion, we should not be surprised that companies that make money by manufacturing and selling products that cause increases in greenhouse gases will not voluntarily embrace facts, or policies based on those facts, that limit those profitable benefits. Whether or not these contributors to greenhouse gases are hurt by climate change, relatively speaking, they are better off than others who are hurt because the contributors also profit from the causes of the problem. Climate change war profiteers, if you will, have no incentive to see the war end when their only profits come from selling the tanks. In this sense, climate change “winners” do recognize themselves and have already had an enormous influence on policy. Recognizing that others, such as farmers, can also benefit is important, but it is not new.

Importantly, Professor Ruhl notes that the perception of climate change winners depends on how those in society perceive and care about risks to others versus risks to them-

MAINSTREET (Aug. 29, 2011), <http://www.mainstreet.com/article/moneyinvesting/insurance/how-they-and-you-make-money-disasters>.

17. Ruhl, *supra* note 2, at 215 (citing GOVERNOR’S CLIMATE CHANGE INTEGRATION GRP., FINAL REPORT TO THE GOVERNOR: A FRAMEWORK FOR ADDRESSING RAPID CLIMATE CHANGE 10 (2008), available at <http://cms.oregon.gov/ENERGY/gblwrm/docs/ccigreport08web.pdf>).

18. *Id.* at 238.

19. *Id.* at 244.

20. UPTON SINCLAIR, I, CANDIDATE FOR GOVERNOR: AND HOW I GOT LICKED 109 (1935).

selves.²¹ This underlies the whole article, and occasionally Professor Ruhl points it out.²² This point alone deserves further study as it is an observation about how society has changed its attitudes on community versus individual goals. The rhetoric surrounding the first major domestic environmental laws of the 1970s assumed a communitarian attitude or one that, even if based on self-interest, assumed that interests coincide.²³ That has changed since the Reagan Revolution, and it may be this underlying phenomenon that creates a situation in which action must be based on summing individual divergent interests and convincing people of the need for change.²⁴ To the extent that this is true, society must examine its own definition of moral underpinnings with eyes open in order to understand personal behavior and the politics that result from it, including the politics from winners.

II. THE SHUTDOWN OF POLICY DISCOURSE IN ENVIRONMENTAL POLICY GENERALLY MAY BE THE BIGGER PROBLEM

I believe Professor Ruhl's most important point is his observation of the apparent approbation in discussing climate change winners openly in the environmental community.²⁵ But this aversion goes far beyond climate change to debate about most major environmental laws and policies. While the progressive environmental community has been clear about its denunciations of cost-benefit analysis, and has elucidated most of the reasons why,²⁶ it has failed to broadly embrace a re-visitation of the underlying policy goals of our environmental statutes and debate the merits of possible trade-offs in policy between certain forms of environmentalism and other interests, be they economic, moral, or other environmental concerns.

I personally am fully supportive of the policies of widespread protection and shared interests in our environmental laws,²⁷ but by failing to openly defend and discuss them, we are

21. See Ruhl, *supra* note 2, at 237, 239–40.

22. *Id.* at 247 (stating that Professor Ruhl “assum[es that people and businesses] act primarily out of self-interest”).

23. Victor B. Flatt, *Too Big to Jail or Too Remote (or Rich) to Care?*, 72 MD. L. REV. (forthcoming 2013) (manuscript at 8) (on file with author).

24. *Id.*

25. See Ruhl, *supra* note 2, at 255–56.

26. Don Bradford Hardin, Jr., *Why Cost-Benefit Analysis? A Question (and Some Answers) About the Legal Academy*, 59 ALA. L. REV. 1135, 1164 (2008).

27. See Flatt, *supra* note 3, at 2–6.

skating on thin ice. It has long been noted that certain interests perceived as anti-environmental may “hide the ball” in terms of exaggerating the economic detriments from environmental law or understating the wide-spread benefits;²⁸ however, certain environmental activists may themselves not address concerns that are important to the public.²⁹ This could be chalked up to the fear of airing “dirty laundry” or giving the “other side” ammunition, but failing to have an honest discussion and debate (even if only one-sided) may lead to policies that are best for no one (or a very few) winning out.³⁰

Climate change mitigation itself provides a good example. In many environmental debates, the solving of climate change has become the solving of the use of fossil fuels, even though these are not the same things. While not using fossil fuels could have many benefits beyond climate change mitigation (less coal waste and conventional air pollution for starters), fossil fuel reduction itself is not the only path to climate change mitigation. When we fail to make this distinction, we give rise to criticisms and skepticism that the environmental community really cares less about climate change and only about getting its way.

Less than two years ago in California, there were protests over designating a 10,000-square-foot house (which used Forest Stewardship Council-certified wood, low volatile organic compound (VOC) paint, and many other sustainable features) as “green.”³¹ According to the environmentalists protesting, the issue was not about the amount of energy or water used per se (in theory a building of any size could be water and energy self-sufficient), but in the sheer size of the building itself.³² Neighbors suggested that green buildings should only use “just enough.”³³ While this may be laudable from a moral point of

28. FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING 4–6 (2005).

29. Barton H. Thompson, Jr., *Conservative Environmental Thought: The Bush Administration and Environmental Policy*, 32 *ECOLOGY L.Q.* 307, 308 (2005) (noting that, while Republican presidents may be perceived as less environmentally friendly than Democratic ones, they may bring other important perspectives and innovation).

30. Victor B. Flatt, *Saving the Lost Sheep: Bringing Environmental Values Back into the Fold with a New EPA Decisionmaking Paradigm*, 74 *WASH. L. REV.* 1, 12 (1999).

31. Fred A. Bernstein, *How Green is My Mansion?*, *N.Y. TIMES*, Mar. 11, 2012, at D4, available at <http://www.nytimes.com/2010/03/11/garden/11green.html?pagewanted=all>.

32. *Id.*

33. *Id.*

view, it is not necessarily true in terms of the scientific facts about environmental impacts. There are certainly many arguments to be made with respect to this kind of home under philosophy and equity, concerning relative incomes and resource choices among the public. But, at least with respect to the cold hard facts of the production of greenhouse gases (and even co-harms), even large homes can be a positive in the fight against climate change if they can achieve zero greenhouse gas emissions.

By failing to acknowledge that greenhouse gas reduction is itself a discrete issue that we can and should analyze with respect to other interests and concerns, many of us pretend that all “green” concerns come as a single package. This may prevent much of the public, particularly in “libertarian minded” America, from taking the scientific findings seriously, believing instead that they are part of a plot to get Americans to change their behavior for other reasons. It can also mean bad policy as we may fail to consider the relative importance of environmental or other concerns by focusing only on one thing.³⁴

We in the environmental community need to be clearer both to ourselves and the general public about what the issues with respect to the climate are, and understand that there are a range of response options. This does not mean that we may not disagree with some of those options (such as geo-engineering), but it does mean that we need to be specific about why such options are not preferable, and what trade-offs exist and must be made. Where we do not have scientific certainty, we must acknowledge it. Clearly we cannot honestly debate what to do about climate change if we are unwilling to disentangle climate change concerns from other important and related concerns.

This applies not only to the context of climate change winners and losers, but also other environmental debates. Social and political realities have a tremendous influence upon the question of whether environmental harms are harmful enough to warrant a particular level of intervention. Much of the high level of today’s environmental concern can be traced to changing awareness of harms and the increased appreciation of natural and health values.³⁵ A consideration of values may also require analysis of resource allocation preferences. Political

34. Maria Savasta-Kennedy, *The Dangers of Carbon Reduction Tunnel Vision 1* (unpublished manuscript) (on file with author).

35. See Flatt, *supra* note 3, at 21.

realities, combined with moral concerns, influence the palatability of regulating certain segments of the economy, the protection of certain populations, and the amount of funding to accomplish regulation. When faced with uncertainty, value systems can influence who is given rights, accountability, and responsibility for environmental harm. These values choices can easily be obscured by debates over implementation or science, so it is critical that they be debated openly.³⁶

It would be nice if we all wanted the same things or all won and lost together, but we do not. Controlling greenhouse gases or protecting endangered species may make investments under prior regulatory contexts worthless, and this may create winners and losers. Does everyone need to win? No, but we should be aware of who should win and why, and perhaps be open to compensating those who are harmed. Or as in Professor Ruhl's example, allow them to receive the "winner's benefits" but not stay locked into that course forever.³⁷

In the 1977 amendments to the Clean Air Act, legislators considered one of these trade-offs in the jobs benefits versus air-quality detriments of mining high-sulfur coal.³⁸ But the debate was not as explicit about this choice as it could have been, and therefore, the outcome may not have been the best. We required higher cost technological pollution control so that there would still be jobs mining high-sulfur coal, instead of using resources to invest in other employment opportunities in coal country.³⁹ And we are still paying the price for that. I would suggest that such a suboptimal outcome came from not openly exploring the importance of jobs, lifestyle, and history in one part of the country versus the right to be free from air pollution. Discussing these as trade-offs would have allowed us to engage with the complexity of values.

As Michael Vandenberg has stated, "At the outset, the debate over establishment of the initial . . . goals could stimulate open discussion about both the importance of environmental protection and the trade-offs involved in environmental

36. See Flatt, *supra* note 30, at 11.

37. See Ruhl, *supra* note 3, at 269–76.

38. BRUCE A. ACKERMAN & WILLIAM T. HASSLER, CLEAN COAL/DIRTY AIR: OR HOW THE CLEAN AIR ACT BECAME A MULTIBILLION-DOLLAR BAIL-OUT FOR HIGH-SULFUR COAL PRODUCERS AND WHAT SHOULD BE DONE ABOUT IT 45 (1981).

39. See Allan R. Gold, *Bush Clean Air Plan Called Energy Policy in the Making*, N.Y. TIMES, Sept. 24, 1989, at A22, available at <http://www.nytimes.com/1989/09/24/us/bush-clean-air-plan-called-energy-policy-in-the-making.html>.

measures.”⁴⁰ Moreover, discussion of all of the issues openly gives the legislature the ability to alter statutes as needed with full information by all participants.

I know environmentalists are often scared of this debate because they think the environment will lose, and it might sometimes, but we might also be surprised. In any event, we live in a plural society, where we must all be educated and heard on important issues. Part of “getting there” is creating the proper mechanisms to discuss and understand the problem and to have ways of determining what our values are. A practical way to do this would be to know the science, separate the science from the policy considerations, and find out which policies have the support of our plurality.

The first is addressed by opening up the discussion and debate to recognize that there are definitive scientific answers to definitive scientific problems. This will require education as well as different ways of constituting analysis of climate change in organizations such as the IPCC. Once we understand the science and its limitations, it becomes easier to disentangle policy responses. Determining public preferences is, of course, difficult as we have no ready answers to polling or understanding the interests of the public beyond general representative democracy, which seeks to balance interests with overall welfare enhancement. Nevertheless, simply separating out pure policy from other issues allows a focus to better frame decisions.⁴¹

New laws could help in some ways by funding methods to increase participation or to have local concerns and issues translated to larger fora. But to do that we would have to have practical funding and participatory mechanisms, perhaps something along the lines of the Coastal Zone Management Act.⁴² We have already seen this push in discussion of disaster response and preparation for disaster,⁴³ and the reasoning applies to the wider environmental arena, which involves human choice as much it does in disaster and coastal development.

40. Michael P. Vandenbergh, *An Alternative to Ready, Fire, Aim: A New Framework to Link Environmental Targets in Environmental Law*, 85 KY. L.J. 803, 902 (1997).

41. See Flatt, *supra* note 30, at 25.

42. 16 U.S.C. §§ 1451–1464 (2006).

43. See Gavin Smith, *Catastrophic Disaster Recovery: An Institutional Network Perspective*, in PREPAREDNESS AND RESPONSE FOR CATASTROPHIC DISASTERS (Rick Bissell ed., 2013).

An example of this broader vision of the environment comes from the international framework for sustainable development, which looks at both environmental protection and economic development. At the Rio+20 United Nations (U.N.) Conference on Sustainable Development and even the U.N. Framework Convention on Climate Change COP 15 in Copenhagen, many of the side meetings focused on how adaptation funding can be accomplished.⁴⁴ But rather than use the old paradigm of simple funds transfer, these discussions recognized that funding per se isn't the solution.⁴⁵ They recognized that adapting to the challenges of climate change might require an examination of productivity and jobs, the local environment, and women's empowerment and education.⁴⁶ Drawing on the recent research of international funding organizations, persons discussing adaptation funding delivery in Copenhagen recognized that there must and will be a better way to address the harms of climate change—and that if we are careful, we can do so in a manner that also mitigates climate change and generally improve the lives of those affected.

CONCLUSION

Professor Ruhl is absolutely right that we must continue to study and discuss the disparate impacts of climate change, even if these impacts create what might be considered “winners.” He is also correct that this has implications for climate change policy and what will and could work going forward. But his article puts into relief an even more important phenomenon—the failure of much of the environmental community to engage in honest debate about environmental and other values.

What does being “open” about values discussion in the environmental realm mean? What are some of the values at play in climate change that are necessary to discuss winners and

44. Rep. of the U.N. Conference on Sustainable Dev., 48–51, June 20–22, 2012, U.N. Doc. A/CONF.216/16 (2012) [hereinafter U.N. Sustainable Development Report], available at <http://www.uncsd2012.org/content/documents/814UNCSD%20REPORT%20final%20revs.pdf>; Rep. of the Conference of the Parties on Its Fifteenth Session, 6–7, 30–40, Dec. 7–19, 2009, U.N. Doc. FCCC/CP/2009/11/Add.1 (2010) [hereinafter U.N. Conference of the Parties Report], available at <http://unfccc.int/resource/docs/2009/cop15/eng/11a01.pdf>.

45. U.N. Sustainable Development Report, *supra* note 44, at 48–53 (acknowledging the need to focus on funding, technology, capacity building, trade, and registry commitments); U.N. Conference of the Parties Report, *supra* note 44, at 6–7.

46. U.N. Sustainable Development Report, *supra* note 44, at 1–3.

losers? We can definitively say that it isn't about simply making our environment "natural." Such a situation hasn't really existed for hundreds of years, and most people long ago, implicitly agreed to some deviance from the "natural" for purposes of human happiness. But this is where it gets tricky. What can be considered in deciding human happiness? Are environmental amenities only important vis a vis how humans appreciate them? Or do they have independent value? Or is it indeed possible to do this? What about distributional effects? With respect to climate change in domestic law, do we only consider U.S. interests, or do we consider other interests as well? Should we be looking at the highest aggregate benefit level, or does it matter if harms fall disproportionately on a few?

I would state strongly that distributional values are important and that moral theory requires us to compensate those who are harmed in climate change and other harms on a group because of the actions of another group.⁴⁷ Your values may be different. I challenge us to openly discuss these values.

We often think our environmental laws are unassailable. Who would vote against clean air? But we have seen again and again that there have been many attempts to weaken underlying values through administrative fiat,⁴⁸ and in the last ten years, even calls for explicit retreat from important principles (such as the use of cost-benefit analysis in the setting of Clean Air Act standards⁴⁹). Unless we are willing to openly discuss why underlying policy prescriptions are important, and openly compare and balance them with others, I am afraid we will be unready for an assault on our environmental laws that we will not be able to repel.

47. See Flatt, *supra* note 3, at 19–24.

48. The Bush EPA attempted to redefine "routine maintenance, repair, and replacement" under Clean Air Act regulations, for instance. See *New York v. EPA*, 413 F.3d 3, 12 (D.C. Cir. 2005).

49. See Jenny Hopkinson, *Bush EPA Air Chief Seeks CASAC Input on Costs of Stricter Ozone NAAQS*, INSIDEEPA.COM (Nov. 5, 2012), <http://insideepa.com/Inside-EPA-General/Inside-EPA-Public-Content/bush-epa-air-chief-seeks-casac-input-on-costs-of-stricter-ozone-naaqs/menu-id-565.html?s=sm>.