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## The Grass Is Not Always Greener: Congressional Dysfunction, Executive Action, and Climate Change in Comparative Perspective

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THE GRASS IS NOT ALWAYS GREENER:  
CONGRESSIONAL DYSFUNCTION, EXECUTIVE ACTION,  
AND CLIMATE CHANGE IN COMPARATIVE PERSPECTIVE

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1. Cathy Wilcox, <http://cathywilcox.com.au/cartoons/>. This cartoon is reproduced with the permission of Cathy Wilcox.

## I. INTRODUCTION

The U.S. Congress is generally too politically divided to take significant action supporting or opposing climate change regulation. Even on the rare occasions when it unites on this issue, it does not do so in a way that could survive presidential veto. In June 2015, for example, the House of Representatives passed the Ratepayer Protection Act, a law aimed at undermining the Obama administration's proposed Clean Power Plan to regulate power plant greenhouse gas emissions.<sup>2</sup> This bill, however, has only symbolic political value; even if it passed the Senate, President Obama would veto it.<sup>3</sup> On the other side of the aisle, numerous efforts at passing comprehensive climate change legislation—including one early in President Obama's first term—have failed, and little prospect exists for such legislation in the foreseeable future.<sup>4</sup> Facing legislative gridlock in Congress, President Obama has sought to pursue his administration's climate policy goals through executive action under existing federal environmental statutes. Such action, often in interaction with litigation, has become the primary mechanism for national-level regulation of greenhouse gas emissions from motor vehicles and power plants.<sup>5</sup>

Many observers, despairing over this state of affairs, wistfully contemplate parliamentary systems of government in other developed countries that seem to be more effective in passing legislation.<sup>6</sup> For instance, in their book, *It's Even Worse Than It Looks: How the American Constitutional System Collided with the New Politics of Extremism*, political scientists Thomas E. Mann and

2. Kate Sheppard, *House Passes Bill to Undermine Obama's Climate Rules*, HUFFINGTON POST (June 24, 2015), [http://www.huffingtonpost.com/2015/06/24/house-climate-delay\\_n\\_7658096.html](http://www.huffingtonpost.com/2015/06/24/house-climate-delay_n_7658096.html).

3. EXEC. OFFICE OF THE PRESIDENT, OFFICE OF MGMT. & BUDGET, STATEMENT OF ADMINISTRATIVE POLICY – H.R. 2042 RATEPAYER PROTECTION ACT OF 2015 (2015), [https://www.whitehouse.gov/sites/default/files/omb/legislative/sap/114/saphr2042r\\_20150623.pdf](https://www.whitehouse.gov/sites/default/files/omb/legislative/sap/114/saphr2042r_20150623.pdf).

4. Hari Osofsky has analyzed the barriers to federal legislation in Hari M. Osofsky, *Litigation's Role in the Path of U.S. Federal Climate Change Regulation: Implications of AEP v. Connecticut*, 46 VAL. U. L. REV. 447, 448–51 (2012).

5. *Id.* at 447. See also JACQUELINE PEEL & HARI M. OSOFSKY, CLIMATE CHANGE LITIGATION: REGULATORY PATHWAYS TO CLEANER ENERGY (2015).

6. Ari Shapiro, *Would the U.S. Be Better Off with a Parliament?*, NPR (Oct. 12, 2013), <http://www.npr.org/sections/itsallpolitics/2013/10/12/232270289/would-the-u-s-be-better-off-with-a-parliament>; Ishaan Tharoor, *Prime Minister Obama: Would the U.S. Be Better Served with a Parliament?*, TIME (Aug. 18, 2011), <http://world.time.com/2011/08/18/prime-minister-obama-would-the-u-s-be-better-served-by-a-parliament/>.

Normal J. Ornstein compare the dysfunction of the U.S. political system unfavorably with parliamentary democracies, where it is easier for majorities to act. Vehemently adversarial parties in the U.S. separation-of-powers government system, they say, “are a formula for willful obstruction and policy irresolution.”<sup>7</sup>

But are parliamentary democracies any more effective at dealing with major policy issues such as climate change where deep partisan divisions exist? In this essay, we compare the U.S. experience of congressional dysfunction and executive action regarding climate change with that of Australia, which has a parliamentary system of government. Both countries have high levels of partisanship on issues of climate change and energy, but Australia does not face the same level of legislative gridlock because the party that leads its House of Representatives selects its prime minister. Instead, Australia has seen climate change legislation pass and then be repealed as government control shifts between parties.<sup>8</sup> This divergent Australian experience raises the question of whether it is better to have gridlock or legislative uncertainty; neither of which is ideal.

Parts II and III examine the respective experiences in the United States and Australia in attempting to make progress on climate action in a partisan environment. These Parts compare the two countries’ systems of government, how they function when the public and political parties are deeply divided on policy questions, and the way in which these interactions have played out in the development of climate policy over the past two decades. The essay concludes with a reflection on the difficulties faced under both systems and considers possibilities for a better way forward.

## II. U.S. CONGRESSIONAL DYSFUNCTION AND EXECUTIVE ACTION

This Part explores the ways in which partisanship, paired with a system of government based on separation of powers and checks and balances, has resulted in congressional gridlock and executive assertions of authority on climate change. It begins with a brief overview of the U.S. system of government, then turns to a discussion of the intense partisanship over the issue of climate

7. THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT’S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM*, xiii (2012).

8. See *infra* Part III.

change, and concludes by analyzing how that partisanship has played out in the federal government.

### A. U.S. Divided Control of Government

The U.S. Constitution establishes the three federal branches of government and their relationship to one another. This Section traces the ways in which this structure creates a greater separation among the three branches in comparison to Australia's parliamentary system.

Article I establishes the Senate and House of Representatives and designates their election procedures, powers, and limitations. Most significantly, for the purposes of this essay, Section 8 provides Congress with legislative authority under its powers.<sup>9</sup> As discussed more in the following Part, this legislative structure is not significantly different from that of Australia's bicameral legislature.

Article II, however, creates the most significant divergence between the U.S. and Australian forms of government. It establishes an executive branch led by a president elected by state-designated electors, and thus separates the head of the executive branch from congressional leadership.<sup>10</sup> Because the president leads neither the Senate nor the House, the executive's role in advancing legislation is far more limited than in a parliamentary system.

Article III creates the judicial branch, and provides for a Supreme Court and congressional authority to create lower federal courts. Although it does not provide detailed explanation of the federal courts' roles, they are widely viewed as interpreting and evaluating laws in the U.S. common law system.<sup>11</sup> Most significantly for executive branch action in the climate change context, as discussed in more depth in Section II.C, the courts can evaluate the scope of legislation and whether executive branch agencies have abused their discretion in acting or failing to act.<sup>12</sup>

Interestingly, given the current gridlock, the decision to separate executive and legislative authority more fully in the United States stemmed in part out of a fear of partisanship. For example,

9. U.S. CONST. art. I, § 8.

10. *Id.* at art. II.

11. *Id.* at art. III; *How the U.S. Government Is Organized, Branches of Government*, USA.Gov, <https://www.usa.gov/branches-of-government#item-211477> (last visited Sept. 12, 2015).

12. See *infra* Section II.C.

*Federalist Papers No. 10* provides significant analysis of the dangers of “mischiefs of faction” and the need for a republican form of government to address them.<sup>13</sup> James Madison even acknowledges possibilities for gridlock in a republican system, explaining:

If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote. It may clog the administration, it may convulse the society; but it will be unable to execute and mask its violence under the forms of the Constitution. When a majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens.<sup>14</sup>

The U.S. system of checks and balances among the branches constrains the actions of all three branches, and limits their action substantially when the country is closely divided. As has been the case under many administrations, during the latter half of the Obama administration, a different party has controlled the legislative branch than controls the executive branch, and the party controlling the legislative branch lacks the super majority necessary to pass legislation that could overcome presidential veto authority.<sup>15</sup>

### *B. Partisan Climate Change Politics in the United States*

This tendency towards legislative gridlock during times of political division has greatly influenced the U.S. trajectory on climate change. As explored in more depth in our article *Energy Partisanship*, the past two decades have seen a worsening of partisanship across the board in the United States.<sup>16</sup> A 2012 study

13. THE FEDERALIST NO. 10, at 57–58 (James Madison) (J. & A. McLean, 1787).

14. *Id.* at 57.

15. *Presidential Vetoes*, U.S. HOUSE OF REPRESENTATIVES: HISTORY, ART & ARCHIVES, <http://history.house.gov/Institution/Presidential-Vetoes/Presidential-Vetoes/> (last visited July 29, 2015). George Washington exercised the first presidential veto in 1792. *Washington Exercises First Presidential Veto, This Day in History Apr. 05*, HISTORY.COM, <http://www.history.com/this-day-in-history/washington-exercises-first-presidential-veto> (last visited Sept. 13, 2015).

16. Jacqueline Peel & Hari M. Osofsky, *Energy Partisanship*, 65 EMORY L.J. (forthcoming 2016) (citing NOLAN MCCARTY ET AL., POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES (The MIT Press 2006)); Chris Cillizza, *Partisanship Doesn't Seem Worse. It Is Worse.*, WASH. POST: POL. (June 4, 2012), [http://www.washingtonpost.com/blogs/the-fix/post/partisanship-doesnt-seem-worse-it-is-worse/2012/06/04/gJQAJluzDV\\_blog.html](http://www.washingtonpost.com/blogs/the-fix/post/partisanship-doesnt-seem-worse-it-is-worse/2012/06/04/gJQAJluzDV_blog.html)); Nolan McCarty, *What We Know and Don't Know About Our Polarized Politics*, WASH. POST: MONKEY CAGE (Jan. 8, 2014), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/01/08/what-we-know-and-dont-know-about-our-polarized-politics/>.

by the Pew Research Center for the People and the Press, for example, found that although the nation's core beliefs and principles have remained pretty stable over the past 25 years, these beliefs are being sorted along increasingly partisan lines.<sup>17</sup>

Against that backdrop, though, environmental and climate issues have been especially divisive.<sup>18</sup> Professor of Communication Studies Matthew Nisbet explains:

Predictably, on climate change, poll analyses reveal politically polarized opinions, resulting in two Americas divided along ideological lines. Over the past decade, an increasing majority of Republicans question the validity of climate science and dismiss the urgency of the problem, while an increasing majority of Democrats accept climate science and express concern about the issue. This deep partisan division remains even after factoring in education and knowledge. In fact, the persistent gap in perceptions over the past decade suggests that climate change has joined a short list of issues such as gun control or taxes that define what it means to be a Republican or Democrat.<sup>19</sup>

The levels of partisanship over climate change have waxed and waned over time, and may be lessening somewhat currently. Public support for action on climate change was comparatively high in 2007, the year in which the Intergovernmental Panel on Climate Change and Al Gore shared a Nobel Peace Prize and the U.S. Supreme Court decided the landmark climate change case, *Massachusetts v. EPA*.<sup>20</sup> However, this support declined markedly over the years that followed, reaching such a nadir by 2012 that Professor Richard Lazarus declared: “[c]limate change had become the political equivalent of Harry Potter’s Lord Voldemort: the crisis that dared not be named.”<sup>21</sup>

Superstorm Sandy was a key turning point, and successive polls since have shown gradually rising levels of public concern over

17. *Partisan Polarization Surges in Bush, Obama Years: Trends in American Values 1987-2012*, PEW RESEARCH CTR. FOR THE PEOPLE & PRESS 1, 17–18 (June 4, 2012), <http://www.people-press.org/files/legacy-pdf/06-04-12%20Values%20Release.pdf>; *Energy Partisanship*, *supra* note 16.

18. Peel & Osofsky, *supra* note 16.

19. Matthew C. Nisbet, *Communicating Climate Change: Why Frames Matter for Public Engagement*, ENV'T: SCI. & POL'Y FOR SUSTAINABLE DEV. 12, 12–14 (2009).

20. *Massachusetts v. Env'tl. Prot. Agency*, 549 U.S. 497 (2007); Frank Newport, *Americans Show Low Levels of Concern on Global Warming*, GALLUP (Apr. 4, 2014), <http://www.gallup.com/poll/168236/americans-show-low-levels-concern-global-warming.aspx>; *The Nobel Peace Prize 2007*, NOBELPRIZE.ORG, [http://www.nobelprize.org/nobel\\_prizes/peace/laureates/2007/](http://www.nobelprize.org/nobel_prizes/peace/laureates/2007/) (last visited Sept. 15, 2015).

21. Richard J. Lazarus, *Presidential Combat Against Climate Change*, 126 HARV. L. REV. F. 152 (2013).

climate change and willingness to take action to address it among Democrats, Republicans, and Independents.<sup>22</sup> For instance, a 2015 *New York Times*-Stanford University-Resources for the Future poll found that seventy-eight percent of the U.S. public—including sixty percent of Republicans—support “the federal government limit[ing] the amount of greenhouse gases that U.S. businesses put out.”<sup>23</sup>

However, even with this trend, a divide still exists among Democrats, Republicans, and Independents in how they treat this issue. Republicans remain less likely to support policy measures to address climate change and more likely to vote for those who deny climate change science or do not view themselves as qualified to evaluate the science.<sup>24</sup> There are also partisan differences in how important the issue is to people and how concerned they are about the cost of measures to address it. For instance, in the above-mentioned 2015 poll, sixty-three percent of Democrats indicated that global warming was very or extremely important to them personally as compared to eighteen percent of Republicans, and forty-seven percent of Republicans worried that measures to address climate change would harm the economy.<sup>25</sup> As the next section explores, these party divides have translated into congressional inaction in the United States.

22. Lisa Lerer, *Americans by 2 to 1 Would Pay More to Curb Climate Change*, BLOOMBERG NEWS (June 11, 2014), <http://www.bloomberg.com/news/articles/2014-06-10/americans-by-2-to1-would-pay-more-to-curb-climate-change>; Lydia Saad, *Republican Skepticism Toward Global Warming Eases*, GALLUP (Apr. 9, 2013), <http://www.gallup.com/poll/161714/republican-skepticism-global-warming-eases.aspx>; Lydia Saad, *Americans' Concerns About Global Warming on the Rise*, GALLUP (Apr. 8, 2013), <http://www.gallup.com/poll/161645/americans-concerns-global-warming-rise.aspx>; *How Americans View the Top Energy and Environmental Issues*, PEW RESEARCH CTR. (Jan. 15, 2014), <http://www.pewresearch.org/key-data-points/environment-energy-2/>.

23. *Global Warming: What Should Be Done?*, N.Y. TIMES (Jan. 29, 2015), <http://www.nytimes.com/interactive/2015/01/29/us/global-warming-poll.html>. 48 percent of Republican respondents also said that they were more likely to vote for a candidate who supports dealing with climate change. *Id.* For a discussion of the poll, see Coral Davenport & Marjorie Connelly, *Most Republicans Say They Back Climate Action, Poll Finds*, N.Y. TIMES: POL. (Jan. 30, 2015), [http://www.nytimes.com/2015/01/31/us/politics/most-americans-support-government-action-on-climate-change-poll-finds.html?emc=edit\\_na\\_20150130&nid=52930963&r=0](http://www.nytimes.com/2015/01/31/us/politics/most-americans-support-government-action-on-climate-change-poll-finds.html?emc=edit_na_20150130&nid=52930963&r=0).

24. Peel & Osofsky, *supra* note 16.

25. Davenport & Connelly, *supra* note 23; Peel & Osofsky, *supra* note 16.

### C. U.S. Climate Change Policy—A Tale of Congressional Dysfunction and Executive Action

The U.S. approach to addressing the problem of climate change reflects the combination of structural barriers to legislative action and partisanship over climate change discussed in the previous two sections. The United States, unlike Australia, has broad environmental statutes with significant citizen suits provisions,<sup>26</sup> but very limited federal statutory law directly addressing climate change. U.S. federal laws on climate change primarily focus on data collection and scientific research, with some language about coordination and international leadership.<sup>27</sup> Congressional gridlock has constrained both legislative efforts to undermine those broad environmental statutes and those aimed at passing comprehensive climate change legislation. Even early in President Obama's first term, when his party held both houses of Congress, comprehensive climate change legislation failed to pass.<sup>28</sup>

As a consequence, the president and executive branch agencies—in recent years galvanized or influenced by litigation—have deeply shaped the U.S. regulatory path regarding climate change. This Section explores the crucial role of the U.S. executive branch and limited role of the legislative branch in determining how the United States has responded to climate change since its failure to ratify the Kyoto Protocol two decades ago. Like in Australia, control of the legislative and executive branches has shifted back and forth during this time period.<sup>29</sup> But without major legislation on climate change—only broader statutes with implications for climate change like various acts reforming energy regulation and including financial incentives for renewables—executive branch direction and initiatives have dominated the U.S. approach.

26. Citizen suits involve lawsuits by private citizens to enforce a statute. Such provisions are particularly common in the field of environmental law. See Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339 (1990); James R. May, *Now More Than Ever: Trends in Environmental Citizen Suits at 30*, 10 WIDENER L. REV. 1 (2003).

27. See Hari M. Osofsky & Jacqueline Peel, *Litigation's Regulatory Pathways and the Administrative State: Lessons from U.S. and Australian Climate Change Governance*, 25 GEO. INT'L ENVTL. L. REV. 207, 223 (2013); Hari M. Osofsky, *Diagonal Federalism and Climate Change: Implications for the Obama Administration*, 62 ALA. L. REV. 237 (2011) [hereinafter *Diagonal Federalism*].

28. See *Diagonal Federalism*, *supra* note 27. For the defeated legislation, see The American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009).

29. See *infra* Part III.

## 1. The Death of Kyoto Ratification and Executive Action

The limited U.S. legislation on climate change predates the Clinton administration and the death of Kyoto Protocol ratification in the Senate.<sup>30</sup> The 1978 National Climate Program Act required the president to establish a program to “assist the Nation and the world to understand and respond to natural and man-induced climate processes and their implications.”<sup>31</sup> In accordance with that law, President Carter commissioned a National Research Council report which produced findings indicating the seriousness of the problem and need to act: “[i]f carbon dioxide continues to increase, the study group finds no reason to doubt that climate changes will result and no reason to believe that these changes will be negligible . . . [a] wait-and-see policy may mean waiting until it is too late.”<sup>32</sup> The 1987 Global Climate Protection Act, passed when Ronald Reagan was president, included language about “coordinated national policy” and U.S. leadership in international efforts to address climate change,<sup>33</sup> but without specific mandates to achieve those goals. Although this Act has been amended since, follow-up legislative efforts to create a more comprehensive regime have still failed.

President Clinton’s executive action on climate change was far less extensive than the regulations being promulgated under President Obama, but the pattern of congressional gridlock paired with executive action was similar. President Clinton’s administration, led by Vice President Al Gore, participated actively in the Kyoto Protocol negotiations, shaping some of its key attributes. However, at home, President Clinton faced such difficult legislative barriers that he did not even submit the Kyoto Protocol for ratification. The Senate unanimously passed a resolution stating that the United States should not ratify the Kyoto Protocol because it did not include developing-country major emitters like China and India.<sup>34</sup> This resolution made it clear that despite the Clinton administration’s desire to join many of the other developed-country major emitters in

30. Hari M. Osofsky has described this legislation in depth in her prior work. *Diagonal Federalism*, *supra* note 27, at 246.

31. National Climate Program Act, Pub. L. No. 95-367, 92 Stat. 601, 601 (1978) (codified as amended at 15 U.S.C. §§ 2901–2908 (2006)).

32. Verner E. Suomi, *Foreword* to CARBON DIOXIDE AND CLIMATE: A SCIENTIFIC ASSESSMENT vii, viii (1979).

33. Global Climate Protection Act, Pub. L. No. 100-204, §§ 1101–06, 101 Stat. 1331, 1408 (1987) (codified as amended at 15 U.S.C. § 2901 (2006)).

34. S. Res. 98, 105th Cong. (1997) (enacted).

making binding commitments to targets and timetables, Congress would prevent such action.<sup>35</sup>

Despite this Kyoto Protocol defeat, the Clinton administration advanced many initiatives to address greenhouse gas emissions. Many of these efforts focused on spurring technological development needed to reduce emissions. They included the Climate Change Technology Initiative and partnerships with industry such as the Partnership for a New Generation of Vehicles (PNGV), the Partnership for Advancing Technology in Housing (PATH), Energy Star, Climate Wise, and Industries of the Future.<sup>36</sup> President Clinton secured more than \$3 billion in annual funding—a fifty percent increase—for research and development of clean energy technologies.<sup>37</sup> The Clinton administration also promulgated energy efficiency standards aimed at reducing the average appliance's energy use by thirty percent.<sup>38</sup>

## 2. "Unsigning" the Kyoto Protocol and Refusing EPA Greenhouse Gas Emissions Regulation

President George W. Bush's presidency brought a more complex relationship between the executive branch and climate change action. As during the Clinton administration, congressional action on climate change was limited. The 2007 Energy Independence and Security Act (EISA) was arguably the law with the most significance for climate change passed during Bush's presidency. It included, for example, stricter CAFE standards that required automakers to bring fleet-wide gas mileage to thirty-five miles per gallon (mpg) by 2020.<sup>39</sup> Numerous bills were introduced during President Bush's two terms to address climate change directly, but all of them died in committee.<sup>40</sup>

35. See SUSAN R. FLETCHER, CONG. RESEARCH SERV., RL 30692, GLOBAL CLIMATE CHANGE: THE KYOTO PROTOCOL 2 (2005).

36. See *The Clinton Presidency: Protecting Our Environment and Public Health*, THE CLINTON-GORE ADMIN.: A RECORD OF PROGRESS, <http://clinton5.nara.gov/WH/Accomplishments/eightyears-08.html> (last visited Oct. 30, 2015).

37. *Id.*

38. *Id.*

39. See Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492, 1499 (2007).

40. For examples of proposed legislation that died in committee in the Senate or House, see Carbon Leakage Prevention Act, H.R. 7146, 110th Cong. (2008); Climate MATTERS Act of 2008, H.R. 6316, 110th Cong. (2008); Climate Stewardship and Economic Security Act of 2007, H.R. 4226, 110th Cong. (2007); Low Carbon Economy Act of 2007, S. 1766, 110th Cong. (2007); Clean Air Planning Act of 2007, S. 1177, 110th Cong. (2007); Safe Climate Act

President Bush, unlike some of the outspoken Republicans during President Obama's administration and the 2016 election, acknowledged human-caused climate change as a serious problem. In the same speech in which he rejected the Kyoto Protocol as an "unsound international treaty that will throw millions of our citizens out of work," he reaffirmed the U.S. commitment to the United Nations Framework Convention on Climate Change and the importance of acting to reduce emissions, stating:

[W]e must address the issue of global climate change. We must also act in a serious and responsible way, given the scientific uncertainties. While these uncertainties remain, we can begin now to address the human factors that contribute to climate change. Wise action now is an insurance policy against future risks.<sup>41</sup>

In that speech, he also committed to "cutting our nation's greenhouse gas intensity—how much we emit per unit of economic activity—by 18% over the next 10 years" through agreements with key industries; developing standards for measuring emissions and providing companies that can show real measurable reductions with transferrable credits; and promoting renewable energy, clean coal production, and nuclear power.<sup>42</sup> Internationally, the Bush administration led the push for an Asia-Pacific Partnership on Clean Development and Climate Change (which included Australia)—a bottom-up model of nationally-nominated emissions reduction targets that was designed as an alternative to the top-down targets and timetable approach of the Kyoto Protocol.<sup>43</sup>

of 2007, H.R. 1590, 110th Cong. (2007); Global Warming Reduction Act of 2007, S. 485, 110th Cong. (2007); Climate Stewardship Act of 2007, H.R. 620, 110th Cong. (2007); Electric Utility Cap and Trade Act of 2007, S. 317, 110th Cong. (2007); Global Warming Pollution Reduction Act, S. 309, 110th Cong. (2007); Climate Stewardship and Innovation Act of 2007, S. 280, 110th Cong. (2007); Global Warming Reduction Act of 2006, S. 4039, 109th Cong. (2006); Safe Climate Act of 2006, H.R. 5642, 109th Cong. (2006); Clean Air Planning Act of 2006, S. 2724, 109th Cong. (2006); Keep America Competitive Global Warming Policy Act of 2006, H.R. 5049, 109th Cong. (2006); New Apollo Energy Act of 2005, H.R. 2828, 109th Cong. (2005); Climate Stewardship and Innovation Act of 2005, S. 1151, 109th Cong. (2005); Climate Stewardship Act of 2005, S. 342, 109th Cong. (2005); Climate Stewardship Act of 2005, H.R. 759, 109th Cong. (2005); Climate Stewardship Act of 2004, H.R. 4067, 108th Cong. (2004); Climate Stewardship Act of 2003, S. 139, 108th Cong. (2003).

41. See President George W. Bush, Address at the National Oceanic and Atmospheric Administration (June 11, 2001).

42. *Id.*

43. For discussion of the Asia-Pacific Partnership, see Peter Christoff & Robyn Eckersley, *The Kyoto Protocol and the Asia Pacific Partnership on Clean Development and Climate*, in *CLIMATE LAW IN AUSTRALIA* 32 (Tim Bonyhady & Peter Christoff eds., 2007). Ironically, the bottom-up approach of the Asia-Pacific Partnership is now the model being pursued in international negotiations for a new, post-2020 climate agreement.

However, despite these commitments, the Bush administration repeatedly refused to regulate domestic greenhouse gas emissions under existing environmental laws, and prevented leader states from moving ahead with their own regulation of greenhouse gas motor vehicles emissions.<sup>44</sup> The executive branch's refusal to take these steps to regulate greenhouse gas emissions, and continued congressional inaction, helped spur a growth in climate change litigation, which first emerged in the United States in the 1990's.<sup>45</sup> One of these challenges led, in 2007, to the landmark decision in *Massachusetts v. EPA*, in which the Supreme Court ruled that the Bush administration EPA had abused its discretion in the way in which it refused to regulate motor vehicle greenhouse gas emissions under the Clean Air Act.<sup>46</sup> Although the Bush administration did not take significant action pursuant to that decision, as discussed in the following section, the case provided the basis for extensive regulation of motor vehicles and major stationary sources by the Obama administration.

### 3. The Death of Comprehensive Climate Change Legislation and Major New Executive Action

Although the pattern of limited congressional action and substantial executive branch power over the shape of U.S. efforts on climate change continued under the Obama administration, the scope of his administration's actions was far greater. President Obama began taking steps through federal agencies to regulate under the Clean Air Act pursuant to *Massachusetts v. EPA* within a week of taking office, even as his administration worked with legislators to try to pass comprehensive climate change legislation.<sup>47</sup> After making an Endangerment Finding necessary to regulate pollutants under the Clean Air Act in 2009,<sup>48</sup> the EPA under

44. Editorial, *Arrogance and Warming*, N.Y. TIMES (Dec. 21, 2007), <http://www.nytimes.com/2007/12/21/opinion/21fri1.html? r=0>; John M. Broder & Felicity Barringer, *E.P.A. Says 17 States Can't Set Greenhouse Gas Rules for Cars*, N.Y. TIMES (Dec. 20, 2007), <http://www.nytimes.com/2007/12/20/Washington/20epa.html>.

45. CLIMATE CHANGE LITIGATION, *supra* note 5, at 19.

46. *Massachusetts v. Env'tl. Prot. Agency*, 549 U.S. 497 (2007); CLIMATE CHANGE LITIGATION, *supra* note 5, at 63.

47. For more detailed discussion of the Obama administration's initial action on climate change, see Hari M. Osofsky, *Is Climate Change "International"?: Litigation's Diagonal Regulatory Role*, 49 VA. J. INT'L L. 585 (2009).

48. Endangerment and Cause and Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act; Final Rule, 74 Fed. Reg. 66496 (Dec. 15, 2009) (to be codified at 40 C.F.R. ch. I).

President Obama began regulating emissions from motor vehicles and major stationary sources (such as power plants).<sup>49</sup> Under the “National Program,” the EPA and Department of Transportation have promulgated joint regulations regarding fuel economy and tailpipe greenhouse gas emissions.<sup>50</sup> In 2010, the agencies finalized their first set of light-duty vehicles rules for model years 2012-2016.<sup>51</sup> They have since addressed post-2017 model years of light-duty vehicles, medium and heavy vehicles, and harmonizing federal and California standards.<sup>52</sup> To date, this program has survived all judicial challenges and automakers have been on track for meeting the standards.<sup>53</sup>

Parallel to its motor vehicles regulations, the EPA has also been acting under § 111 of the Clean Air Act to address emissions from power plants and other stationary sources. The EPA’s first step in 2010 was to establish threshold greenhouse gas permit requirements, which aimed at focusing its regulation on only the

49. For an overview of the EPA’s mitigation efforts, see *Regulatory Initiatives*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/climatechange/EPAactivities/regulatory-initiatives.html> (last updated Aug. 3, 2015).

50. Notice of Upcoming Joint Rulemaking to Establish Vehicle GHG Emissions and CAFE Standards, 74 Fed. Reg. 24,007 (May 22, 2009). The EPA regulations focus on tailpipe emissions under the Clean Air Act, and the National Highway Traffic Safety Administration (NHTSA) regulations involve CAFE standards under the Energy Independence and Security Act and the Energy Policy Conservation Act. They are coordinated for the first time under this program on the basis that “[t]he close relationship between emissions of CO<sub>2</sub> [carbon dioxide] – the most prevalent greenhouse gas emitted by motor vehicles – and fuel consumption, means that the technologies to control CO<sub>2</sub> emissions and to improve fuel economy overlap to a great degree.” *Id.* at 24,009 n.7. For further discussion of compliance and measurement under the program, see *id.*

51. See Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324 (May 7, 2010) (to be codified at 40 C.F.R. pts. 85, 86, and 600; 49 C.F.R. pts. 531, 533, 536 et al.); see also President Barack Obama, Remarks on National Fuel Efficiency Standards in the Rose Garden (May 19, 2009) (on file at [http://www.whitehouse.gov/the\\_press\\_office/Remarks-by-the-President-on-national-fuel-efficiency-standards/](http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-on-national-fuel-efficiency-standards/)).

52. Notice of Intent, 75 Fed. Reg. 62,739 (Oct. 13, 2010) (to be codified at 49 C.F.R. pts. 531, 533); Greenhouse Gas Emissions Standards and Fuel Efficiency Standards for Medium and Heavy-Duty Engines and Vehicles, 75 Fed. Reg. 74152 (Nov. 30, 2010) (to be codified at 49 C.F.R. pts. 523, 534, 535). For correction to proposed rules, see Greenhouse Gas Emissions Standards and Fuel Efficiency Standards for Medium and Heavy-Duty Engines and Vehicles, 75 Fed. Reg. 81952 (Dec. 29, 2010) (to be codified at 37 C.F.R. pt. 201); Press Release, U.S. Env’tl. Prot. Agency & U.S. Dep’t of Transp., EPA, DOT and California Align Timeframe for Proposing Standards for Next Generation of Clean Cars (Jan. 24, 2011) (on file at <http://yosemite.epa.gov/opa/admpress.nsf/6424ac1caa800aab85257359003f5337/6f34c8d6f2b11e5885257822006f60c0!OpenDocument>).

53. See Press Release, U.S. Env’tl. Prot. Agency, EPA Report: Data Show Automakers on Track in meeting Greenhouse Gas Standards (Apr. 25, 2014) (on file at <http://yosemite.epa.gov/opa/admpress.nsf/0/A04E3F24D235D14185257CC5004F1907>).

most significant emitters that account for seventy percent of emissions.<sup>54</sup> The EPA proposed a “Carbon Pollution Standard” for new power plants under Clean Air Act § 111(b) in 2013, which was very controversial because coal-fired power plants could only meet it through partial carbon sequestration and storage.<sup>55</sup> The EPA put forward its “Clean Power Plan” in 2014—revised over the course of the next year in response to feedback and proposed in final form in 2015<sup>56</sup>—which proposes “emission guidelines for states to follow in developing plans to address greenhouse gas emissions from existing fossil fuel-fired electric generating units.”<sup>57</sup> The plan aims to reduce carbon dioxide emissions from the power sector by 30 percent from 2005 levels by 2030.<sup>58</sup>

These efforts have been extremely controversial and challenged through legislation, such as the Ratepayer Protection Act mentioned in the introduction, and lawsuits.<sup>59</sup> Thus far, federal courts have deemed the Clean Power Plan challenges brought prior to the final rule premature,<sup>60</sup> and the Supreme Court has partially

54. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010) (to be codified at 40 C.F.R. pts. 51, 52, 70 et al.); Press Release, U.S. Envtl. Prot. Agency, EPA to Set Modest Pace for Greenhouse Gas Standards (Dec. 23, 2010) (on file at <http://yosemite.epa.gov/opa/admpress.nsf/6424ac1caa800aab85257359003f5337/d2f038e9daed78de8525780200568bec!OpenDocument>); *Clean Air Act Permitting for Greenhouse Gas Emissions - Final Rules, Fact Sheet*, U.S. ENVTL. PROT. AGENCY (Dec. 23, 2010), <http://www.epa.gov/NSR/ghgdocs/201011223factsheet.pdf>.

55. See Standards of Performance for Greenhouse Gas Emissions from New Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 1430 (Jan. 8, 2014) (to be codified at 40 C.F.R. pts. 60, 70, 71 and 98); Gina McCarthy, *Keynote Remarks at the University of Michigan Environmental Law and Public Health Conference*, 3 MICH. J. ENVTL. & ADMIN. L. 243 (2014).

56. Carbon Pollution Emission Guidelines for Existing Stationary Source: Electric Utility Generating Units, Prepublication Version of the Final Rule, 79 Fed. Reg. 67406 (Aug. 3, 2015) (to be codified at 40 C.F.R. Part 60) [hereinafter Clean Power Plan].

57. *Id.*

58. News Release, U.S. Envtl. Prot. Agency, EPA Proposes First Guidelines to Cut Carbon Pollution from Existing Power Plants/Clean Power Plan is Flexible Proposal to Ensure a Healthier Environment, Spur Innovation and Strengthen the Economy (June 2, 2014) (on file at <http://yosemite.epa.gov/opa/admpress.nsf/bd4379a92ceceec8525735900400c27/5bb6d20668b9a18485257ceb00490c98!OpenDocument>).

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

60. *In re Murray Energy Corp.*, 788 F.3d 330 (D.C. Cir. 2015); Coral Davenport, *Judges Skeptical of Challenge to Proposed E.P.A. Rule on Climate Change*, N.Y. TIMES (Apr. 16, 2015), [http://www.nytimes.com/2015/04/17/us/legal-battle-begins-over-obama-bid-to-curb-greenhouse-gases.html?\\_r=0](http://www.nytimes.com/2015/04/17/us/legal-battle-begins-over-obama-bid-to-curb-greenhouse-gases.html?_r=0).

accepted and partially rejected a challenge to the tailoring rule, which has limited practical consequences for what is regulated.<sup>61</sup> However, challenges have already been brought to the final Clean Power Plan, including a stay request,<sup>62</sup> emergency petition for an extraordinary writ,<sup>63</sup> and fifteen cases filed by 26 states and industry groups that have been consolidated before the D.C. Circuit Court of Appeals.<sup>64</sup> Mirroring the dynamics in other climate change cases, including *Massachusetts v. EPA*, eighteen states, the District of Columbia, five cities, and one county intervened on behalf of the EPA in those consolidated cases.<sup>65</sup>

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

61. Util. Air Regulatory Grp. v. Envtl. Prot. Agency, 134 S. Ct. 2427, 2449 (2014).

62. Letter from Elbert Lin, Solicitor Gen. of W.Va., to The Honorable Gina McCarthy, Adm’r, U.S. Envtl. Prot. Agency, EPA Docket No. EPA-HQ-OAR-20 13-0602; Application for Administrative Stay by the State of West Virginia and 15 Other States (Aug 5, 2015) (on file at <http://www.ago.wv.gov/Documents/WV%20-%20Administrative%20Request%20for%20Stay%20CPP.PDF>); see also John Funk, *Shelve Clean Power Plan Until Courts Rule, Ohio, West Virginia and 13 Other States Ask EPA*, CLEVELAND.COM (Aug. 5, 2015, 6:41 PM),

[http://www.cleveland.com/business/index.ssf/2015/08/shelve\\_clean\\_power\\_plan\\_until.html](http://www.cleveland.com/business/index.ssf/2015/08/shelve_clean_power_plan_until.html).

63. Petition for Extraordinary Writ to the U.S. Envtl. Prot. Agency, *In re West Virginia*, No. 15-1277 (D.C. Cir. Aug. 13, 2015),

[http://www.eenews.net/assets/2015/08/14/document\\_ew\\_04.pdf](http://www.eenews.net/assets/2015/08/14/document_ew_04.pdf).

64. For a summary of the cases to date, discussion of potential future challenges, and exploration of these issues, see *Legal Challenges – Overview and Documents*, E&E PUBL’G, [http://www.eenews.net/interactive/clean\\_power\\_plan/fact\\_sheets/legal](http://www.eenews.net/interactive/clean_power_plan/fact_sheets/legal) (last visited Apr. 25, 2015). For a more detailed discussion of these lawsuits and other reactions to the Clean Power Plan, see Peel & Osofsky, *supra* note 16.

65. The intervenors on behalf of the EPA include:

the States of New York, California (by and through Governor Edmund G. Brown Jr., the California Air Resources Board, and Attorney General Kamala D. Harris), Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Minnesota (by and through the Minnesota Pollution Control Agency), New Hampshire, New Mexico, Oregon, Rhode Island, Vermont, Washington, the Commonwealths of Massachusetts and Virginia, the District of Columbia, the Cities of Boulder, Chicago, New York, Philadelphia, and South Miami, and Broward County, Florida

Unopposed Motion for Leave to Intervene as Respondents, *West Virginia v. Envtl. Prot. Agency*, No. 15-1363, at 1 (D.C. Cir. Nov. 4, 2015), <http://www.ag.ny.gov/pdfs/2015-11-04-Motion-to-Intervene-FILED.pdf>.

agency climate change-risks and vulnerabilities and to manage the effects of climate change on the agency's operations and mission in both the short and long term."<sup>66</sup> In 2013, both the president and federal agencies released climate change adaptation plans. The president's Climate Action Plan addresses removing barriers to action; fostering state, local and tribal efforts; building scientific capacity; and identifying vulnerabilities across different economic sectors.<sup>67</sup> Agency plans focus on adaptation with respect to operations, missions and programs, and President Obama issued an additional executive order directing federal agencies to take a variety of steps on adaptation.<sup>68</sup> That order also established a federal-level interagency Council on Climate Preparedness and Resilience and a multi-level State, Local, and Tribal Leaders Task Force on Climate Preparedness and Resilience.<sup>69</sup>

The U.S. federal government has thus had a very consistent structural approach to addressing climate change over the past two decades. Congress has not had the political cohesion to address climate change directly, though it has passed some legislation, particularly on energy, with implications for climate change.<sup>70</sup> This lack of significant legislative action has made the executive branch particularly powerful in this sphere, often based on executive authority from broader statutes passed decades ago. All three of the past presidential administrations have followed this pattern, though political differences have altered how that executive authority has been used and litigation has accordingly tried to push or limit federal executive action.<sup>71</sup>

### III. AUSTRALIAN LEGISLATIVE FLIP-FLOPS

Australia is just as divided along partisan lines as the United States when it comes to issues of clean energy and climate change. However, in Australia, a different system of government has seen divergent policy outcomes on these issues. Australia's parliamentary

66. Exec. Order No. 13,514—Federal Leadership in Environmental, Energy, and Economic Performance, 74 Fed. Reg. 52,117 (Oct. 5, 2009).

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

68. Exec. Order No. 13,653—Preparing the United States for the Impacts of Climate Change, 78 Fed. Reg. 66,819 (Nov. 1, 2013).

69. *Id.*

70. See *Diagonal Federalism*, *supra* note 27.

71. CLIMATE CHANGE LITIGATION, *supra* note 5.

system of government aligns the federal legislature with the executive, allowing for action by the party that wins the majority of seats in the lower house of parliament. Rather than legislative gridlock, the result has been dramatic flip-flops on climate policy under different administrations. Over the last two decades, Australia has both opposed and embraced ratification of the Kyoto Protocol, and has both introduced and removed a price on carbon. This policy inconsistency has seen it fall from being hailed as an international climate leader to being derided as a climate dinosaur.<sup>72</sup>

This Part examines the Australian parliamentary system of government, and its functioning in the context of partisan climate politics, as a backdrop for understanding the extraordinary legislative shifts on climate change that have taken place under successive federal governments. Although the different structure of government in Australia has avoided the kind of congressional gridlock seen in the United States, a partisan environment has nonetheless resulted in inconsistent policies. For those in the United States who pine for the greater legislative efficiency of a parliamentary system, Australia's experience on climate policy provides a cautionary tale.

### A. Australia's Parliamentary System of Government

At first glance, Australia's system of government looks very familiar to U.S. eyes. The country has a federal Constitution, closely modeled on the U.S. Constitution, which divides powers between the federal government and the six states, and also separates power at the federal level between the legislature, executive, and judiciary.<sup>73</sup> The federal legislature consists of two houses known as the House of Representatives and the Senate.<sup>74</sup> Members of the

72. KRISTINA STEFANOVA, THE CLIMATE INST., CLIMATE OF THE NATION 2014 AUSTRALIAN ATTITUDES ON CLIMATE CHANGE: ARE AUSTRALIANS CLIMATE DINOSAURS? 2 (2014).

73. *Australian Constitution*. The six states in the Commonwealth of Australia are New South Wales, Victoria, Queensland, South Australia, Western Australia and Tasmania. There are also two self-governing mainland territories: the Northern Territory and the Australian Capital Territory.

74. *Id.* pt. I §1. Members of the House of Representatives—the “people’s house”—are elected for three-year terms to represent their electorates, the boundaries of which are designated to ensure coverage of roughly equal numbers of electors. The Senate or “states’ house” has seventy-six senators, twelve from each of the country’s six states and two from each of the two mainland territories. Senators serve for a period of six years and are elected based on a system of proportional representation. See *About the House of Representatives*, PARLIAMENT OF AUSTR., [http://www.aph.gov.au/About\\_Parliament/House\\_of\\_Representatives/About\\_the\\_House\\_of\\_R](http://www.aph.gov.au/About_Parliament/House_of_Representatives/About_the_House_of_R)

House of Representatives and Senate (collectively known as the Australian Parliament) usually belong to one of two party groupings: the Australian Labor Party (with a center-left focus)<sup>75</sup> or the Coalition of the Liberal Party and the National Party (both with a conservative focus).<sup>76</sup> In recent years, other parties, such as the Australian Greens, as well as independent members, have been elected to both houses of parliament.<sup>77</sup> To become legislation, laws need to pass each house of the Australian Parliament. Legislation then receives “royal assent” from the Head of Government—nominally the Queen of England, who exercises her powers in this regard through the Governor-General.<sup>78</sup>

While this system shares many structural features with the United States, there is an important difference. Like many western countries, Australia’s system of government operates as a parliamentary democracy and not as a strict separation-of-powers system.<sup>79</sup> The political party that wins the majority of seats in the House of Representatives is able to form government and nominate its leader as Prime Minister.<sup>80</sup> The executive government, therefore, effectively controls the legislature, at least in the lower house, and generally is able to pursue its legislative agenda efficiently.<sup>81</sup> On

representatives (last visited Sept. 14, 2015); *About the Senate*, PARLIAMENT OF AUSTRALIA, [http://www.aph.gov.au/About\\_Parliament/Senate/About\\_the\\_Senate](http://www.aph.gov.au/About_Parliament/Senate/About_the_Senate) (last visited Sept. 14, 2015).

75. See AUSTRALIAN LABOR PARTY, <http://www.alp.org.au> (last visited Sept. 15, 2015). The Labor Party has strong ties with the union movement.

76. For the Liberal Party, see LIBERAL PARTY OF AUSTRALIA, <https://www.liberal.org.au> (last visited Sept. 15, 2015), and for the National Party, see THE NATIONALS, <http://www.nationals.org.au> (last visited Sept. 15, 2015).

77. There are presently 10 Greens Senators and one Greens member of the lower house. Independents and minor parties make up a further 6 members of the Senate and 5 members of the House of Representatives. *Senate Composition*, PARLIAMENT OF AUSTRALIA, [http://www.aph.gov.au/Senators\\_and\\_Members/Senators/Senate\\_composition](http://www.aph.gov.au/Senators_and_Members/Senators/Senate_composition) (last visited Sept. 16, 2015).

78. CLAIRE MACKEN & MADELEINE DUPUCHE, *LAW ESSENTIALS: FOUNDATIONS IN AUSTRALIAN LAW* (Thomas Reuters 2011).

79. John M. Carey, *Presidential Versus Parliamentary Government*, in *HANDBOOK OF NEW INSTITUTIONAL ECONOMICS* 91, 93 (Claude Ménard & Mary M. Shirley eds., 2008).

80. *Id.* at 92.

81. It is still possible in the Australian system for the Senate to be controlled by a different party from that of the government or for independent senators and senators from other minor parties to make up the “balance of power” in the Senate. This is the current situation in the Australian Senate where Greens, minor party and independent Senators constitute 18 of the Senate members. The Australian Labor Party has 25 Senators and the Coalition has 33. To secure a majority of votes in the Senate where there is a partisan (Labor/Coalition divide), the Coalition government has to secure votes from the Greens or other independent and minor party Senators to pass legislation. See *supra* note 77.

occasion, blockage of legislation through the actions of opposition or minor party senators may slow down progress on particular legislative proposals. However, the Constitution provides mechanisms to break deadlock if there is ongoing opposition in the Senate to legislation passed by the House of Representatives.<sup>82</sup> Often, there is also strong political pressure for the upper house to pass government legislation or to reach a compromise, especially when the government has been elected with a “mandate” to pass or repeal certain laws.<sup>83</sup>

Australia’s parliamentary system, and the scope it allows for the executive to enact its legislative agenda efficiently, seems at first blush to compare favorably with the gridlock and legislative inaction seen in the United States. However, although this system tends to promote the passage of legislation, those legislative gains can be quickly reversed following elections that install a different party with a majority in the lower house. Rather than gridlock, the problem can become one of policy inconsistency as legislation radically changes course with successive administrations. This phenomenon of legislative flip flops is particularly likely where the major parties have strongly differing, partisan views on particular policy issues, which influence prevailing public attitudes. As the following Section explores, partisanship is a well-established feature of Australian climate politics just as it is in the United States.

### *B. Partisan Climate Politics in Australia*

Australians, like their U.S. counterparts, exhibit relatively low levels of concern about climate change as a threat and a greater ambivalence about climate change science than citizens of many other countries.<sup>84</sup> While compared with people in the United States, Australians are more likely to believe that climate change is happening (more than eighty percent in agreement) and to see

82. *Australian Constitution* pt. I §57.

83. This was arguably the case with the Clean Energy Act following the Abbott government’s election win on a platform of “axing the carbon tax.” See also Katherine Murphy, *Tony Abbott Begins Dismantling Carbon Tax: ‘Our Bill to Reduce Your Bills’*, *GUARDIAN* (Nov. 12, 2013), <http://www.theguardian.com/world/2013/nov/13/abbott-begins-dismantling-carbon-tax>.

84. See Stuart Capstick et al., *International Trends in Public Perceptions of Climate Change over the Past Quarter Century*, 6 *WIRES: CLIMATE CHANGE* 35, 35–36 (2015); Irene Lorenzoni & Nick F. Pidgeon, *Public Views on Climate Change: European and USA Perspectives*, 77 *CLIMATIC CHANGE* 73, 75–76 (2006).

human activity as a significant contributing cause,<sup>85</sup> this has not translated directly into environmental concerns rising up the hierarchy of the *general* concerns of the Australian public. In recent surveys, Australians consistently rank climate change as lower in importance than other general concerns, including the economy and other environmental issues.<sup>86</sup>

Political elites in Australia, just as in the United States, exhibit much more starkly divided views on climate change than do the general public. The Australian Labor Party, for instance, sees itself as “the party for the environment” and believes “[h]uman-induced climate change is real and it is happening now.”<sup>87</sup> Further to the left of the Australian Labor Party, the Australian Greens describe human-induced climate change as “the greatest threat to our world” requiring “urgent and sustained local, national and global action;”<sup>88</sup> a position similar to former Labor Prime Minister Kevin Rudd’s declaration that climate change is “the great moral challenge of our generation.”<sup>89</sup>

By contrast, former conservative Prime Minister and leader of the ruling Coalition government up until September 14, 2015, Tony Abbott, is on record as saying the “climate change argument is absolute crap.”<sup>90</sup> Although Abbott toned down his anti-climate rhetoric after becoming Prime Minister, many members of the Liberal and National Parties that make up the Coalition, and their advisors, continue to hold skeptical views on climate science.<sup>91</sup>

85. ZOE LEVISTON ET AL., COMMONWEALTH SCI. & INDUS. RESEARCH ORG., FOURTH ANNUAL SURVEY OF AUSTRALIAN ATTITUDES TO CLIMATE CHANGE: INTERIM REPORT (2014). It is likely that a greater occurrence of extreme weather events in Australia, including major floods, fires, droughts, and cyclones, has prompted more concern about local climate change effects. See STEFANOVA, *supra* note 72. Despite general agreement that climate change is happening, partisan divides are more apparent with conservative voters much more likely to see the causes of climate change as natural. See LEVISTON ET AL.

86. See *id supra* note 85, at 5. Respondents ranked climate change as the 14<sup>th</sup> most important concern among 16 general concerns, and 7<sup>th</sup> out of 8 environmental concerns.

87. AUSTRALIAN LABOR PARTY, <http://www.alp.org.au/asustainableenvironment> (last visited Sept. 23, 2015).

88. *Climate Change and Energy*, AUSTRALIAN GREENS, <http://greens.org.au/policies/climate-change-energy> (last visited Sept. 23, 2015).

89. Australian Labor, *Climate Change: The Great Moral Challenge of Our Generation*, YOUTUBE (Aug. 6, 2007), <https://www.youtube.com/watch?v=CqZvpRjGtGM>.

90. Interview with Kerry O’Brien, *The 7.30 Report*, on ABC Television (Feb. 2, 2010). In the interview, Tony Abbott retreats from his previous statement at a meeting in October 2011 that “The climate change argument is absolute crap,” characterizing this as “a little bit of rhetorical hyperbole” which did “not represent my considered position.”

91. For instance, Chair of the former Prime Minister’s Business Advisory Council, Maurice Newman, wrote in *The Australian* newspaper in May 2015 that “global warming is the

Even so, there are significant differences of opinion on climate change within the ruling Coalition government. For instance, new Prime Minister Malcolm Turnbull—installed on September 14, 2015 after a leadership spill displaced the unpopular Tony Abbott<sup>92</sup>—is regarded as a climate change moderate who has previously supported cost-effective, market-based approaches for reducing Australia’s greenhouse gas emissions.<sup>93</sup>

Partisan divides over climate change have played an important role in shaping policy, public attitudes, and activism on the issue in Australia. As the next section discusses further, the ten-year period of the government of conservative Prime Minister John Howard saw the emergence of a very similar political stance on climate change to that of the U.S. Bush administration, particularly from 2001 onwards. Like President Bush’s administration, the Howard government rejected the Kyoto Protocol and resisted the introduction of domestic mitigation measures, under heavy lobbying from the coal mining industry.<sup>94</sup> This approach generated similar public and political dissent to that seen in the United States. The courts became a focus for many environmental groups frustrated with the lack of federal action on climate change,<sup>95</sup> while at the sub-national level the Labor

hook” designed to institute “a new world order under the control of the UN.” Maurice Newman, *The UN is Using Climate Change as a Tool Not an Issue*, AUSTRALIAN (May 8, 2015), <http://www.theaustralian.com.au/opinion/the-un-is-using-climate-change-as-a-tool-not-an-issue/story-e6frg6zo-1227343839905>. A month later at the Liberal Party federal council meeting in June 2015, a group of rural members of the party put forward a motion calling for a parliamentary inquiry to “examine the scientific evidence that underpins the man-made global warming theory and investigate the reasons for the failure of computer models, the Intergovernmental Panel on Climate Change and prominent individuals to predict, among other things, the pause in global warming this century.” Eliza Borello, *Rural Liberals Put Climate Skepticism on Agenda at Federal Council Meeting in Melbourne*, ABC NEWS (June 23, 2015), <http://www.abc.net.au/news/2015-06-23/rural-liberals-put-climate-scepticism-on-agenda-at-party-summit/6568082>.

92. Since April 2014, the Abbott government trailed the Labor opposition in the polls. See Daniel Munoz & Ian Waldie, *Tony Abbott Ousted from Power as Australia’s Prime Minister*, CBS NEWS (Sept. 14, 2015), <http://www.cbsnews.com/news/tony-abbott-ousted-from-power-as-australias-prime-minister/>; see also Terrence McCoy, *How Australia’s Winking Tony Abbott Became One of the World’s Most Unpopular Prime Ministers*, WASH. POST (May 22, 2014), <http://www.washingtonpost.com/news/morning-mix/wp/2014/05/22/how-australias-winking-tony-abbott-became-one-of-the-worlds-most-unpopular-prime-ministers/>.

93. Lenore Taylor, *Malcolm Turnbull: Three Things We Need to Know about Our New Prime Minister*, GUARDIAN (Sept. 14, 2015), <http://www.theguardian.com/australia-news/2015/sep/14/malcolm-turnbull-the-three-things-we-need-to-know-about-the-challenger>.

94. GUY PEARSE, HIGH AND DRY: JOHN HOWARD, CLIMATE CHANGE AND THE SELLING OF AUSTRALIA’S FUTURE (2007).

95. Jacqueline Peel, *The Role of Climate Change Litigation in Australia’s Response to Global Warming*, 24 ENVTL. & PLANNING L. J. 90, 90–96 (2007).

state governments of the day pursued proactive climate policies and worked towards an inter-state emissions trading scheme.<sup>96</sup> Dissatisfaction with the Howard government's approach to climate change and an increasing public belief in the need for action contributed to the victory of Kevin Rudd and the Labor Party at the 2007 federal election.

Paralleling developments in the United States, the year 2007 was a particularly high point for Australian public awareness and concern regarding climate change.<sup>97</sup> However, over the next four years, there was a general shift "down" in the Australian public's attitude towards the threat of climate change.<sup>98</sup> As in the United States, the failure of domestic and international efforts to make progress on the issue was apparently a contributing factor.<sup>99</sup> When domestic legislation on climate change did eventually emerge under the Labor government led by Prime Minister Julia Gillard, partisan rhetoric on climate change—particularly voiced by then opposition leader, Tony Abbott—fed into negative public attitudes about the need for climate action. During this period, while many Australians continued to believe that climate change was real, a declining number of them saw this change as being a result of human activity.<sup>100</sup> A strong correlation also emerged between political preference and belief in and attitudes towards climate change.<sup>101</sup>

96. For discussion of state initiatives and the proposed inter-state emissions trading scheme (which was shelved when Kevin Rudd was elected Prime Minister) see ALEXANDER ZAHAR ET AL., *AUSTRALIAN CLIMATE LAW IN GLOBAL CONTEXT* 151–57 (2013).

97. THE CLIMATE INST., *CLIMATE OF THE NATION: AUSTRALIANS ATTITUDES TO CLIMATE CHANGE AND ITS SOLUTIONS* (2007), [http://www.climateinstitute.org.au/verve/\\_resources/climatation\\_2007.pdf](http://www.climateinstitute.org.au/verve/_resources/climatation_2007.pdf); Natalie Collins, *What Do Australians Say About Climate Change?* (Crawford School of Econ. & Gov't, Austl. Nat'l Univ., Policy & Governance Discussion Paper No. 09-01, 2009) [https://crawford.anu.edu.au/degrees/pogo/discussion\\_papers/PDP09-01.pdf](https://crawford.anu.edu.au/degrees/pogo/discussion_papers/PDP09-01.pdf).

98. Anita Pugliese & Linda Lyons, *Australians' Views Shift on Climate Change*, GALLUP (Aug. 6, 2010), <http://www.gallup.com/poll/141782/australians-views-shift-climate-change.aspx>.

99. Australians support for tackling climate change decreased over the period of the Rudd government from a high of 75% in 2007 to just 46% support in 2011. Fergus Hanson, *The Lowy Institute Poll 2011: Australia and the World Public Opinion and Foreign Policy*, LOWY INST. FOR INT'L POLICY (2011), <http://www.lowyinstitute.org/publications/2011-lowy-institute-poll>.

100. ZOE LEVISTON ET AL., COMMONWEALTH SCI. & INDUS. RESEARCH ORG., *SECOND ANNUAL SURVEY OF AUSTRALIAN ATTITUDES TO CLIMATE CHANGE: INTERIM REPORT* (2011), <https://publications.csiro.au/rpr/download?pid=csiro:EP116224&dsid=DS2>.

101. *Id.* For instance, a Morgan telephone poll conducted in July 2011 (when legislation to establish a carbon price was being debated in the federal parliament) found 37 percent of respondents asked for their view of global warming believed "concerns are exaggerated," and 58 per cent opposed the proposed carbon pricing mechanism. *Only 37% of Australians*

In the wake of Tony Abbott's victory in the September 2013 federal election, public attitudes on climate change appeared to again shift, with increasing criticism of the government's policy record.<sup>102</sup> Polls also recorded widespread public dissatisfaction with the federal government's management of climate change, which most ranked as "below average."<sup>103</sup> It is possible that with the installation of climate moderate, Malcolm Turnbull, as the new leader of the Liberal party and the country's twenty-ninth Prime Minister, there will be greater alignment between government policy and public attitudes on climate change. However, a major hurdle for the new Prime Minister remains: convincing hard-line climate skeptics within his own Coalition government of the need for more stringent measures to reduce emissions.<sup>104</sup>

### *C. Australian Climate Policy – A Tale of Inconsistency*

Fluctuating public attitudes to climate change coupled with partisan politics on the issue have made for a toxic policy mix in Australia. Indeed, one journalist evocatively labeled climate change the "killing fields" of Australian politics because the issue has been the political death of several leaders—from both parties—over the last two decades.<sup>105</sup> This Section tells the story of Australia's policy twists and turns on climate change, from the Howard government's opposition to ratifying the Kyoto Protocol in the early 2000's, to the efforts under the Labor Rudd and Gillard governments to price

*Support the Gillard Government's Carbon Tax While Clear Majority (58%—up 5%) Do Not*, ROY MORGAN RESEARCH (July 15, 2011), <http://www.roymorgan.com/findings/finding-4686-201302150110>.

102. *2015 Lowy Institution Poll Finds Rapidly Shifting Attitudes on Climate Issues and Strong Views About Solar*, LOWY INST. FOR INT'L POLICY (2015), <http://www.loyyinstitute.org/news-and-media/press-releases/2015-lowy-institute-poll-finds-rapidly-shifting-attitudes-climate-issues-and-strong-views-about> [hereinafter *2015 Lowy Institution Poll*]. See also Oliver Millman, *Australians Unhappy over Coalition's Response to Climate Change*, GUARDIAN (June 22, 2014), <http://www.theguardian.com/environment/2014/jun/22/australian-unhappy-coalitions-response-climate>.

103. *2015 Lowy Institution Poll*, *supra* note 102. See also STEFANOVA, *supra* note 72, which found, for the first time, greater support for laws that would put a price on carbon than opposition to such laws.

104. Peter Hartcher, *The Ties That Bind: Tony Abbott Never Cut it as a Unifying National Leader*, SYDNEY MORNING HERALD (Sept. 15, 2015), <http://www.theage.com.au/federal-politics/political-opinion/the-ties-that-blind-abbott-never-cut-it-as-a-unifying-national-leader-20150914-gjmi4i.html#ixzz3lifsqqCG>.

105. James West, *How the Carbon Tax Became the 'Killing Fields' of Australian Politics*, GUARDIAN (Sept. 6, 2013), <http://www.theguardian.com/environment/2013/sep/06/election-2013-carbon-price-australian-politics>.

carbon, and finally to the repeal of the carbon price legislation under Abbott's Coalition government, which is now led by new Prime Minister, Malcolm Turnbull. As the discussion illustrates, in a partisan environment, the legislative efficiency of a parliamentary-style government can come at the price of policy inconsistency.

### 1. Early Australian Climate Policy Mirroring the United States

During the 1990's, Australian governments were enthusiastic proponents of action on climate change. The country was one of the first to ratify the UNFCCC.<sup>106</sup> The Labor government of the day subsequently announced an emissions reduction target of twenty percent below 1990 levels by 2005,<sup>107</sup> albeit with the caveat that "the Government will not proceed with measures which have net adverse economic impacts nationally or on Australia's trade competitiveness in the absence of similar action by major greenhouse gas producing countries."<sup>108</sup>

These concerns about the potential economic impact of climate change measures underpinned the climate policy of the conservative Howard government that came to power in 1996.<sup>109</sup> While Australia participated in the international negotiations for the Kyoto Protocol, the government's focus was on securing key concessions in the treaty text, including a generous target of 108 percent of 1990 levels by 2012.<sup>110</sup> The Howard government subsequently signed the Kyoto Protocol in 1998. However, its close ties to the Bush administration in the United States saw the Australian government follow the U.S. lead when the latter rejected the Protocol in 2001.<sup>111</sup>

106. *Status of Ratification of the Convention*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE (May 2, 1992), [http://www.unfccc.int/essential\\_background/convention/status\\_of\\_ratification/items/2631.php](http://www.unfccc.int/essential_background/convention/status_of_ratification/items/2631.php).

107. *Australia & Greenhouse Parliament - A Chronology*, PARLIAMENT OF AUSTRALIA, [http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/Publications\\_Archive/Background\\_Papers/bp9798/98bp04](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/Background_Papers/bp9798/98bp04) (last visited Sept. 27, 2015).

108. CLIVE HAMILTON, *RUNNING FROM THE STORM: THE DEVELOPMENT OF CLIMATE CHANGE POLICY IN AUSTRALIA* 33 (2001).

109. Nick Minchin, *Responding to Climate Change: Providing a Policy Framework for a Competitive Australia*, 24 U. N.S.W. L.J. 550, 550-55 (2001).

110. Vincent Cusack, *Perceived Costs Versus Benefits of Meeting the Kyoto Target for Greenhouse Gas Emission Reduction: The Australian Perspective*, 16 ENVTL. & PLANNING L. J. 53, 54 (1999).

111. PEARSE, *supra* note 94.

On the domestic front, the Howard government enacted some climate change legislation,<sup>112</sup> but it remained strongly opposed throughout its ten-year term to mandatory emissions reduction measures.<sup>113</sup> This inaction on climate change became a focus of public opposition and activism. Several cases were brought before the federal courts seeking to bring greater public and political attention to the issue.<sup>114</sup> However, unlike in the United States, where the *Massachusetts v. EPA* decision sparked major federal action, Australia's more limited federal environmental laws restricted the scope for those opposed to the government's policies to force executive action on climate change through judicial review.<sup>115</sup>

## 2. Legislative Flip – The Road to an Australian Carbon Price

The federal election in Australia in 2007 coincided with a high point in Australian public concern over climate change.<sup>116</sup> Many were influenced in their views by Al Gore's film, *An Inconvenient Truth*, as well as the strengthening of scientific findings of climate impact laid out in the fourth assessment report of the Intergovernmental Panel on Climate Change.<sup>117</sup> Australia was also in the midst of a devastating drought, which became known as the Millennium Drought.<sup>118</sup> These factors combined to make climate change a salient issue in the 2007 election. Kevin Rudd and the Labor party, promising a new approach on climate change, were swept to power with a sizeable majority in the House of Representatives. The first act of the new government was to ratify the Kyoto Protocol, an announcement that saw Prime Minister Rudd

112. *Renewable Energy (Electricity) Act 2000* (Cth) (Austl.); *Energy Efficiency Opportunities Act 2006* (Cth) (Austl.); *National Greenhouse and Energy Reporting Act 2007* (Cth) (Austl.).

113. Sensing changing public climate attitudes, in 2007 the Howard government commissioned a taskforce which recommended the adoption of an emissions trading scheme. See AUSTRALIAN GOVERNMENT PRIME MINISTERIAL TASK GROUP ON EMISSIONS TRADING, REPORT OF THE TASK GROUP ON EMISSIONS TRADING 7 (2007). Howard went to the 2007 election with a promise that a national emissions trading scheme would be introduced no later than 2012, but lost the election.

114. Most notably, *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc. v. Minister for the Environment and Heritage* (2006) 232 ALR 510 (Austl.).

115. CLIMATE CHANGE LITIGATION, *supra* note 5, at 105–06.

116. See *supra* Section III.B.

117. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: SYNTHESIS REPORT 30–31 (Abdelkader Allali et al. eds., 2007).

118. On the role of climate change in the Millennium Drought, see Wenju Cai et al., *Did Climate Change-Induced Rainfall Trends Contribute to the Australian Millennium Drought?*, 27 J. CLIMATE 3145 (2014).

receive a standing ovation at the UNFCCC Bali Conference of the Parties in December 2007.<sup>119</sup>

The Rudd government's majority in the lower house and "mandate" to take federal action on climate change did not translate into climate change legislation as rapidly as many supporters hoped. Following an extensive advisory and consultation process, the government twice presented legislation in 2009 for a Carbon Pollution Reduction Scheme (CPRS)—a system of emissions trading applicable to large corporate emitters—but encountered opposition in the Senate from Coalition senators and the Australian Greens.<sup>120</sup> Following the Senate's second rejection of the CPRS legislation in October 2009, it seemed that the government was on the brink of a bipartisan deal on amendments to the law brokered with then leader of the Opposition, Malcolm Turnbull. However, partisan divides in the Coalition over climate change saw Turnbull's leadership toppled in favor of Tony Abbott. With the conservative anti-climate faction in control, the Coalition party voted down the CPRS legislation for a third time in the Senate.<sup>121</sup>

This action by the opposition party in the Senate would have provided grounds for the Rudd government to activate the Constitution's provisions to resolve the legislative deadlock. In the meantime, however, the international climate summit at Copenhagen in December 2009—touted as the world's last best chance to agree on a new framework to succeed the Kyoto Protocol—failed dismally to deliver anything close to a new treaty.<sup>122</sup> Public support for climate change measures and the CPRS

119. *Bali Summit Applauds Rudd for Kyoto Move*, ABC NEWS (Dec. 3, 2007), <http://www.abc.net.au/news/2007-12-04/bali-summit-applauds-rudd-for-kyoto-move/976302>.

120. *Carbon Pollution Reduction Scheme (Charges-General) Bill 2009* (Austl.); *Carbon Pollution Reduction Scheme Bill [No. 2] 2009* (Austl.). The Greens' rejection of the CPRS was based on their view that the scheme did not have sufficiently stringent targets and made too many concessions to industry. See *The Greens and Emissions Trading: Your Questions Answered*, AUSTL. GREENS (Jan. 14, 2010), <http://greensmps.org.au/content/news-stories/greens-and-emissions-trading—your-questions-answered#cantsupportCPRS>.

121. Phillip Coorey, *Shock Result as Abbott Wins Liberal Leadership by One Vote . . . ETS Dead*, SYDNEY MORNING HERALD (Dec. 1, 2009), <http://www.smh.com.au/national/shock-result-as-abbott-wins-liberal-leadership-by-one-vote—ets-dead-20091130-k1uz.html>.

Ironically, Malcolm Turnbull has now defeated Tony Abbott to take over leadership of the Liberal Party and the Prime Ministership. Latika Bourke, *Malcolm Turnbull Defeats Tony Abbott in Liberal Leadership Spill to Become Prime Minister*, AGE (Sept. 14, 2015), <http://www.theage.com.au/federal-politics/political-news/malcolm-turnbull-defeats-tony-abbott-in-liberal-leadership-spill-to-become-prime-minister-20150914-gjmhiu.html>.

122. Daniel Bodansky, *The Copenhagen Climate Change Conference: A Post-Mortem*, 104 AM. J. INT'L L. 230 (2010).

collapsed, and the Rudd government decided to shelve the legislation for an emissions trading scheme. Having announced climate change as “the great moral challenge of our generation,” this policy failure on the part of the Rudd government dealt a major blow to the Prime Minister’s credibility. Facing dire public polling, the Labor Party took the extraordinary step to remove Rudd from the party leadership and to replace him with the deputy party leader, Julia Gillard.<sup>123</sup>

Soon after, Julia Gillard called a general election that she narrowly won over opposition leader Tony Abbott. Climate policy had again featured as an issue in the election campaign but given declining public support for strong climate measures, both major parties expressed opposition to introducing a “carbon tax.” In one now-infamous media interview, Julia Gillard promised that if elected there would be no carbon tax under her government. The election produced a hung parliament with neither major party having a majority of members in the House of Representatives. In order to form government, Julia Gillard reached a deal with the Australian Greens and independents that included agreeing to the Greens’ demands to revisit the issue of climate policy.

One year later, in November 2011, Prime Minister Julia Gillard’s government, with support from the Australian Greens in the Senate, successfully passed a legislative package to introduce a “carbon pricing mechanism.”<sup>124</sup> The carbon pricing legislation, known as the Clean Energy Act 2011, took effect on July 1, 2012. The mechanism established a fixed period carbon price, commonly known as the carbon tax, that was set to transition to a fully-fledged emissions trading scheme from July 2015.<sup>125</sup> However, this elaborate legislative regime has quickly “enter[ed] history as one of the best-designed yet shortest-lived policies for climate change mitigation.”<sup>126</sup>

123. For an excellent insight into these dramatic events in Australian political history, see Sarah Ferguson, *The Killing Season (3 episodes)*, ABC NEWS (June 2015), <http://www.abc.net.au/news/programs/killing-season/>.

124. *Clean Energy Act 2011* (Cth) (Austl.); *Clean Energy (Consequential Amendments) Act 2011* (Cth) (Austl.); *Clean Energy Regulator Act 2011* (Cth) (Austl.); *Climate Change Authority Act 2011* (Cth) (Austl.).

125. The design and early experience with the carbon pricing mechanism is described in Jacqueline Peel, *The Australian Carbon Pricing Mechanism: Promise and Pitfalls on the Pathway to a Clean Energy Future*, 15(1) MINN. J. L., SCI. & TECH. 429 (2014).

126. Frank Jotzo, *Australia’s Carbon Price*, 2 NATURE CLIMATE CHANGE 475, 476 (2012).

### 3. Legislative Flop – Axing of the Carbon Tax

Far from a climate policy triumph, passage of the Clean Energy Act by the Gillard government quickly became a millstone around the neck of the Labor Party and the Prime Minister in particular. During 2011-2012, the Prime Minister and the government became deeply unpopular in the electorate, in part because of the “broken” pre-election promise not to introduce a carbon tax. Community opposition to the carbon tax was stirred by Tony Abbott (aided by the conservative media), who portrayed the carbon tax as “a giant new tax on everything.”<sup>127</sup> Dismal polling for the Gillard government in the lead-up to the September 2013 federal election resulted in an internal party vote in June to reinstate Kevin Rudd as the new (old) leader of the party. This change did not save the Rudd/Gillard government, which was soundly defeated at the election that installed Tony Abbott as Prime Minister.<sup>128</sup>

The Abbott government’s “first order of business” following the election was the repeal of the carbon pricing legislation and dismantling of the supporting institutional infrastructure.<sup>129</sup> Though opposition in the Senate from independent senators and the Greens frustrated some of the Abbott government’s attempts to repeal climate-related legislation,<sup>130</sup> it successfully delivered on its election promise to “axe the carbon tax.”<sup>131</sup> In place of the carbon-pricing scheme, the Abbott government enacted legislation for an Emissions Reduction Fund.<sup>132</sup> This voluntary program allows

127. Lenore Taylor, *Tony Abbott's Next Policy Vow: Anything But a 'Great Big New Tax'*, AUSTRALIAN (Dec. 2, 2009), <http://www.theaustralian.com.au/news/tony-abbotts-next-policy-vow-anything-but-a-great-big-new-tax/story-e6frg6n6-1225805927737>.

128. West, *supra* note 105.

129. For details see *Repealing the Carbon Tax*, AUSTRALIAN GOV'T DEP'T OF THE ENV'T, <http://www.environment.gov.au/climate-change/repealing-carbon-tax> (last visited Aug. 29, 2015).

130. In particular, the Abbott government failed to repeal legislation establishing the Climate Change Authority (which advises the government on emissions reduction targets) and the Clean Energy Finance Corporation (which provides funding for clean energy projects and technology development). See *The Climate Change Authority (Abolition) Bill 2013*, PARLIAMENT OF AUSTRALIA, [http://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_search\\_results/Result?bid=r5136](http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_search_results/Result?bid=r5136) (last visited Aug. 29, 2015); *Clean Energy Finance Corporation (Abolition) Bill 2014*, PARLIAMENT OF AUSTRALIA, [http://aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bid=r5288](http://aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bid=r5288) (last visited Aug. 29, 2015).

131. See *Clean Energy Legislation (Carbon Tax Repeal) Act 2014* (Cth) (Austl.).

132. See *Carbon Farming Initiative Amendment Act 2014* (Cth) (Austl.) (amending the *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) (Austl.)).

businesses to bid for public monies to undertake activities that will reduce emissions, an approach that has been roundly criticized by economists and climate policy advocates as more costly and less environmentally effective than a carbon price.<sup>133</sup>

Evidence from Australia's annual emissions data indicates that the carbon price had a measurable effect on emissions, especially from the power sector.<sup>134</sup> However, with the repeal of the carbon pricing legislation, these reductions have been reversed as coal plants increase production and renewable energy producers retreat from the electricity market.<sup>135</sup> Given the short life of the carbon price and the political uncertainty that attended it from its birth, Australian businesses generally did not make major clean energy infrastructure investments under the Gillard government that might have locked in the effects of the carbon pricing legislation.

With the ousting of Abbott from the Prime Ministership by Malcolm Turnbull, the course of climate change policy in Australia is again uncertain. Turnbull infamously supported Rudd's CPRS legislation for an emissions trading scheme, a move that led to his downfall as opposition leader and replacement with the more hard-line Abbott.<sup>136</sup> At the time of his overthrow by Abbott, Turnbull announced: "I will not lead a party that is not as committed to effective action on climate change as I am."<sup>137</sup> However, even with public attitudes shifting in favor of stronger climate measures, Prime Minister Turnbull's actions may be constrained by his partisan, conservative colleagues. Already, Turnbull has indicated that he will not make changes to the Australian emissions reduction target announced in the lead-up to the December 2015 international

133. Paul Burke & Frank Jotzo, *Direct Action Subsidies: Wrong Way, Go Back*, INSIDE STORY (Mar. 17, 2014), <http://insiderstory.org.au/direct-action-subsidies-wrong-way-go-back>; Peter Christoff, *On These Numbers, Australia's Emissions Auction Won't Get the Job Done*, CONVERSATION (Apr. 26, 2015), <http://theconversation.com/on-these-numbers-australias-emissions-auction-wont-get-the-job-done-40761>; Peter Hannam & Johnathan Swan, *Ross Garnaut Slams Abbott Government's Direct Action Policy as Like a 'Martian Beauty Contest'*, SYDNEY MORNING HERALD (Mar. 7, 2014), <http://www.smh.com.au/federal-politics/political-news/ross-garnaut-slams-abbott-governments-direct-action-policy-as-like-a-martian-beauty-contest-20140306-34atj.html>.

134. Marianna O'Gorman & Frank Jotzo, *Impact of the Carbon Price on Australia's Electricity Demand, Supply and Emissions*, ECON PAPERS (July 14, 2014), <http://EconPapers.repec.org/RePEc:een:ccepwp:1411>.

135. *Carbon Tax Repeal Sparks Jump in Australia's Electricity Emissions*, GUARDIAN (July 5, 2015), <http://www.theguardian.com/environment/2015/jul/05/carbon-tax-repeal-sparks-jump-in-australias-electricity-emissions>.

136. See Coorey, *supra* note 121.

137. See Taylor, *supra* note 93.

climate negotiations in Paris.<sup>138</sup> The only thing that seems certain is that climate change will remain an issue of high political salience in Australia, with every chance that next federal election—due in November 2016—will see another legislative flip on climate change.

#### IV. CONCLUDING REFLECTIONS: PROGRESS IN PARTISAN ENVIRONMENTS?

In the final analysis, the Australian example suggests that a less gridlocked legislative system does not necessarily produce better results. Neither system is ideal for making progress in a partisan environment. While one can debate the merits of legislative inaction versus inconsistency, both the U.S. congressional gridlock paired with executive assertions of authority and Australian flip-flopping legislation are problematic. Partisanship in both systems makes progress on climate change, and the other politically contentious issues explored in this symposium, vulnerable. In the United States, gains on climate policy under one administration could be significantly undermined if the other party wins the presidential election.<sup>139</sup> In Australia, similar shifts in policy happen, just through the legislature rather than the executive branch.<sup>140</sup>

We argue in *Energy Partisanship* that these types of partisan divisions generally lead to two strategies to achieve progress: “going around” strategies in which one side circumvents the other and “going together” strategies in which people find common ground.<sup>141</sup> Thus far, this essay has focused primarily on “going around” strategies in which one side gains control of mechanisms of power, whether in the legislative or executive branch, and uses it to advance policy. These kinds of strategies can accomplish a great deal quickly, and if they are around long enough, they can result in corporate lock-in and path dependency that may survive a change in political winds. The Obama administration’s executive branch action

138. Michelle Innis, *Malcolm Turnbull Defeats Tony Abbott to Become Party Leader and Prime Minister of Australia*, N. Y. TIMES (Sept. 14, 2015), [http://www.nytimes.com/2015/09/15/world/asia/tony-abbott-liberal-party-australia.html?\\_r=0](http://www.nytimes.com/2015/09/15/world/asia/tony-abbott-liberal-party-australia.html?_r=0). On Australia’s post-2020 targets, which are amongst the lowest announced by any developed country, see Pep Canadell et al., *Australia’s Post-2020 Climate Target Not Enough to Stop 2C Warming: Experts*, CONVERSATION (Aug. 11, 2015), <https://theconversation.com/australias-post-2020-climate-target-not-enough-to-stop-2c-warming-experts-45879>.

139. See *infra* Part II.

140. See *infra* Part III.

141. Peel & Ososky, *supra* note 16.

has put mitigation and adaptation measures into place that a gridlocked Congress has not managed to overturn.<sup>142</sup> The Australian government's carbon pricing legislation represented a major step forward in its efforts to address climate change.<sup>143</sup> But the vulnerability of these measures to the election cycle, which can have a chilling effect on investment and corporate lock-in,<sup>144</sup> suggests that "going together" strategies must also be a crucial part of the puzzle.

Our research on partisanship indicates that both substantive and structural reframing of the climate change issue can play a role. Substantive reframing, especially when focused on economic development or disaster resilience, has produced bipartisan cooperation and also serves mitigation and adaptation goals, whether climate change is mentioned or not. Structural reframing, in which the action is shifted to forums that are less contentious, often pairs well with this substantive reframing. We have found that scaling down to state and local levels, and focusing more directly on the private sector and financial incentives for corporate action can provide opportunities for cooperation. Such bipartisan collaboration has often been elusive in the contentious environments of both countries' federal governments despite its potential contributions to policy progress. The substantive and structural reframing strategies thus may have an important role to play in these countries' partisan environments.<sup>145</sup>

None of these strategies is a panacea, though, and our analysis of the political vulnerability of the Obama administration's executive action is not intended as a critique of the President's choosing to act in the context. Partisanship, and the constant media focus on conflict, makes meaningful progress difficult and "going around" strategies necessary at times. The Obama administration would not have achieved the gains it has on climate change without its—often very controversial—executive action. As mothers who are not skeptical of climate change science, we think making progress on this problem is urgent.

142. See *infra* Section II.C.

143. See *infra* Section III.B.

144. See, e.g., Giles Parkinson, *Australia's Renewable Energy Renaissance May Be Over in 5 Years*, RENEW ECON. (July 16, 2015), <http://reneweconomy.com.au/2015/australias-renewable-energy-renaissance-may-be-over-in-5-years-87926> (arguing that without longer-term policy signals, the renewable energy industry will fall off a cliff).

145. We have explored these framings in depth, relying on extensive interviews and case studies in Peel & Osofsky, *supra* note 16.

Rather, the primary purpose of this essay is to make clear that congressional dysfunction is not the heart of the problem. Partisanship plays just as poisonous a role in other systems of government, as demonstrated by this essay's comparative analysis. In any democratic system in which people and their representatives are deeply politically divided, one side will likely resort to going around the other to achieve progress. But this phenomenon across systems underscores the importance of finding ways to tamp down the conflict and focus on common ground. Our work on partisanship suggests that this is possible to a greater extent than the tenor of political dialogue in both countries suggests, and at least as crucial to making progress as bold executive and legislative action by one party or coalition.<sup>146</sup>

146. *Id.*