
ARTICLE

FROM THE GREENHOUSE TO THE POORHOUSE: CARBON-EMISSIONS CONTROL AND THE RULES OF LEGISLATIVE JOINDER

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

Pending legislation to address carbon-emissions includes large subsidies for existing emitters. These subsidies make little sense economically or politically. Worse, they divert resources needed to address two crucial issues that the proposed legislation largely ignores: the impact of raising carbon costs on low-income people and the effects of the pending legislation on the massive structural federal deficit.

A carbon tax or cap-and-trade system would substantially increase costs not only for transportation but also for food and housing. With poverty levels rising even before the current economic downturn, the consequences of these price increases could be dire. Even without the pending legislation, the structural deficit will require deflationary tax increases or spending cuts. Combining carbon regulation with these measures could do severe damage.

Although few challenge their merits, these proposals may nonetheless fail if a consensus emerges that they are extraneous to climate change legislation.

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Overly complex legislation often bogs down, and we lack coherent normative principles for “issue joinder” in public policy debates. Such principles can be derived and can counsel how we address both low-income subsidies and deficit reduction as part of climate change legislation.

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

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INTRODUCTION

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

The focus on ultimate decisions in part reflects their more obvious finality. Their binary character, as well as the more-accessible substantive grounds that ostensibly drive them, also contributes to the tendency to focus on final decisions at the expense of preliminary decisions formulating the issues for resolution. Questions of which issues to join for decision, by contrast, are handled relatively inconspicuously: in litigation, through dry motion practice; in legislation, through backroom negotiations.

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

Party joinder in legislatures is controlled constitutionally. Except in rare cases where a member's misconduct or qualifications are at issue, the identities of the parties are as fixed as those of the adjudicators within the legislative process—because the two groups are the same. Legislative issue joinder reflects the same mix of parties' strategic judgments and the system's normative concerns that guide issue joinder in litigation. Legislators and the interest groups advising them make strategic judgments about which aggregation of issues will best advance their agendas. The system imposes normatively driven constraints on their ability to pursue their chosen strategies. As with litigation, these external constraints consist of a combination of explicit rules and discretionary choices. The mix of rules and discretion varies by legislative body: many state legislatures have rules effectively limiting each bill to a single object, while others either lack or ignore such rules. Congress allows particularly freewheeling issue joinder. Congress's joinder rules offer numerous means for burdening opponents' proposals with unpopular or distracting riders. As a result, a

common way of favoring a particular substantive outcome, such as deficit reduction or closing military bases, is to establish special rules limiting the issues that may be joined to such initiatives.

A paucity of *ex ante* principles for legislative issue joinder is particularly important because discretion over those matters is exercised not by impartial judges but rather by the same partial legislators that will ultimately decide the fate of the legislation. Debate in the broader political arena, however, can circumscribe legislators' ability to serve their own strategic interests on joinder questions. For example, voters may punish legislators for voting against joinder of a proposal they favor, not understanding that joinder could have brought down an underlying bill that they also support. And in the broader political arena, no formal rules constrain joinder of either parties or issues. Voters and even journalists are far less savvy about how alternative aggregations of issues will influence ultimate outcomes. The norms that guide these groups' judgments about which interests, and which claims, are sufficiently related to deserve to be heard as part of a particular debate can therefore have a powerful impact on ultimate policy outcomes.

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

The myopic focus on ultimate decisions leaves students of legislation oddly flat-footed at crucial times. With legislation, as opposed to judge-made law, playing an ever more dominant role in the U.S. legal system, the inability to understand principles of legislative joinder is the rough equivalent of being unable to anticipate the precedential implications of a new constitutional or common law decision. For example, a fundamental change in the politics of an issue may indicate

¹ An additional concern in legislative joinder that is absent in litigation is that decisions are all-or-nothing. Legislative joinder can thus force a majority to adopt substantive positions it does not support. The most common examples involve swing members extracting funding for pork-barrel projects that have little legislative support. See also *infra* text accompanying note 12.

that *some* legislation is likely. Without understanding legislative joinder, however, observers cannot begin to estimate the likelihood that this substantive consensus will produce a broad response, a narrow response, or unexpected gridlock: Will agreement on large issues carry along a host of more contestable measures on smaller points? Will the legislature insist on keeping the legislation “clean,” disallowing consideration of distracting side issues to ensure quick approval of a narrow initiative? Or will enough disputed side issues be joined to fracture the apparent majority for the underlying initiative and yield no legislation at all?²

The lack of a coherent theory of legislative joinder also hobbles judicial interpretation of statutes. Most theories of interpretation begin with an inquiry into actual or hypothetical intent.³ Courts often assert that those who enacted the statute in question had some particular intent. Einer Elhauge posits that the polity enacting a statute would want interpreting courts to consider legislative history because such interpretation maximizes the polity’s influence on subsequent public policy.⁴ He assumes that a court can determine which of the possible interpretations would have been most likely to have been enacted had they been presented to the legislators that created the statute at issue.⁵ Others have made similar claims.⁶ Yet as Kenneth Arrow has demonstrated, under many common arrangements of preferences, this question may be unanswerable without knowing the or-

² Joinder disputes have played a major role in slowing health care reform legislation. Some have advocated a narrow package of insurance reforms while others have found persuasive the insurance companies’ arguments for joining universal coverage to prevent adverse selection. Opponents have tried to distract or fracture the majority by joining controversial issues, such as abortion, to the initiative.

³ ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 16-18 (Amy Gutmann ed., 1997).

⁴ See EINER ELHAUGE, *STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION* 116 (2008) (arguing that legislatures would support a default rule directing courts to look to legislative history when a statute’s meaning is unclear).

⁵ See *id.* at 119-21 (arguing that courts can minimize legislative dissatisfaction with their interpretation of a statute by choosing the plausible interpretation that would have had the greatest probability of being enacted had it been presented to the enacting polity).

⁶ See, e.g., *United Steelworkers v. Weber*, 443 U.S. 193, 226-30 (1979) (Rehnquist, J., dissenting) (urging the Court to consider the legislative history of Title VII and positing that the history “irrefutably demonstrates” Congress’s intent); Roscoe Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379, 381 (1907) (arguing that statutory interpretation can require imagining the position of the lawmaker and thus divining “his intention with respect to the particular point in controversy”).

der in which the proposals come up for decision.⁷ Even more commonly, which choice a legislature would have made depends on joinder decisions—especially when the actual legislation relied on strategic votes from legislators who never actually supported the disputed provision.

New Textualists, most prominently Justice Antonin Scalia, disparage this inquiry on several grounds, including the impossibility of ascertaining a unitary intent among the scores of people whose assent was required to enact the legislation and the risk that judges will disguise the pursuit of their personal policy preferences as a search for legislative intent.⁸ Yet in the New Textualists' search for what the words of a law mean, they consider a kind of hypothetical intent, asking, "What would someone using this language mean?"⁹ Although this inquiry does not depend on what a particular legislature meant on a particular occasion, it nonetheless relies on a sense of how the legislature *typically* speaks. For example, a New Textualist may find an interpretation "wrong if it does not fit with the use of [the term] throughout the Act."¹⁰ Such a conclusion implicitly assumes a joinder process that produces a coherent whole. Textualist and nontextualist judges alike may read statutes on related subjects *in pari materia*, applying interpretations from one to another.¹¹ Yet if the two are separate because legislative joinder rules prevented them from being enacted together, merging them at the interpretive stage may effectively defy the legislature's choice.

⁷ See KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 46-60 (2d ed. 1963) (noting the inherent difficulties with ascertaining collective preferences through a voting system).

⁸ See, e.g., SCALIA, *supra* note 3, at 17-18.

⁹ See *id.* at 17 ("The evidence suggests that . . . we do not really look for subjective legislative intent. We look for a sort of 'objectified' intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*.").

¹⁰ *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 722-23 (1995) (Scalia, J., dissenting). This is not an uncommon view:

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

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

¹¹ See *Branch v. Smith*, 538 U.S. 254, 281 (2003) (concluding that courts should interpret statutes in the context of the body of laws of which they are a part).

Perhaps the most famous modern example of the pivotal role of joinder is the prohibition of sex-based employment discrimination in the Civil Rights Act of 1964. Looking at the overall political climate at the time, virtually no one would believe that this country was prepared to enact such sweeping legislation. In fact, the ban on sex discrimination might never have had sincere majority support in Congress. It entered, and remained in, the legislation on the strength of a coalition of sincere supporters—a distinct minority—and virulent racists, who saw the sex discrimination ban as a “poison pill” whose joinder could defeat the legislation as a whole.¹² The lack of majority support for the provision on the merits has posed severe subsequent challenges for intentionalist judges seeking to interpret it.¹³

More recently, opponents of a bankruptcy overhaul with overwhelming congressional support (reflecting the campaign contributions of credit card companies), managed to stall action for several years in large part by joining abortion to the debate.¹⁴ Opponents of the bankruptcy bill demanded that the legislation deny bankruptcy relief to damage awards against persons obstructing access to abortion clinics.¹⁵ Once they achieved joinder, the two sides in the abortion debate each became determined not to allow the bill to pass without treatment of the issue that they favored.¹⁶

¹² See CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* 115-16 (1985) (providing a historical account of these tactics).

¹³ See, e.g., *Johnson v. Transp. Agency*, 480 U.S. 616, 627-30 (1987) (relying on congressional intent with regard to race as a guide to resolving a gender discrimination case).

¹⁴ The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub. L. No. 109-8, 119 Stat. 23 (codified in scattered sections of 11 U.S.C.), was proposed to work several major changes to the U.S. Bankruptcy Code. Frustration over controversial and highly peripheral amendments designed to stall the bill is evidenced in the legislative history. See, e.g., 151 CONG. REC. S1855 (daily ed. Mar. 1, 2005) (statement of Sen. Grassley) (calling an abortion-related amendment to the Act a “poison pill”).

¹⁵ See Stephen Labaton, *Bankruptcy Bill Set for Passage; Victory for Bush*, N.Y. TIMES, Mar. 9, 2005, at A1 (describing the defeat of an amendment to the BAPCPA that would have prevented protesters at abortion clinics from using bankruptcy laws as a shield in civil lawsuits).

¹⁶ See *id.* (reporting that the amendment “had threatened to derail the legislation”); see also 146 CONG. REC. 26,355-57 (2000) (remarks of Sen. Torricelli) (reporting that the Senate Republican leadership would not allow the bill to proceed with an amendment making damage awards for abortion-clinic violence undischARGEABLE); *id.* at 26,352-55 (remarks of Sen. Durbin) (insisting that, despite his support for the underlying bill, he would support a filibuster against it if the abortion-clinic amendment were not included).

The failure to account for legislative issue joinder also calls into question the assumptions about institutional competence that underlie much contemporary constitutional theory. Even if one believes that the legislature is better at making certain kinds of ultimate decisions once the issues are properly framed,¹⁷ if the legislature's joinder rules prevent pivotal choices from coming up for a vote, then those superior capacities may never come to the fore. Hence, the legislature's hypothetical ability to make those choices will be irrelevant to the extent of judicial deference properly afforded. Distortions resulting from joinder rules, like those flowing from the disproportionate leverage of concentrated interest groups,¹⁸ can prevent the median legislator's will from prevailing and, for analogous reasons, might justify a more searching form of judicial review.¹⁹ Indeed, because problematic joinder rules defeat rather than merely distort the will of the majority, they may be more compelling candidates for offsetting reductions in judicial deference.²⁰

¹⁷ See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 226 (Yale Univ. Press 2d ed. 1986) (1962) ("[Legislatures] are, indeed, the forum for clashes of interests, contests of power, which produce sometimes a winner and a loser, and sometimes a compromise."); JOHN HART ELY, *DEMOCRACY AND DISTRUST* 56-58 (1980) (arguing that "popular input on moral questions" might make legislators better at making moral judgments than the dispassionate judiciary). See generally HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (discussing various methods of statutory interpretation and offering an influential formulation of "legal process" theory).

¹⁸ See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 53-57 (1971) (discussing how small interest groups may gain disproportionate leverage over larger groups whose members may not share the same incentives).

¹⁹ Cf. Cass R. Sunstein, *Interest Groups in American Public Law*, 38 *STAN. L. REV.* 29, 72 (1985) (advocating "marginally more searching" review because of the influence of factional pressures on legislatures).

²⁰ The recent health care reform debate offers a case in point. When the Senate took up the legislation in the fall of 2009, the median senator probably preferred a plan emphasizing regulation of the private insurance market over direct state provision of health insurance. See Robert Pear & David M. Herszenhorn, *Senate Leader Shows New Interest in Public Plan*, *N.Y. TIMES*, Oct. 23, 2009, at A1 (describing polls showing growing support for the public option). The inability to marshal sixty votes to defeat a potential Republican filibuster could force the Democratic leadership to invoke special "reconciliation" procedures that would disallow filibusters and allow passage with fifty-one votes. The joinder rules for reconciliation, however, disallow most regulatory provisions, allowing only tax and spending changes. See 2 U.S.C. § 644(b)(1)(A) (2006) (designating as extraneous any provision of a reconciliation bill or resolution that does not produce a change in outlays or revenues). This would effectively force the legislation to rely on public health insurance by taking regulation in the private market off the table. To be sure, such legislation would only pass if it won majorities in both houses. But the result would be more statist than most members of Congress would

Rarely have the legal, political, and ethical difficulties surrounding legislative joinder been more important than in the current climate change debate. The election of a President committed to action on climate change, with apparently comfortable congressional majorities, led many to believe that the enactment of legislation was assured.²¹ But a close vote in the House and delayed consideration in the Senate have exposed the political difficulties of the issue.²² What has remained largely unappreciated is how the scope of legislative joinder will determine both the content and the long-term consequences of that legislation.

likely prefer. One could reasonably ask whether that result deserves the same judicial respect as an unconstrained majority choice might.

Joinder difficulties defeated health care reform in 1994, the last time it was in the public spotlight. See generally MICHAEL B. KATZ, *THE PRICE OF CITIZENSHIP* 266-73 (2001) (describing President Clinton's ambitious health care plan and its ultimate failure to be enacted). The congressional Republican leadership opposed Democratic proposals; many believed Republicans wanted no legislation at all. *Id.* at 272. Given the broad public support for health care reform, however, Republicans had to tread lightly. *Id.* As a result, several Republicans, including the House and Senate Minority Leaders, introduced legislation that would expand health insurance coverage far beyond what current law then or now provided. See, e.g., Affordable Health Care Now Act of 1993, H.R. 3080, 103d Cong. (1994) (as introduced by Rep. Michel) (providing a Republican alternative to the Democratic health care plan); S. 2374, 103d Cong. (1994) (as introduced by Sen. Dole) (same). An overwhelming majority of representatives and senators cosponsored at least one sweeping reform bill. See H.R. 3080 (showing that the Michel bill had 142 sponsors); S. 2374 (showing that the Dole bill had 2 sponsors); Comprehensive Family Health Access and Savings Act, S. 1807, 103d Cong. (1994) (11 sponsors); Managed Competition Act of 1993, H.R. 3222, 103d Cong. (1994) (57 sponsors); Health Security Act, S. 1757, 103d Cong. (1993) (30 sponsors); Health Equity and Access Reform Today Act of 1993, S. 1770, 103d Cong. (1993) (22 sponsors); Consumer Choice Health Security Act of 1994, S. 1743, 103d Cong. (1993) (25 sponsors); Managed Competition Act of 1993, S. 1579, 103d Cong. (1993) (4 sponsors); Health Security Act, H.R. 3600, 103d Cong. (1993) (104 sponsors); American Health Security Act of 1993, H.R. 1200, 103d Cong. (1993) (92 sponsors). It was the Democratic leadership's inability to formulate workable joinder principles, rather than defeat on the substance of any proposal, that prevented meaningful action on the floor of either chamber and resulted in an outcome—preservation of the status quo—more restrictive than almost any member professed to prefer. See Jonathan Paul Yates, *Overreaching Killed the Health Bill*, BALT. SUN, Oct. 18, 1994, at 15A, available at 1994 WLNR 860572 (“The emphasis on social engineering rather than health-care reform doomed the effort.”).

²¹ See Margaret Kriz Hobson, *The Senate's Climate-Change Dealmakers*, NAT'L J., Oct. 31, 2009 (describing efforts to pass climate change legislation after the election of President Obama).

²² See *id.* (describing the political difficulties as including Congress's preoccupation with health care reform and contentious points of disagreement such as coal and nuclear power).

Three important classes of claims have competed for inclusion in the climate change debates and proposed legislation. First, current carbon emitters have sought compensation for the increased costs that emissions reductions will impose on them.²³ Second, advocates for low-income consumers have sought offsets for higher prices, to prevent their clients from being driven deeper into poverty.²⁴ And third, people across the political spectrum have advocated using the proceeds of emissions-permit sales to reduce the soaring federal deficit.²⁵ Although a wealth of polling shows that the electorate has by far the strongest feelings about reducing the deficit,²⁶ this is the one set of claims whose joinder with the climate change debate seems to have been most decisively rejected. By contrast, compensating existing emitters (the set of claims with the greatest potential to undermine the core goal of carbon emission reductions and the one that, at least as applied to industrial emitters, likely has the least public support) has taken a dominant position in the debates and legislative process. Some of this is a familiar public choice tale of the effectiveness of small, concentrated interest groups, particularly those with enormous wealth. Another part of the explanation, however, lies in unarticulated conceptions of which kinds of claims are too tangential to merit inclusion in a particular debate. Understanding how these conceptions regulate legislative joinder is crucial both to improving environmental, antipoverty, and fiscal policy in the near- and long-term and to developing a theory of legislative joinder applicable across substantive areas.

Receiving huge allocations of carbon permits free of charge would provide an enormous windfall to energy companies, far exceeding any losses they might experience due to the reductions in permissible

²³ See Ronald Brownstein, *Region or Nation?*, NAT'L J., Apr. 18, 2009 (reporting the efforts of legislators from "coal states" seeking relief from cap-and-trade regulations).

²⁴ See CLIMATE EQUITY ALLIANCE, PRINCIPLES FOR ADDRESSING THE NEEDS OF LOW AND MODERATE INCOME WORKERS, FAMILIES AND COMMUNITIES WITHIN GLOBAL WARMING LEGISLATION (2009), available at <http://www.greenforall.org/what-we-do/working-with-washington/climate-equity/download> (proposing principles designed to mitigate the financial impact of climate change legislation on low- and middle-income workers and families).

²⁵ See, e.g., Avery Palmer, *Without Cap-and-Trade Revenue in Resolutions, Chairmen Have Leeway*, CONG. Q. TODAY, Mar. 25, 2009, available at 2009 WLNR 5975140 (reporting on the myriad proposals for spending revenue generated by cap-and-trade, including deficit reduction).

²⁶ See John Harwood, *Tossing and Turning over the Federal Deficit*, N.Y. TIMES, June 22, 2009, at A11 (noting that fifty-two percent of Americans would like the government to reduce the federal deficit).

emissions. Further, the debate concerning these allocations has largely crowded out distributional and fiscal concerns. Policies increasing the cost of energy will disproportionately affect low-income people, who pay a larger proportion of their budgets in energy costs than more affluent households. Prominent proposals for regulating climate change include large subsidies for existing carbon emitters;²⁷ the vast majority of these subsidies would accrue to the relatively affluent owners of these companies, further exacerbating the regressive impact.

Climate change regulation will have major fiscal implications. Even after the current recession-induced surge in the deficit subsidies, the continuation of current policies will condemn the United States to a long-term fiscal imbalance estimated at around three percent of the country's gross domestic product (GDP) annually.²⁸ A gap of this size cannot be closed without considerable economic pain.²⁹ Emissions reduction, through a carbon tax or an auction of carbon-emissions permits, is one way to close a large part of this gap while structuring that pain in a socially constructive manner. Conversely, the economy may suffer serious harm if it must absorb *both* the disruption of carbon-emissions curbs that do not reduce the deficit *and* separate deficit-control legislation. Restraining environmental waste while committing fiscal waste would be a grim irony indeed. And, as the political winds shift, the failure to join a major deficit-reduction initiative to climate change legislation may prove politically, as well as ethically, disastrous.

This Article fills these important gaps in the climate change debate while taking a modest first step toward offering a more general theory of joinder in the legislative process. It contends that the climate change debate needs to be expanded from its current exclusive focus on environmental and business concerns to consider distributive justice and fiscal policy. In particular, it criticizes proposals to give away valuable emissions permits as the irresponsible product of industry's rent seeking. Instead, it urges that any permitting regime should auction off emissions permits and devote the proceeds to aiding low-

²⁷ John M. Broder, *Senate Global Warming Bill Is Seeking to Cushion the Impact on Industry*, N.Y. TIMES, Oct. 25, 2009, at A16.

²⁸ See CONG. BUDGET OFFICE, THE LONG-TERM BUDGET OUTLOOK 7 (2009) (calculating the federal fiscal gap using projections of annual revenue and spending).

²⁹ Michael Boskin, Chairman of the Council of Economic Advisors to the first President Bush, noted that "[t]he impact of raising taxes for budget balance could be severe." Michael J. Boskin, *Economic Perspectives on Federal Deficits and Debt*, in FISCAL CHALLENGES: AN INTERDISCIPLINARY APPROACH TO BUDGET POLICY 141, 152 (Elizabeth Garrett et al. eds., 2008).

income people, to funding basic research likely to lead to alternative energy sources and greater energy efficiency, and to reducing the structural federal deficit. In the process, it develops principles for delineating the bounds of other social policy debates over issues with potentially complex, far-flung interactions.

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

Although some environmental groups have shown a laudable sensitivity to distributional issues, many have argued that any broadening of the terms of the debate increases the risk of impasse and failure. Few environmentalists have shown much willingness to admit fiscal concerns to the debate. Starting from the premise that the pending arrangement is not inevitable, Part II seeks to derive principles for determining when additional constraints, such as the distributive and fiscal concerns offered here, should be admitted to a policy debate over the existing participants' objections. These principles must find a plausible middle ground between heedless, narrow-minded policy-making that causes serious ancillary damage to other important social values, on the one hand, and miring important social initiatives in the complexities of extraneous issues, on the other. Applying these principles to the present debate, Part II finds strong reasons to include distributional and fiscal considerations in the climate change debate.

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

I. CLIMATE CHANGE POLICY IN CONTEXT

To date, most media coverage of the climate change debate has focused on science. This choice reflects in part industry's and the Bush Administration's dogged denial of the broad scientific consensus on the issue. The media's choice to focus on science also reflects the availability of compelling images: collapsing ice shelves, vanishing

islands, and anxious polar bears. The complexities of formulating a policy to reduce carbon emissions may be less photogenic but are equally pivotal to achieving change. This Part provides a broad overview of climate change regulation, focusing on those aspects producing its distributional and fiscal effects. Section I.A describes the two main competing regulatory structures for reducing carbon emissions: taxation and cap-and-trade programs. Section I.B examines how restricting carbon emissions could exacerbate the growing income inequality in the United States. It also assesses the large, structural federal budget deficit. Section I.C then explores and rejects economic, political, and moral arguments for including—as most current proposals do—large subsidies for current emitters in climate change legislation.

A. *Market-Based Emissions-Reduction Legislation*

In the past, when government wanted to control consumption of a scarce commodity, it often resorted to rationing.³⁰ It commonly imposed price controls to prevent “profiteering” while limiting the quantities individuals and businesses could purchase with ration cards. This put the government into the costly, inefficient, and thankless position of allocating consumption. It also spawned illicit markets, with high prices, in which the commodity could be purchased in excess of a consumer’s assigned ration.³¹ This was inevitable because the controlled prices kept demand for the commodity higher than the available supply.

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

³⁰ See RICHARD G. LIPSEY ET AL., *ECONOMICS* 110-11 (10th ed. 1993) (providing the example of the United States rationing gasoline during a shortage in the 1970’s and during World Wars I and II).

³¹ See *id.* (explaining how rationing, by creating the opportunity for a seller to buy a product at the government-dictated low price and selling at the market-dictated higher price, creates the opportunity for an underground market to emerge).

tem, the government would specify the total amount of emissions but the market would determine how those emissions would be distributed, with the most economically productive users presumably out-bidding and supplanting low-value emitters. To date, cap-and-trade has held the upper hand in political debates.

B. *Distributional and Fiscal Consequences of Emissions Controls*

With the possible exception of sweeping health care reform, climate change control is likely to be the most economically important legislation in at least a generation. It will leave no sector of the economy untouched. This has already produced a flurry of rent-seeking and special-interest pleading. Furthermore, carbon-emissions regulation will profoundly affect three aspects of macroeconomic performance: growth, the distribution of income and wealth, and fiscal balance. Only the first of these has received prominent attention to date. Subsection 1 identifies the particular vulnerability of low-income people and people of color to increases in carbon costs. Subsection 2 describes the severe long-term imbalance in the federal budget.

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

The gap between rich and poor in the United States is growing rapidly. This can be seen from changes at both ends of the income scale. The income of the top one percent of households rose 61.8% during the last economic expansion, from 2002 to 2007; during the same five years, the income of the bottom ninety percent of households rose just 3.9%.³² That left the top one percent with the highest share of national income since 1928: over one in five dollars of income went to these households in 2007.³³ More than three-quarters of all income gains during the last expansion went to the top ten percent of households.³⁴ Income inequality has been growing for the past three decades, in sharp contrast to the thirty years after World War II, when income gains were widely shared and inequality dropped.³⁵ In

³² AVI FELLER & CHAD STONE, CTR. ON BUDGET & POLICY PRIORITIES, TOP 1 PERCENT OF AMERICANS REAPED TWO-THIRDS OF INCOME GAINS IN LAST ECONOMIC EXPANSION 2 tbl.1 (2009), available at <http://www.cbpp.org/files/9-9-09pov.pdf>. These figures have been adjusted for inflation.

³³ *Id.* at 2.

³⁴ *Id.* at 1 fig.1.

³⁵ *Id.* at 3.

2008, in the early stages of the recession, the poverty rate jumped to 13.2%,³⁶ with almost fifty-four million people living below or near the poverty line.³⁷ Much larger increases are likely for 2009 and 2010.

Disproportionate energy costs are already taking a heavy toll on low-income families. Families forced to prioritize heating bills are cutting back on food and other necessities.³⁸ When energy prices rose 42.1% from 2000 to 2005, families with annual incomes between \$15,000 and \$30,000 reduced their food spending by 10%.³⁹ High energy costs have wide-ranging impacts on the well-being of low-income families: children in homes where energy costs consume a high share of income are more likely to be in poor health, have a history of hospitalization, be at risk for developmental problems, and have insufficient food.⁴⁰

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

In addition, research finds that African-Americans are especially vulnerable to increases in the costs of carbon emissions. Although African Americans as a group generate about one-fifth less carbon emissions than whites per capita,⁴¹ on average they spend a higher proportion of their incomes on energy than the rest of the population.⁴² Part of the reason is that energy costs consume a larger share

³⁶ See CARMEN DENAVAS-WALT ET AL., U.S. DEP'T OF COMMERCE, INCOME, POVERTY AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2008, at 14 tbl.4 (2009), available at <http://www.census.gov/prod/2009pubs/p60-236.pdf> (showing an increase from 12.5% in 2007).

³⁷ *Id.* at 17 tbl.5.

³⁸ See CHILDREN'S SENTINEL NUTRITION ASSESSMENT PROGRAM (C-SNAP), FUEL FOR OUR FUTURE: IMPACTS OF ENERGY INSECURITY ON CHILDREN'S HEALTH, NUTRITION, AND LEARNING 3 (2007), available at http://www.childrenshealthwatch.org/upload/resource/fuel_for_our_future_9_18_07.pdf (describing the situation facing low-income families as "heat or eat").

³⁹ *Id.* at 2.

⁴⁰ *Id.* at 4.

⁴¹ CONG. BLACK CAUCUS FOUND., INC., AFRICAN AMERICANS AND CLIMATE CHANGE: AN UNEQUAL BURDEN 68 (2004), available at http://www.rprogress.org/publications/2004/CBCF_REPORT_F.pdf.

⁴² *Id.* at 79 fig.2.16.

of the income of impoverished households, and African Americans are much more likely to have low incomes.⁴³ Even controlling for income, however, African Americans spend a higher share of their incomes on energy.⁴⁴ This may reflect the wealth inequality of African Americans, which is even greater than their income inequality.⁴⁵ African Americans are far more likely than whites to rent, and landlords are far less likely than homeowners to invest in weatherization and energy-saving appliances.⁴⁶

2. The Long-Term Fiscal Imbalance

Although the news media has made much of the short-term deficits resulting from efforts to reverse the recent recession, the longer-term budget outlook is far worse. This is partially due to the fiscal impact of the baby boomers' retirement, with Social Security costs rising from the current level of 4.8% of GDP to more than 6% by 2030.⁴⁷ Far more serious is the impact of health care inflation on Medicare and Medicaid spending.⁴⁸

Deficits of this size are unsustainable. At some point, investors become unwilling to buy any more public debt, which may force the government to finance its operations by printing money and igniting inflation.⁴⁹ Even before that point is reached, government deficits crowd out private investment by consuming the available capital

⁴³ *Id.* at 36.

⁴⁴ *See id.* at 71-74 (attributing African Americans' higher energy expenditures partially to factors such as living in buildings made of poorer stock and owning appliances that are less energy efficient).

⁴⁵ *See generally* MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH 91-125 (1995) (examining the wealth disparity between African Americans and whites by comparing assets such as savings and investments).

⁴⁶ *See* CONG. BLACK CAUCUS FOUND., INC., *supra* note 41, at 74.

⁴⁷ BD. OF TRUSTEES, FEDERAL OLD-AGE AND SURVIVORS INS. AND FED. DISABILITY INS. TRUST FUNDS, THE 2009 ANNUAL REPORT OF THE BOARD OF TRUSTEES OF THE FEDERAL OLD-AGE AND SURVIVORS INSURANCE AND FEDERAL DISABILITY INSURANCE TRUST FUNDS, H.R. DOC. NO. 111-41, at 12 (2009), available at <http://www.socialsecurity.gov/OACT/TR/2009/tr09.pdf>.

⁴⁸ *See generally* CONG. BUDGET OFFICE, PUBL'N NO. 3085, THE LONG-TERM OUTLOOK FOR HEALTH CARE SPENDING, 5-16 (2007), available at <http://www.cbo.gov/ftpdocs/87xx/doc8758/11-13-LT-Health.pdf> (analyzing the impact of rising health care costs on government health care spending).

⁴⁹ *See* Boskin, *supra* note 29, at 153 (noting historical examples of hyperinflation in countries with highly indebted governments).

supply, and they slow the economy by raising interest rates.⁵⁰ To put this into perspective, in 2008, before the depth of the recent recession was clear, the Center of Budget and Policy Priorities estimated that balancing the budget in 2016 while continuing the 2001 and 2003 tax cuts would require cutting Social Security by 41%, cutting Medicare by 53%, cutting defense by 61%, or cutting every other program in the federal budget—from aid to education to school lunches to national parks to overseas embassies—by 29%.⁵¹

Any measures to narrow the deficit would increase drag on the economy. In addition, taxes inevitably have behavioral effects, raising the costs of some activities relative to others.⁵² Most taxes negatively affect socially desirable behavior, such as work and savings. A carbon tax, or an auction of emitting permits, offers a rare revenue-raising opportunity whose behavioral effects are desirable. Thus, such a tax or auction system would mitigate the deflationary effects of deficit reduction more efficiently than other available means. These effects are not wholly benign: as noted above, they would dampen economic activity and cost jobs in many industries. Raising the cost of carbon emissions nonetheless is far superior to other plausible means of reducing the deficit.

By contrast, if the federal government spends or rebates the proceeds of a carbon tax or permit auction, it will have to layer on an additional round of tax increases or spending cuts to cope with the deficit. The Republican Party's defining opposition to taxes and the Democratic Party's skittishness on the subject make a second round of tax increases unlikely. In addition, if the proceeds of carbon-emissions regulation are to be spent at the same time that other programs are being cut to reduce the deficit, the net effect will be to shift spending from existing programs to those the climate change legislation favors.

This country's massive structural deficits have important distributional implications. In the simplest terms, deficits transfer wealth from the nation as a whole to bondholders, a disproportionately affluent group. More broadly, programs that serve groups lacking political

⁵⁰ See *id.* at 158-62 (illustrating the crowding effects of government borrowing on private investment and noting the potential for increased government debt to drive up interest rates).

⁵¹ See Bob Greenstein, Ctr. on Budget & Policy Priorities, Slide Presentation: Background on the Federal Budget and the Return of Budget Deficits 7 (2008), available at <http://www.gistfunders.org/documents/greenstein.ppt>.

⁵² See Boskin, *supra* note 29, at 161 (discussing the effect of behavior-distorting taxes on current and future deadweight losses).

power, such as low-income children, are disproportionately affected by budget-cut legislation;⁵³ budgetary procedures ensuring that this is the case have won bipartisan support.⁵⁴ One of the major political parties is doggedly defending almost all tax preferences for the affluent; its opponent supports many of those same tax preferences and is also ambivalent and selective in its defense of spending programs that benefit low-income people. The one large new tax sometimes discussed in the context of deficit reduction—a consumption or value-added tax—would be sharply regressive.⁵⁵ This dynamic ensures that, if this issue is left alone, low-income people are likely to be asked to pay a disproportionate share of the costs of deficit reduction.

Large deficits also transfer wealth between generations. The standard political rhetoric about “burdening our children with debt” is too simplistic:⁵⁶ of course we also bequeath them all of the positive developments of the current generation. Accumulating debt so that we can cure disease or make other productive social investments is entirely consistent with a conscientious regard for future generations; most obviously, future generations depend upon us for their education, which is costly.⁵⁷

Passing on huge debt incurred to finance contemporary consumption is another matter. Our forebears produced much of our current wealth, likely intending it to benefit all of their successors rather than just our current generation. Leaving future generations an economy incapable of rewarding their efforts to the same degree that the economy did ours breaches a fiduciary duty we owe to our des-

⁵³ See ROBERT GREENSTEIN, CTR. ON BUDGET & POLICY PRIORITIES, HOUSE CHILD CREDIT LEGISLATION NOT FISCALLY RESPONSIBLE: BILL MORE LIKELY TO HARM CHILDREN THAN TO ASSIST THEM 3 (2003), available at <http://www.cbpp.org/6-11-03tax.pdf> (“With low-income children being one of the nation’s weakest political constituencies, programs to assist them will likely suffer from the deep budget cuts . . .”).

⁵⁴ See ROBERT GREENSTEIN & ISAAC SHAPIRO, CTR. ON BUDGET & POLICY PRIORITIES, PUTTING THEIR CARDS ON THE TABLE: SENATE BUDGET BILL INDICATES INTENTION TO PAY FOR TAX CUTS BY SWEEPING CUTS IN PROGRAMS FOR MIDDLE- AND LOW-INCOME HOUSEHOLDS 4-6 (2006), available at <http://www.cbpp.org/files/8-2-06tax.pdf> (noting that budgetary and tax cuts on domestic programs, which would disproportionately affect low- and middle-income families, had won support in the House and Senate).

⁵⁵ See Anne L. Alstott & Ben Novick, *War, Taxes, and Income Redistribution in the Twenties: The 1924 Veterans’ Bonus and the Defeat of the Mellon Plan*, 59 TAX L. REV. 373, 386 (2006).

⁵⁶ See Boskin, *supra* note 29, at 162 (pointing out that “the economic effects of deficits are not automatically to help current citizens at the expense of future taxpayers”).

⁵⁷ See *id.* at 164 (observing that public debt can finance education, an “important aspect[] of generational equity”).

cedents on behalf of our ancestors. Many environmentalists rely on similar arguments of intergenerational equity to criticize the wasteful exploitation of natural resources.⁵⁸

C. *The Weak Case for Large Corporate Subsidies*

The stampede to include large corporate subsidies in any climate-control legislation is unwise and unnecessary. This Section shows why. Subsection 1 rebuts the perceived political inevitability of including large corporate subsidies in climate change legislation. Subsection 2 demonstrates that compensating business owners for their losses due to carbon-emissions regulation is neither possible nor desirable and that any attempt to do so could seriously distort laudable economic signals.

1. The Politics of Corporate Subsidies

Including large corporate subsidies in climate change legislation is politically unnecessary. Although opponents of regulating greenhouse gases will seek to retain leverage over the final policy by refusing to formally concede, they have decisively lost the public debate—and they know it. They do not need to be bought off: both major-party nominees in the 2008 election espoused strong carbon-emissions controls.⁵⁹ In this regard, a crucial distinction exists between issues that can only be addressed during fleeting periods of public salience—such as poverty, which quickly dropped from the public consciousness after Hurricane Katrina⁶⁰—and those with an entrenched place in the public agenda. Because the effects of global warming are so numerous and widespread and because they implicate numerous widely shared middle-class values, the issue faces little risk of receding from the political agenda. The political explosion ignited by rising gasoline prices not only counsels a measured phase-in of the new reg-

⁵⁸ See, e.g., EDWARD A. PAGE, CLIMATE CHANGE, JUSTICE AND FUTURE GENERATIONS 59-96 (2006) (arguing for intergenerational equality of natural resources); Michael Wallack, *The Minimum Irreversible Harm Principle: Green Inter-Generational Liberalism* (“A key element in the problem of justice between generations is the discontinuity between the benefits received by present generations from some technologies and the costs of the unintended consequences . . . for future generations.”), in LIBERAL DEMOCRACY AND ENVIRONMENTALISM 167, 167-68 (Marcel Wissenburg & Yoram Levy eds., 2004).

⁵⁹ See James Kanter, *The Trouble with Markets for Carbon*, N.Y. TIMES, June 20, 2008, at C1.

⁶⁰ See David A. Super, *Laboratories of Destitution: Democratic Experimentalism and the Failure of Antipoverty Law*, 157 U. PA. L. REV. 541, 544-45 (2008) (describing the Katrina disaster as a moment of “heightened passion” that did not lead to lasting changes in policy).

ulatory regime but also is likely to transform attitudes toward conservation: within a few years, the number of voters with Hummers and SUVs will shrink to political insignificance.⁶¹

Procedurally, proponents of climate change regulation have little need to fear obstructionism from a minority loyal to rent-seeking business interests. Budget-process rules allow a simple majority to pass—and limit committees' ability to obstruct—legislation that would raise substantial revenues, as a carbon tax or cap-and-trade regime would. Proponents therefore need not offer the business subsidies to purchase the Senate supermajority that progressive initiatives commonly require.⁶²

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

In fact, excluding large corporate subsidies could actually improve the prospects for meaningful legislation that aims to control climate change. A fiscally prudent proposal that is sensitive to distributional effects could broadly expand the coalition of support. Since the end

⁶¹ See Ken Bensinger, *The Sedan Is Again King of the Car Lot*, L.A. TIMES, June 4, 2008, at 1 (noting that consumer preferences are shifting toward smaller automobiles as a result of high gas prices).

⁶² Once it has cost estimates for climate change legislation from the Congressional Budget Office (CBO) and the Joint Committee on Taxation, a simple majority supporting that legislation can craft a congressional budget resolution that compels the committees with jurisdiction over the legislation to produce those increased revenues with minimum revenue levels and a reconciliation instruction. 2 U.S.C. §§ 632(a)(2), (b)(2), 641(a)(2) (2006). The budget resolution is immune to Senate filibusters and requires only a simple majority to pass. *Id.* § 636(b)(1). Once such a budget resolution is adopted, any amendments that would lower the legislation's revenue yield below the specified levels by diverting funds to subsidize emitters would be subject to a point of order that only sixty senators' votes could overrule. *Id.* §§ 641(d)(2), 642(a)(2)(B), 644(b)(1)(B). Moreover, the reconciliation instructions would compel the committees of jurisdiction to report out legislation achieving the specified revenues or subject themselves to a privileged amendment by the chair of the Budget Committee to modify their bill to correct any shortfall. *Id.* § 641(b)(2). The resulting "reconciliation" bill is itself immune from filibusters, requiring only a bare majority of the Senate. *Id.* § 641(e)(2).

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

of the New Deal era, the progressive agenda in this country has become increasingly fragmented, divided between those with domestic orientations and those looking internationally, between those with substantive agendas and those with proceduralist commitments, and across a plethora of issue areas. Environmentalism has secured a justifiably privileged place on that agenda, but diversifying its support to include the antipoverty movement and “good government” advocates of fiscal rectitude could significantly reduce competition for progressive political capital and financial support. A key to strengthening political environmentalism is establishing its relevance to low-income people hard-pressed by problems that seem more immediate.⁶³ Conversely, environmentalism needs to avoid the perception that it is a socially or racially insensitive agenda of the affluent.⁶⁴

2. The Economics of Corporate Subsidies

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

First, increasing prices for carbon-based energy consumption through a carbon tax or a cap-and-trade permitting regime will only modestly impact emitters’ profitability. These regimes reduce demand for this form of energy and thus the sales of the companies producing it. The extent of the profits foregone on these sales, however, is a complicated question. Many producers may have marginal costs that rise at such a rate that the last several units sold provide almost no profits. For example, the new regime may cause companies to abandon marginally profitable efforts to extract oil and gas from the sea bed. The Congressional Budget Office (CBO) estimates that fully compensating existing emitters for losses under a carbon-emissions-control regime would require less than fifteen percent of

⁶³ See John Barry, *From Environmental Politics to the Politics of the Environment: The Pacification and Normalization of Environmentalism?* (suggesting that one way to advance environmentalist issues is to “fit or attach . . . ecological aims” to existing social development concerns), in LIBERAL DEMOCRACY AND ENVIRONMENTALISM, *supra* note 58, at 179, 183-84.

⁶⁴ See Andrew Light, *The Urban Blind Spot in Environmental Ethics* (noting that the environmentalist movement has historically been associated with “nativism, if not racism,” and an anti-urban bias), in POLITICAL THEORY AND THE ENVIRONMENT 7, 20-21, 27 (Mathew Humphrey ed., 2001).

the proceeds of a carbon tax or of the emissions permits issued under a cap-and-trade system, a small fraction of what they would receive under most current proposals.⁶⁵

Even this estimate, however, is likely overstated. Many companies producing energy from fossil fuels also have holdings in non-carbon-based energy sources or in technologies to increase energy efficiency.⁶⁶ These holdings will appreciate significantly in the new regime, offsetting any losses from the companies' carbon-based businesses. Even those companies not currently active may be well positioned—for example, with distribution and marketing networks—to seize commanding positions in those markets. Depending on a particular company's portfolio, the new regulatory regime may bring it net gains, net losses, or little change at all in value. Subsidizing all existing emitters with free permits or tax cuts would thus provide windfalls to some companies that would already be profiting from the change. Yet any effort to limit subsidies to those companies actually losing money would punish other firms for making prudent, and socially beneficial, investments.

Moreover, compensating those actually losing money because of climate change policy is impossible. As scientific evidence, public concern, and political will around global warming strengthened, the chances of regulation increased and the markets reduced the value of emitters' stocks accordingly. Those that sold stock since this process began already absorbed some of the emitting companies' expected losses before the regulatory regime was even in place. Identifying the companies and calculating their losses would be infeasible and pointless: the risk of government regulation, like the risks of changing consumer tastes, increased competition, and environmental catastrophe, is just one more factor affecting profitability that the markets handle quite efficiently. Indeed, markets can handle regulatory risk with par-

⁶⁵ CONG. BUDGET OFFICE, TRADE-OFFS IN ALLOCATING ALLOWANCES FOR CO₂ EMISSIONS 5 (2007).

⁶⁶ Chevron's slogan as of the printing of this Article, for example, is "The Power of Human Energy: Finding Newer, Cleaner Ways to Power the World." Chevron Corp. Home, <http://www.chevron.com> (last visited Feb. 15, 2010). Chevron's website reports that "[a]t Chevron, we are working to . . . expand our energy supply portfolio" and boasts of extensive research into a wide range of alternative energy sources and carbon-capture technologies. Chevron, Climate Change, <http://www.chevron.com/globalissues/climatechange> (last visited Feb. 15, 2010). Similarly, BP reports that "[i]n response to increasing demand for energy with a lower-carbon footprint, we have made a major commitment to develop low-carbon sources of energy." BP, SUSTAINABILITY REPORT 2006, at 33 (2007), available at http://www.bp.com/liveassets/bp_internet/globalbp/STAGING/global_assets/downloads/B/bp_sustainability_report_2006.pdf.

ticular efficiency because regulatory regimes take shape relatively gradually and transparently, allowing investors plenty of opportunity to respond.⁶⁷ Risk-averse investors protect themselves by diversifying their portfolios; risk-loving investors stand to make windfalls if events turn out to favor their investments, and they therefore have no special claim to sympathy when the winds blow the other way.

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

More generally, distributing valuable commodities to businesses free of charge puts the government in the position of picking winners in the market. That is rarely a prescription for an efficient result. When a national government allocates corporate subsidies arbitrarily among its businesses, it distorts competition both domestically and internationally.⁶⁸ even if our trading partners also give away permits, they will be doing so with different stringency or through different systems altogether. Legislation inevitably will distribute permits based on what companies' emissions *were* (because that amount will be known), not on what they *would have been* in the affected years absent regula-

⁶⁷ By contrast, most people have difficulty comprehending low probabilities of great harm, such as the risk of sudden natural disasters. See RICHARD A. POSNER, *CATASTROPHE* 9 (2004) (“The human mind does not handle even simple statistical propositions well, and has particular difficulty grasping things with which human beings have no firsthand experience.”); Cass R. Sunstein, *Probability Neglect: Emotions, Worst Cases, and Law*, 112 *YALE L.J.* 61, 62-63 (2002) (describing the human tendency to focus on possible adverse outcomes regardless of the low probabilities of those outcomes actually occurring).

⁶⁸ See Dietrich Brockhagen, *Inhomogeneous Allocation and Distortions of Competition in the Case of Emissions Trading in the EU* (arguing that “differences in allocation may lead to distortions in competition” among EU countries), in *CLIMATE CHANGE POLICY* 309, 309-15 (Michael Bothe & Eckhard Rehbinder eds., 2005).

tion. Some emissions permits will prop up inefficient companies that were failing in the market. Conversely, some fast-rising, highly innovative companies will be placed at a competitive disadvantage by an allocation of permits that fails to reflect their trajectories. To be sure, they can purchase additional permits to sustain their growth, but requiring them to pay for what their less-efficient competitors get for free will distort the results of market competition.⁶⁹

Perhaps most importantly, establishing the political precedent that polluters must be held harmless in any new regulatory regime will do long-term harm to environmental quality. The economics of climate change regulation make that feasible; in other important environmental contexts, it may not be. At a time when the Court's expanding definition of regulatory takings of real property is frustrating environmental land-use controls,⁷⁰ it is difficult to understand why environmentalists would want to establish a de facto principle of compensation for profits lost because of emissions limits. Even in the land-use context, amortization—allowing a prior usage a number of years to phase out—is accepted as obviating the need for just compensation, despite the financial losses that remain.⁷¹ All serious proposals would phase in restrictions on carbon emissions, providing the same sort of relief to current emitters that takings law offers to those losing important interests in land.⁷² Similarly, international climate control regimes would have little prospect of effectiveness if they had to compensate currently high-emitting countries for potential limitations on their lifestyles.⁷³

⁶⁹ See *id.* at 315-21 (discussing the potential distortion effects of allocating emissions permits based on historic emissions).

⁷⁰ See, e.g., *Dolan v. City of Tigard*, 512 U.S. 374, 394 (1994) (requiring a reasonable relationship between land-use regulations and a legitimate state interest); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1025-26 (1992) (finding a regulation that deprives a parcel of land of all value to be a taking); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831 (1987) (finding an uncompensated, permanent public easement to be a taking).

⁷¹ See *City of Fayetteville v. S & H, Inc.*, 547 S.W.2d 94, 98 (Ark. 1977) (accepting an amortization provision as an acceptable method of eliminating nonconforming use when a city is acting pursuant to its police power).

⁷² See CONG. RESEARCH SERV., MARKET-BASED GREENHOUSE GAS CONTROL: SELECTED PROPOSALS IN THE 111TH CONGRESS (2009), available at <http://openers.com/document/R40556/2009-05-27/download/1013> (providing a summary of major congressional proposals controlling greenhouse gas emissions).

⁷³ See Raúl A. Estrada-Oyuela, *Equity and Climate Change* ("Equity is the fundamental condition to ensure compliance of any international agreement."), in ETHICS, EQUITY AND INTERNATIONAL NEGOTIATIONS ON CLIMATE CHANGE 36, 37-38 (Luiz Pinguelli-Rosa & Mohan Munasinghe eds., 2002).

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

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

The adverse consequences of carbon emissions have long been well-known. If one were to approach this problem as one of corrective justice, surely the argument that past emitters should bear the costs of the environmental harm they caused is far more compelling than any argument that they should be compensated for being restrained from doing still more harm in the future.

II. DETERMINING THE SCOPE OF THE CLIMATE CHANGE DEBATE

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

For example, vast sums are needed to repair the nation’s bridges, tunnels, rail beds, schools, and other physical infrastructure. Climate change likely is exacerbating this problem, subjecting structures to stresses that their designers did not anticipate. Yet devoting the proceeds of a carbon tax or permit sales to infrastructure repair will rule out significant deficit reduction and could crowd out low-income offsets. Advocates need some principle by which to convince sincere policymakers sympathetic to claims for infrastructure spending to nonetheless privilege protecting low-income people and the public fisc in climate change legislation. In other words, this Article’s proposals must not only establish their cardinal merit as worthy public policies but must also show their ordinal superiority to other worthy policies in a competition for scarce space on the climate change agenda. Resolving this kind of ordinal question requires tools beyond those commonly employed in analysis of public law problems.⁷⁴

This problem will not solve itself. Some environmentalists have embraced addressing fiscal rectitude—and in particular, distributive justice—in climate change legislation. Others, however, may have little interest in privileging these social concerns because they adhere to

⁷⁴ Of course, private law is no stranger to ordinal questions. Commercial law and bankruptcy routinely weight the relative priorities of parties, all of whom have valid claims. See U.C.C. § 9-301(1) (2005) (providing a hierarchy of priority for persons with claims against a given piece of collateral). In a prototypical case of ordinal competition in public law—crafting funding priorities—courts apply one of the most deferential versions of minimum rationality analysis. See *Bowen v. Gilliard*, 483 U.S. 587 (1987) (finding that Congress’s need to prioritize claims on public funds requires great judicial deference). Commentators are not so meek, yet even they typically limit their arguments to extolling their proposal’s virtues or denigrating its competitors; public law discourse only rarely seeks to assess the relative strengths of meritorious claims.

a nonanthropocentric ethic,⁷⁵ whatever the political cost.⁷⁶ Pragmatic environmentalists have learned from hard experience the importance of compromising with industry,⁷⁷ and they are loath to walk away from such a strategy. Still others see climate change legislation as a once-in-a-lifetime source of dedicated support for a host of projects that would struggle for funding in the appropriations process. Absent a clear, principled basis for privileging the protection of low-income people and deficit reduction over these important claims indigenous to the environmental-advocacy community, low-income people and the public fisc are unlikely to receive meaningful attention.

This Part seeks a principled basis for determining whether climate change legislation's sponsors and other supporters should privilege admission of distributional and fiscal considerations into the debate. This inquiry into political joinder will attempt to discern defensible norms without becoming disconnected from actors' practice in the actual world.⁷⁸ This avoids the difficulties inherent in making the case for a particular arrangement without explaining how entrenched interests can be compelled to submit to the redistribution necessary to achieve it.⁷⁹ Section II.A seeks to understand the process by which the political system decides which arguably related issues to admit to a political debate, such as the debate concerning climate change, and derives normative rules to guide those decisions. Next, Section II.B applies those criteria to show that concerns about distributive justice have a powerful claim for inclusion in climate change policy debates in particular. Finally, Section II.C applies these principles again to demonstrate that fiscal probity also ought to play a major role in designing climate change regulation.

⁷⁵ See Light, *supra* note 64, at 8-12 (“[E]nvironmental philosophy has been dominated by a concern with more abstract questions of value theory, primarily focused on the issue of whether nature has ‘intrinsic value,’ or some other form of non-instrumental value.”).

⁷⁶ See Avner de-Shalit, *Ten Commandments of How to Fail in an Environmental Campaign* (arguing that environmentalists should reject “the radical language of biocentrism” in communicating their positions to a general audience), in *POLITICAL THEORY AND THE ENVIRONMENT*, *supra* note 64, at 111, 118-19.

⁷⁷ See *id.* at 112-17 (noting that the radical, uncompromising tactics used by many environmental activists have failed to produce positive results).

⁷⁸ See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 7-11 (1977) (arguing that political philosophy must be both normatively and intellectually coherent as well as sensitive to the practical realities of governance).

⁷⁹ See ROBERT PAUL WOLFF, *UNDERSTANDING RAWLS* 202-10 (1977) (criticizing Rawls's theory for paying “so little attention to the institutional arrangements by means of which [his] redistribution is to be carried out”).

A. Policy Issue Joinder in a Complex World

In recent years, students of the political process have paid increasing attention to questions of framing. Proposals framed in one manner may draw broad acclaim even though, presented slightly differently, they might be ignored or actively scorned. Kenneth Arrow has demonstrated that association with other proposals is one of the most important forms of framing, showing that the inclusion of a third option can shift the results of a debate between two alternatives.⁸⁰ Proponents of the original legislation may legitimately fear that inclusion of any new proposals in the debate may change its fate even if preferences concerning the original proposal do not change.⁸¹

This Section analyzes the conflict over which issues may be joined with which others, either formally in a legislative body or informally as part of a public debate. It seeks to derive broadly acceptable principles both from analysis of the politics of issue joinder and from analogous bodies of law. Subsection 1 begins with an examination of groups' motives for seeking to join two public policy proposals into a single initiative. Subsection 2 explores the forms that conflict between groups over the joinder of policy proposals can take. Subsection 3 surveys legislative bodies' rules on issue joinder, finding most conceptually underdeveloped and normatively unappealing. Subsection 4 seeks to draw analogies to joinder rules in litigation, particularly to those in the Federal Rules of Civil Procedure. Subsection 5 looks at the reasons that initiatives' sponsors commonly decline to broaden policy debates into directions they favor substantively. Finally, subsection 6 proposes a set of principles for issue joinder in public policy debates adapted from those in civil litigation to address the different motives for and consequences of joinder in the policy arena.

1. Motives for Seeking to Join Policy Issues

Sometimes political actors' reasons for seeking to merge a second issue with one already under consideration have nothing to do with

⁸⁰ See ARROW, *supra* note 7, at 2-3 (illustrating the "paradox of voting"). For example, three children seeking a new pet should always be able to reach a majority preference between a dog and a cat. On the other hand, if their parents offer them a third option—a bird—the children may become incapable of reaching a stable preference. Two may prefer a bird to a cat, a different two may prefer a cat to a dog, and still another two may prefer a dog to a bird.

⁸¹ See WILLIAM H. RIKER, *LIBERALISM AGAINST POPULISM* 188-93 (1982) (explaining how the introduction of an alternative can open up an entirely new set of political possibilities).

the merits of the proposed amendment. An initiative's sponsor may insert an unrelated provision to expand the initiative's popularity. This is the essence of logrolling. Conversely, legislation's opponents may seek to add a "poison pill" that will destroy its political viability.⁸² Both of these strategies depend on reaching a point at which the forum's rules will force an up-or-down decision and the entire package either advances or fails; without such decisional rules, neither would accomplish much. As a result, where either of these motives is at work, joinder of policy issues looks fundamentally different from joinder in civil or criminal litigation, for which the rules generally allow for split judgments. To the extent that the theoretical literature has considered issue joinder in the policy world at all, it has largely been with regard to these two motives. Legislative bodies' joinder rules largely address the degree to which members may logroll or insert poison pills.

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

a. *The Struggle for Salience*

A large number of issues arise in our complex social and economic environment, but only a tiny fraction have the characteristics to achieve political salience.⁸³ The competition among nascent issues is akin to Darwinian competition for scarce resources.⁸⁴ Issues typically have extremely short life spans within which to affect social change or face extinction.⁸⁵ Issues fail when they lose public attention, either immediately or after achieving modest gains.⁸⁶ Only the rarest of issues is able to reorder the political system to give itself long-term salience.⁸⁷

⁸² See HENRY M. ROBERT, ROBERT'S RULES OF ORDER art. XII, § 56 (Rachel Vixman ed., 1967) [hereinafter ROBERT'S RULES OF ORDER] ("Sometimes the enemies of a measure seek to amend it in such a way as to divide its friends, and thus defeat it.").

⁸³ Edward G. Carmines & James A. Stimson, *On the Evolution of Political Issues, in* AGENDA FORMATION 151, 151-52 (William H. Riker ed., 1993).

⁸⁴ See *id.* (comparing the evolution of political issues, which compete for limited attention in the political arena, to biological evolution).

⁸⁵ *Id.*

⁸⁶ See *id.* at 157 (noting that such issues are typically linked to particular events and observing that these issues lose their salience as the events "fade in public memory").

⁸⁷ *Id.* at 157-58.

Proponents of issues that have been unable to garner prominence on their own may become desperate. Attaching their initiative to another that has achieved salience may seem vital to avoid political oblivion. Riding along with an already-viable proposal may require less political capital, both because the amendment can enter the policy-making process in midstream⁸⁸ and because the underlying proposal's champions are likely to continue working to move it forward.

On the other hand, sponsors of the initiative subject to amendment have strong reasons to resist amendments that lack logrolling potential. Issues fail to move public policy when they become associated with, and mired in, longstanding conflicts that have no clear winner.⁸⁹

b. *Responding to Externalities*

Inevitably, a great deal of policymaking is one-dimensional. The health department inspects restaurants with single-minded determination to prevent food-borne illnesses; the inspector does nothing to ensure that the restaurant is paying its taxes. In our increasingly complex and interconnected world, however, more and more policies have multiple effects. The value of these policies is the sum of their many effects, which may include both positive and negative ones. A major focus of several contemporary legal intellectual movements has been to highlight previously neglected ancillary effects of policies.⁹⁰ Failing to address those side effects in the legislation that gave rise to them gives those effects a head start toward causing harm and risks the political process losing interest before it enacts a corrective.

Yet even if an initiative's supporters recognize its problematic side effects, they may nonetheless oppose incorporating corrective measures. The more complexity they admit into their initiative, the more

⁸⁸ For example, a successful floor amendment avoids the committee process altogether. Even an amendment in committee frees its sponsor from the need to motivate the chair to call a meeting on the proposal. Some legislative bodies have rules seeking to deny initiatives any opportunities for late entry into the deliberative process. Congressional rules prohibit conference reports from including items that appeared in neither the House nor Senate bill. Some states have deadlines for introducing bills that are to be considered in a given legislative session.

⁸⁹ See Carmines & Stimson, *supra* note 83, at 156-57 (arguing that the capacity of new issues tied to existing conflicts to influence the political system is "sharply curtailed").

⁹⁰ For example, economists highlight rent control's consequences for the rental housing stock's maintenance. See LIPSEY ET AL., *supra* note 30, at 13-14. Similarly, feminists identify the subjugating effects of policies built around male models of interpersonal relations. See CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 160-64 (1989).

risk of political or procedural problems. A fair measure of the strength of someone's commitment to particular goals is ascertaining which other claims she is willing to allow to override those goals.⁹¹ Recognizing too many claims as sufficient to override an asserted right largely vitiates that right.⁹² Accordingly, champions of a particular cause tend to resist admitting new claims into political debates over that cause.

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

2. Patterns of Political Conflict over Issue Joinder

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

⁹¹ See DWORKIN, *supra* note 78, at 91-92 ("Collective goals may, but need not, be absolute. The community may pursue different goals at the same time, and it may compromise one goal for the sake of another.").

⁹² See *id.* at 92 ("It follows from the definition of a right that it cannot be outweighed by all social goals.").

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

In practice, this is likely to lead to considerable miscalculation. Some initiatives may fail because of joinder disputes, which may have been solvable, despite clear majority support; others may cause preventable negative side effects because their supporters fear triggering an internecine battle if they "open up" the legislation. More generally, political actors seek to assess one another's good faith when building relationships; the paucity of standards for issue joinder in policy debates frustrates that process.

Complicating the problem of determining the scope of a particular debate is the likelihood that an initiative's originators may disagree with, or value much more lightly, the concerns underlying proffered additions to their proposal. The originators may feel some sweat equity in their initiative and regard efforts to broaden the debate as an illegitimate redistribution of the political capital that they have earned. Even if it could somehow be established that expanding the initiative's scope would increase the aggregate wealth of society as a whole, or of a broad political community with which the originators may identify (progressives, conservatives, libertarians, or some other group), they are nevertheless likely to vigorously reject any duty to seek that end.⁹³ People who are highly altruistic in their personal lives—and whose altruism drives their political activism—may feel justified or even compelled to act as egoistical hedonists on behalf of their cause. Determining the proper scope of joinder collaboratively, therefore, is likely to prove difficult even when the sponsors of the basic initiative and the proposed interveners seem to be natural allies.

In such a case, one might imagine some sort of Coasean bargaining⁹⁴ in which the would-be interveners would rebate to the originators some portion of the benefit that their cause would receive from

⁹³ See RONALD DWORKIN, *LAW'S EMPIRE* 286-88 (1986) (questioning whether there is a moral duty to act in such a way as to maximize wealth within a community).

⁹⁴ For the seminal work on this subject, see generally R.H. Coase, *The Problem of Social Cost*, 3 *J.L. & ECON.* 1 (1960).

being admitted to the debate.⁹⁵ Such bargaining, however, is impractical, both because the diffuse coalitions on both sides make transaction costs prohibitively high and because the benefits that the joining cause receives come in a form difficult for its advocates to transfer.⁹⁶ Even if such a bargain could be struck, it would largely preserve the preexisting distribution of political capital.⁹⁷ In some instances, that prior arrangement may strike policymakers as sufficiently unjust to call for a forced redistribution, either by their own hand or by allowing the interveners to exercise self-help. More generally, although a policy initiative's authors may claim proprietary rights, the initiative's success depends on a broader array of supporters whose interests and preferences have some claim to recognition. Further difficulty arises when several groups wish to join their proposals with a single initiative. The initiative might be able to survive the additional complexity and controversy resulting from inclusion of any one of the proffered amendments but not the cumulative weight of all. Any that are not added, however, will have difficulty gaining salience on their own. As Table 1 suggests, the interaction between advocates seeking inclusion of different issues in a policy initiative with apparent momentum can be loosely modeled as a game of chicken.⁹⁸ The best outcome for each group is to win inclusion in the initiative while its counterpart leaves to mount a new initiative of its own. Each group's worst nightmare, however, is that both tie their fates to the existing initiative and, in so doing, overload and collapse it. If a group is going to pursue an independent initiative, it generally prefers that the other group do the same. Doing so allows the prior initiative to win approval more easily and leaves more capital unspent in the broader community of shared political interests in which the two groups operate. As a result, each group has a strong interest in misleading the other about its inten-

⁹⁵ As in more conventional applications of Coase's Theorem, this sort of bargaining without transaction costs ultimately would lead to the same results whether the initiatives' sponsors or would-be interveners were given initial control over joinder. *See id.* at 6-8 ("[T]he ultimate result (which maximises the value of production) is independent of the legal position if the pricing system is assumed to work without cost.").

⁹⁶ *See* DWORKIN, *supra* note 93, at 279-80 (discussing the difficulty of organizing such bargaining to resolve typical common law problems).

⁹⁷ *See id.* at 279 (pointing out that the initial allocation of rights determines which groups will become richer or poorer through bargaining).

⁹⁸ For simplicity, this model assumes only two would-be interveners; no difference between the political appeal of their respective proposals; a political climate in which all parties know that the initiative can bear one, but only one, new issue without collapsing; and no role for the originators of the initiative. Relaxing these assumptions would yield a more complex model but not a fundamentally different result.

tions: if one group can persuade the other that it is determined to insist on inclusion, it can scare off the competition and enjoy an easy path to enactment. Obviously, this process is prone to miscalculations. It may also produce distributionally undesirable results, with groups in more desperate straits less willing to risk certain defeat by continuing to struggle for inclusion.⁹⁹

Table 1: Strategies for Determining the Scope of a Public Policy Initiative (Payoffs Listed for Strategy in Row First)

	Pursue Separate Initiative	Insist on Inclusion
Pursue Separate Initiative	4,4	2,6
Insist on Inclusion	6,2	0,0

A common means of obtaining more cooperative outcomes to political games is repeated playing.¹⁰⁰ Many social causes and political organizations—certainly those concerned with the environment, poverty, and fiscal discipline—are repeat players. The vagaries of politics make it difficult for many groups to predict whether they will wear the originator’s or intervener’s hat the next time the scope of an initiative must be determined. This uncertainty might seem to provide each group an incentive to follow the course that, if universally pursued over the long term, would maximize aggregate well-being, and to act selfishly only when the expected gains of doing so exceed the expected costs of others acting similarly in future encounters.

In practice, this approach is likely to produce only modest results. First, many groups find themselves in one or another position a disproportionate share of the time. A group that originates politically powerful initiatives most of the time will not sacrifice much to accommodate those that habitually struggle for salience. Second, the stakes of each interaction are not constant. Varying stakes and varying

⁹⁹ See RALPH D. ELLIS, *JUST RESULTS: ETHICAL FOUNDATIONS FOR POLICY ANALYSIS* 124-28 (1998) (discussing the consequences of diminishing marginal utility for distributive justice).

¹⁰⁰ See ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 118-20 (1984) (providing the well-known description of repeated iterations of a game leading to mutual cooperation); ERIC A. POSNER, *LAW AND SOCIAL NORMS* 15-18 (2000) (“[P]eople are more likely to cooperate when they expect to have repeated dealings with each other than when they expect never to see each other again.”).

degrees of transparency tend to undermine the corrective benefits of repeated interactions.¹⁰¹ The base initiative's political strengths, the prospective amendment's chances for achieving salience independently, and the initiative's relative importance to its respective sponsors will all vary considerably. Finally, some groups' accountability structures may place a higher premium on visibly "trying" than on actually achieving success.¹⁰²

Aggregation of preferences among many diverse interest groups is likely to be difficult. Neither extreme position may be stable: those with significant additional concerns will unite to oppose a "clean" bill, while none will want it weighed down with so many extraneous items that the bill sinks. Which combination of proposals is admitted will depend on the order in which they are advanced and on various groups' strategic judgments about which proposals to tolerate and which to oppose.¹⁰³ Even if a stable equilibrium exists, the participants are unlikely to be aware of it, allowing other outcomes to prevail depending on how the agenda is manipulated.¹⁰⁴

Metaphors of community are also unavailing. Analyses of coalition dynamics among multiple players typically assume that the most salient issues can be specified.¹⁰⁵ When that is not the case, interactions may become more chaotic. Discrete political bodies and communities typically have leaders who set their agendas with reference to agreed-on criteria of fairness.¹⁰⁶ Agenda setting is much more complex for the nation as a whole, for the set of interest groups that lobby Congress, and for the subset of interest groups that plausibly claim to be pursuing a progressive or altruistic agenda (whatever that may be).

¹⁰¹ See ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 165 (1991) (indicating that "tit-for-tat", as devised by Axelrod, is "operable only under a highly restrictive set of conditions," including symmetrical payoffs and perfect knowledge of a player's own matches but not of the outcomes of others' matches).

¹⁰² This is likely to be true both of membership organizations and of those depending on donors of modest political sophistication.

¹⁰³ See RIKER, *supra* note 81, at 137-43 (suggesting that, if society discourages concentration of power, at least two methods of manipulation are always available: manipulation of agenda and manipulation of outcomes by false revelation of values).

¹⁰⁴ See *id.* at 170-72 (asserting that because the conditions that preclude manipulation—equilibrium and information about the equilibrium—are not easily fulfilled, manipulation is possible under "any method of voting").

¹⁰⁵ See DENNIS C. MUELLER, *PUBLIC CHOICE III*, at 285-89 (2003) (discussing coalition theories that presume that political parties have predetermined policies and issues that are important to them).

¹⁰⁶ See RIKER, *supra* note 81, at 170 ("[L]eaders' control of agenda is ordinarily not challenged. One reason is that most bodies have customary criteria of fairness, and most leaders abide by them.").

Communities maintain norms through complex systems of signaling that require repeated interactions among the same individuals.¹⁰⁷ Cooperation breaks down when membership in the community becomes transient.¹⁰⁸ Perhaps some interest groups work with one another so regularly that they may evolve agreed-upon practices for amending one another's initiatives. But amendments seeking to contain initiatives' undesirable externalities will, almost by definition, often come from those outside the political community responsible for the initiative.

3. Explicit Legislative Regulation of Issue Joinder

Positive law generally offers little guidance on issue joinder in policy debates. Legislative bodies have a wide variety of joinder rules, few of which have much normative appeal. Most take one of four basic forms: extremely permissive joinder,¹⁰⁹ extremely restrictive joinder,¹¹⁰ joinder subject to some test of germaneness,¹¹¹ or joinder at the whim

¹⁰⁷ See ELLICKSON, *supra* note 101, at 164-66 (describing Axelrod's tit-for-tat strategy and the development of cooperation through repeated iterations of a game); MUELLER, *supra* note 105, at 119-20 ("[I]f the strategy options are played in sequence and the game is played but once, the first player has no means by which to influence the second player's decision at the time the latter is made.").

¹⁰⁸ See ELLICKSON, *supra* note 101, at 169 (noting that the hypothesis of welfare-maximizing norms "does not predict that the norm-making process would lead to the evolution of cooperation in a transient social environment").

¹⁰⁹ For less partisan legislation, the House of Representatives occasionally operates under "open rules," allowing any amendments members wish to offer as long as they are in the first or second degree. For most types of legislation, the Senate ordinarily permits any and all amendments. This allows minority senators to force the majority to cast uncomfortable votes on wholly unrelated issues or simply to bog down deliberations as an informal filibuster. ROBERT'S RULES OF ORDER, *supra* note 82, art. III, § 15, require a two-thirds vote to suppress a proposed amendment.

¹¹⁰ Both House and Senate rules prohibit conference reports from joining any new issues to those each chamber has passed. RULES OF THE HOUSE OF REPRESENTATIVES, R. XXII, cl. 9, H.R. DOC. NO. 110-162, at 906-07 (2009); STANDING RULES OF THE SENATE, R. XXVIII(2), S. DOC. NO. 110-1, at 52-53 (2008). As its calendar becomes more crowded, the House does a greater amount of business under suspension of the rules, which allows no amendments at all. See RULES OF THE HOUSE OF REPRESENTATIVES, R. XV, H.R. DOC. NO. 110-162, at 662-68. Similarly, special legislation prohibits amendments in either house of Congress to resolutions approving the closing of military bases. See 10 U.S.C. § 2687 (2006) (allowing Congress to either accept or reject the Defense Base Closure and Realignment Commission's recommended actions as a package but prohibiting it from making alterations). Senators skilled in the chamber's procedures "filled the amendment tree" by offering meaningless first- and second-degree amendments to their own legislation, blocking any amendments their opponents might have had. MARTIN B. GOLD, SENATE PROCEDURE AND PRACTICE 102-03 (2d ed. 2008).

¹¹¹ When considering appropriations legislation or after invoking cloture against a filibuster, the Senate allows only amendments that meet arcane germaneness stan-

of the majority party.¹¹² These rules largely respond to attempts at joinder motivated by support for or hostility to the underlying proposal.¹¹³ They thus reflect little considered thought about amendments offered to gain salience or to control externalities in the underlying bill. Moreover, those regimes that depend on germaneness—the only ones that attempt to balance the interests of both the sponsors of the original bill and those of the respective amendment—have had great difficulty devising a generally applicable definition.¹¹⁴ Indeed, the normative basis and practical utility of the germaneness standard is unclear: under some definitions, it may tend to favor amendments that address externalities springing from the underlying proposal, but

dards, which have more to do with clever drafting than substantive interrelationships. See GOLD, *supra* note 110, at 106-07 (describing four circumstances under which Senate rules require amendments to be germane).

Many state constitutions prohibit legislation from embracing more than one object, leading to voluminous but not especially useful debates about what constitutes a single object. See, e.g., *Harbor v. Deukmejian*, 742 P.2d 1290, 1299-1304 (Cal. 1987) (pondering at great length whether a piece of legislation encompassed more than a “single subject”).

¹¹² The House of Representatives increasingly relies on closed rules, which allow only those amendments that the majority party’s leadership favors. See Charles Tiefer, *Congress’s Transformative “Republican Revolution” in 2001–2006 and the Future of One-Party Rule*, 23 J.L. & POL’Y 233, 256-59 (2007) (describing the use of closed rules by the majority party to pass “ideological versions of key bills without competition”). House and Senate committees typically have rules allowing only “germane” amendments. See, e.g., RULES OF THE HOUSE OF REPRESENTATIVES, R. XVI(7), H.R. DOC. NO. 110-162, at 703-32 (“No motion or proposition on a subject different from that under consideration shall be admitted under color of amendment.”); S. COMM. ON FINANCE, 111TH CONG., RULES OF PROCEDURE, R. 2(a) (Comm. Print 2009) (“After the agenda for a committee meeting is published and distributed, no nongermane items may be brought up during that meeting unless at least two-thirds of the members present agree to consider those items.”). In practice, committees in which partisan relations are relatively good operate under informal norms allowing much broader joinder. Their chairs, however, can invoke the rules at any time and, in the absence of a system of recorded committee precedents, can decide arbitrarily and self-servingly what is germane.

¹¹³ Jefferson noted the British parliamentary practice of allowing amendments so antithetical to the underlying bill that even the bill’s sponsors would vote against it. See JEFFERSON’S MANUAL OF PARLIAMENTARY PRACTICE § 467 (noting that Parliament “did not require an amendment to be germane”), reprinted in CONSTITUTION, JEFFERSON’S MANUAL AND THE RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 110-162, at 241 (2009). The House’s germaneness requirements sought to block this strategy. *Id.* Conversely, states’ single-purpose requirements seek to prevent logrolling. See *Harbor*, 742 P.2d at 1299 (“[T]he primary purpose of the one subject rule is the regulation of legislative procedures: the avoidance of log-rolling by legislators in the enactment of laws.”).

¹¹⁴ See, e.g., RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 110-162, §§ 929–940, at 704-27 (struggling to reconcile subject matter, fundamental purpose, and jurisdictional tests; declaring that still other tests may govern; and propounding numerous special rules for particular situations).

it offers only limited protection against logrolling and almost none against cleverly designed poison pills.

Perhaps the most thoughtful are the Senate's rules regulating consideration of budget-reconciliation legislation. Recognizing that the goal of fiscal rectitude may motivate votes for broad packages but provide senators insufficient cover to support particular tax increases or spending cuts, these rules generally obstruct the disaggregation of legislation on the floor.¹¹⁵ On the other hand, cognizant of the dangers of broad joinder, the rules generally prohibit nonbudgetary matters from riding along.¹¹⁶ These rules make sense for single-mindedly accomplishing deficit reduction in that they deliberately inhibit consideration of unintended consequences. Thus, the rules are also difficult to generalize to the broad range of policy debates in which most participants are willing to consider—and in which a fair estimation of the legislation's value requires evaluating—more than one set of consequences.

4. Learning from Joinder Rules for Litigation

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

¹¹⁵ 2 U.S.C. § 641(d)(2) (2006). These rules allow simple motions to strike provisions, but a senator who votes for such a motion, with no offset permitted, would be seen as “busting the budget.”

¹¹⁶ *See id.* § 644(b)(1)(A), (D) (prohibiting provisions in a reconciliation bill that do not produce changes in outlays or revenues or that produce small changes merely incidental to the nonbudgetary components of the provision).

public policy debates, namely, which issues must be decided with which others.¹¹⁷

A laissez-faire approach to joinder, allowing raw political power to deny admission to debates without criticism, would be a sharp departure from civil litigation's practice. As the Supreme Court stated in *United Mine Workers v. Gibbs*, "[T]he impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged."¹¹⁸ Equity jurisprudence has also long recognized the injustices that can result from considering only one of a set of related problems: "He who seeks equity must do equity."¹¹⁹

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

Second, many public policy processes lack a clear equivalent to the judge in litigation.¹²⁰ This could make the default power almost absolute unless clear norms with widely accepted legitimacy dictate otherwise. Thus, although litigation rules' insights about which factors affect the strength of an argument for joinder are helpful, their

¹¹⁷ The other aspect of how civil and criminal procedure control the scope of litigation—joinder of parties—has no direct analogue in public policy debates because interest groups generally do not need permission to enter a policy debate the way they do a lawsuit. As a result, existing participants address concerns about the number of contending parties in a policy debate by expanding or shrinking the scope of issues.

¹¹⁸ 383 U.S. 715, 724 (1966).

¹¹⁹ SNELL'S EQUITY 93 (John McGhee ed., 31st ed. 2005).

¹²⁰ Many legislative bodies have parliamentarians, who advise the presiding officer on procedural matters. The respect afforded parliamentarians, in addition to their degree of political independence and authority to make clearly subjective determinations, varies considerably. Even if their stature and independence approach those of a judge, however, parliamentarians enter the process quite late, after media coverage and committee consideration have made many crucial joinder determinations.

highly discretionary structure is less helpful absent a unitary, impartial entity to exercise that discretion. Other members of a broader political community, sympathetic to both combatants but beholden to neither, can play this role to a point; absent clear norms, however, their decisions are likely to be fragmented and confused.

Third, the Federal Rules of Civil Procedure's joinder rules rely heavily upon party status, a concept with no clear analogue in public policy debates. To be sure, those involved with a particular issue know with whom they are interacting. The First Amendment, however, prohibits entry barriers of the kind Rule 24 imposes on would-be interveners in civil litigation.¹²¹ Thus, adoption of a principle comparable to Rule 18,¹²² allowing any "party" to assert any claim against another party, would stimulate many pro forma "interventions" for the purpose of expanding that debate. On the other hand, a group's ongoing engagement in a debate would strike many as conferring some tentative sweat-equity legitimacy on its proposals to broaden that debate.

Fourth, the denial of a litigant's effort to join a claim to an ongoing dispute does not typically prevent the litigant from receiving a decision on the merits.¹²³ By contrast, in the public policy arena most claims never receive a hearing or decision on the merits. Exclusion from one debate may mean the claim will never be heard at all.

Finally, and most importantly, joinder decisions in litigation are generally partial and provisional. A court may try two claims or two defendants together, but it renders separate judgments. Thus, joinder of claims or parties may have an important impact on the speed of litigation and may risk confusing the jury or judge, but it does not change the structure of the decision to be made.¹²⁴ In litigation, unlike in policymaking, the decisionmaker never has to make an all-or-nothing choice concerning joined claims.¹²⁵

One of the most fundamental principles of the Federal Rules, and a revolutionary contrast to their predecessor codes, is that the scope of civil litigation should depend on the scope of the dispute in the real

¹²¹ FED. R. CIV. P. 24.

¹²² *Id.* R. 18(a).

¹²³ Scholars have debated whether failure to join "indispensable" parties is a "jurisdictional" failing. See Howard P. Fink, *Indispensable Parties and the Proposed Amendment to Federal Rule 19*, 74 YALE L.J. 403, 416-21 (1965). In any event, failure to join can sometimes be a fatal defect for otherwise viable litigation.

¹²⁴ Indeed, even before judgment, the court has plenary power to sever a party or claim. See FED. R. CIV. P. 21 ("On motion or on its own, the court may at any time, on just terms, add or drop a party.")

¹²⁵ See *id.* R. 54(b) (governing judgment on multiple claims or parties).

world rather than on legal categories.¹²⁶ Legislative procedure, like common law pleading, takes the opposite position: artificial limits on committees' jurisdictions largely predetermine the scope of resulting legislation. Broader public policy debates occupy a somewhat intermediary position that is influenced, but not absolutely controlled, by preconceptions about which issues "go together."

Rule 13(a) requires joinder of most counterclaims that "arise[] out of the transaction or occurrence that is the subject matter of the opposing party's claim."¹²⁷ This seeks to include defensive counterclaims in the same case as the claims to which they respond. Thus, parties the litigation might harm are heard on their pleas for palliatives at the same time as the claims against them are heard.¹²⁸ As discussed below, convention in public policy debates is that groups at risk of focused losses have a preferred right to participate in those debates to redirect or ameliorate those burdens.¹²⁹ In practice, however, courts have often had great difficulty distinguishing between defensive and affirmative counterclaims in any principled way.¹³⁰ Similarly, identifying those potential legislative harms that are sufficiently focused to convey a preferential right to legislative joinder has proven quite difficult.

Because the Federal Rules tie the right to raise new issues to party status and make achievement of party status contingent on the claims one would assert or defend, the rules on joinder of parties provide a fair starting point for analyzing issue joinder in public policy debates. Rule 24(a)(2) gives the right to intervene when a prospective party "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that inter-

¹²⁶ See Geoffrey C. Hazard, Jr., *Forms of Action Under the Federal Rules of Civil Procedure*, 63 NOTRE DAME L. REV. 628, 628 (1988) ("[T]he unit of litigation [under the Federal Rules] should be the transaction as it occurred in the out-of-court world, and not some part of the transaction that might be encapsulated in one or another single substantive legal theory.").

¹²⁷ FED. R. CIV. P. 13(a)(1)(A).

¹²⁸ See Thomas F. Green, Jr., *Federal Jurisdiction over Counterclaims*, 48 NW. U. L. REV. 271, 277-78 (1953) (describing a counterclaim as having "practically the same purpose and effect as a defense").

¹²⁹ See discussion *infra* subsection II.A.6.d.

¹³⁰ See Green, *supra* note 128, at 279-81 ("Whenever defendant pleads a denial and also a counterclaim smaller than plaintiff's claim it is impossible to know before trial whether the counterclaim will be used offensively or defensively.").

est.”¹³¹ This implies a kind of germaneness analysis built around a vision that litigation’s primary function is characterizing transactions and property. The functions of policymaking are more diverse and more plastic to the whims of initiators. Rule 24(a)(2) also suggests strong deference to claims of necessity: when an interest is unrepresented in litigation and cannot effectively be asserted later, it should be admitted. Rule 24(b)(1)(B) authorizes the court to allow intervention by any party whose claim or defense “shares . . . a common question of law or fact” with the main case—an extremely thin connection.¹³² Rule 24(b)(3) directs the court to consider undue delay or prejudice to the original parties but does not identify the interests of the prospective intervener to balance against those concerns.¹³³

Rule 19’s treatment of mandatory joinder offers considerably more insight.¹³⁴ It even more directly overrides the Rules’ usual deference to the plaintiff on joinder questions.¹³⁵ It seeks to balance three interests that have analogues in public policy debates: the interests of the present parties, the interests of those currently excluded from the process, and the public interest in a decisionmaking process that does not become hopelessly bogged down.¹³⁶ This last interest may take on a quite different cast in civil litigation, where the system’s rewards and penalties are skewed heavily to favor the broadest possible agglomerations.¹³⁷ Public policy debates have no such bias in favor of large, complex arrays of issues; to the contrary, the primary means of advocacy—media accounts of a few hundred words at most—do not lend

¹³¹ FED. R. CIV. P. 24(a)(2).

¹³² *Id.* R. 24(b)(1)(B).

¹³³ *Id.* R. 24(b)(3).

¹³⁴ *See id.* R. 19.

¹³⁵ *See* 4 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 19.02[1] (3d ed. 2009) (noting that the “protection of other parties [in some circumstances] . . . outweigh[s] the interest in plaintiff autonomy”); Richard D. Freer, *Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court’s Role in Defining the Litigative Unit*, 50 U. PITT. L. REV. 809, 826 (1988) (identifying policies recognized in Rule 19 that justify overriding plaintiffs’ autonomy); John C. McCoid, *A Single Package for Multiparty Disputes*, 28 STAN. L. REV. 707, 725 n.117 (1976) (“Consolidation, severance, and mandatory joinder already recognize the need and a willingness to restrict [plaintiff] control over the party structure.”).

¹³⁶ *See* John W. Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 MICH. L. REV. 327, 330 (1957) (describing these three “classes of interests” that benefit from mandatory joinder).

¹³⁷ *See* John B. Oakley, *Joinder and Jurisdiction in the Federal District Courts: The State of the Union of Rules and Statutes*, 69 TENN. L. REV. 35, 36 (2001) (arguing that the “high cost of litigation and strict rules of claim and issue preclusion” encourage joinder and discourage the splitting of claims (footnotes omitted)).

themselves to sorting out multiple, partially overlapping claims. This difference may reflect different points of departure: the common law forms of action gave a bad odor to limits on joinder in civil litigation;¹³⁸ on the other hand, joining too many sets of claims to a single public policy debate multiplied the risk of ideological cleavage, which was widely viewed as inconsistent with the American political system.

Rule 19 is the successor to the concepts of necessary and indispensable parties, in whose absence the litigation might reach a result “inconsistent with equity and good conscience.”¹³⁹ Scholars criticized this formulation for relying on subjective assessments of the desirability of the litigation’s result;¹⁴⁰ the resulting reformulation offers a clearer analogue to the policy realm by focusing on the unfairness of excluding parties from debates that vitally concern them.

The present Rule 19(a)(1)(B)(i) forces the original parties to accept the joinder of any person who “claims an interest relating to the subject of the action”¹⁴¹ if excluding that person’s claims or defenses would “as a practical matter impair or impede the person’s ability to protect the interest.”¹⁴² The “impair or impede” standard falls well short of necessity; it only requires tangible prejudice.¹⁴³ Rule 19(a)(1)(B)(ii) also requires joinder of interested parties if their exclusion creates a “substantial risk” of subjecting one of the existing parties to “inconsistent obligations.”¹⁴⁴ This is the other side of the coin: just as parties have a right to joinder if they might be unable to obtain separate consideration of their claims, parties *must* be joined if they could obtain a later hearing but would unsettle the result of the present litigation in the process. When a party whose joinder is mandatory cannot be joined for whatever reason, Rule 19(b) requires the

¹³⁸ See Mitchell G. Williams, *Pleading Reform in Nineteenth Century America: The Joinder of Actions at Common Law and Under the Codes*, 6 J. LEGAL HIST. 299, 301-06 (1985) (describing the byzantine common law forms of action and the rules of misjoinder applied in the 1800s, which were criticized by courts as “meaningless technicalities”).

¹³⁹ *Shields v. Barrow*, 58 U.S. (17 How.) 130, 139 (1854).

¹⁴⁰ See Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure* (pt. 1), 81 HARV. L. REV. 356, 362 (1967) (stating that *Shields v. Barrow* “fostered an inward analysis of the nature of the rights asserted rather than an outward assessment of the pros and cons” of joining additional parties).

¹⁴¹ FED. R. CIV. P. 19(a)(1)(B).

¹⁴² *Id.* R. 19(a)(1)(B)(i).

¹⁴³ FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE § 10.12, at 612 (5th ed. 2001).

¹⁴⁴ FED. R. CIV. P. 19(a)(1)(B)(ii).

court to consider dismissing an otherwise proper action.¹⁴⁵ This rule requires the court to consider prejudice to the absent party, the ability to narrow the resolution of the litigation to reduce that prejudice (and whether doing so would prevent meaningful resolution of the litigation), and whether the original plaintiff “would have an adequate remedy if the action were dismissed.”¹⁴⁶ This is a familiar balancing of the equities, but one of a special kind: the focus is on the various parties’ abilities to obtain relief, rather than on their burdens of proving entitlement to that relief. The rule’s list is not exclusive, but it strongly implies that the substantive prejudice of not being able to obtain relief overrides any procedural burdens that joinder or nonjoinder might entail.

Once joined, a party may assert any claims it has against other parties, regardless of those claims’ relevance to, or impact on the resolution of, the underlying litigation.¹⁴⁷ This honors the principle that parties may not be drawn into litigation to serve the interests of others without being given the chance to vindicate their own interests.

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

Sponsors that oppose joining other proposals to their initiatives commonly assert that consideration of other proposals will grievously harm those underlying initiatives. They argue that this harm outweighs the adverse side effects or lack of salience that the beneficiaries of the proposed intervention would experience if joinder were denied. This argument could mean any of several distinct things. First, the need for exclusivity may reflect limits of administrative capacity. The military often invokes this ground when it insists on a clear set of operational objectives. Destroying an opponent’s weapons or taking contested ground may be relatively easy; doing so while avoiding common side effects of the use of force is far more difficult. This objection is most likely to have weight when individuals must make nearly instantaneous decisions or when the proposed amendment would add responsibilities to an agency that lacks the practical ability to expand accordingly. The objection, however, has no force against proposed amendments that would assign new responsibilities to a different enti-

¹⁴⁵ See *id.* R. 19(b) (“If a person who is required to be joined if feasible cannot be joined, the court must determine whether . . . the action should proceed among the existing parties or should be dismissed.”).

¹⁴⁶ *Id.* R. 19(b)(4).

¹⁴⁷ *Id.* R. 18(a).

ty. For example, sponsors of legislation giving new duties to the Food and Drug Administration (FDA) may fear that an amendment giving the FDA still more duties will dilute the effectiveness of their initiative, but administrative concerns would not give them a basis to object to an amendment giving new work solely to the Federal Trade Commission.

Second, the argument to exclude otherwise compelling justifications for joinder may imply limitations on long-term deliberative capacity. Adding more factors to all future deliberations on the issue may prevent the achievement of a consensus. The likelihood of an impasse rises significantly as the number of alternatives under consideration increases.¹⁴⁸ Indeed, floating alternatives to confuse and divide the coalition behind the dominant proposal is a major method by which a sophisticated opponent may organize opposition.¹⁴⁹ Objective standards for identifying poison pills, however, are elusive: even die-hard members of a coalition may differ as to whether an amendment improves or politically debilitates their initiative. Absent such standards, this principle justifies minimizing the total number of amendments but offers little guidance as to which amendments leaders should be compelled to accept.

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

Fourth, leaders may exclude a valid claim if it is insufficiently distinguishable from other candidate claims *and* the cumulative effect of considering the like claims would be to overtax the system's legal, long-term deliberative, or short-term deliberative capacity. This is the time-honored principle on which a teacher refuses to give cookies to any child because she does not have enough for all: each child's claim for a cookie is reasonable enough, but the teacher cannot accommo-

¹⁴⁸ See STEVEN J. BRAMS, PARADOXES IN POLITICS 41-43 (1976) (using statistical analysis to show that the probability of a voting paradox occurring increases with the number of alternatives); FED. R. EVID. 403 (allowing court to exclude relevant evidence "if its probative value is substantially outweighed by the danger of . . . confusion of the issues").

¹⁴⁹ *Cf. id.* at 43-45 (noting that "political actors may have an incentive to contrive a paradox that exploits an apparent lack of consensus among voters").

date them all. This concept militates in favor of a “clean bill”; once leaders accept some claims to inclusion, they have difficulty excluding others. It applies, however, only if the many claims presented are largely indistinguishable. If one child is about to faint from low blood sugar, the teacher can and should give that child a cookie without worrying about the rest of the class. Thus, even if leaders exclude all claims proffered in search of salience, they nonetheless could consistently admit claims that seek to mitigate externalities stemming from their initiatives.

Fifth, leaders occasionally exclude a valid claim if they cannot advance it without hindering vindication of another, more important claim. This is particularly likely if they can achieve the same relief that the excluded claim sought by succeeding on the priority claim. Thus, counsel in class action litigation typically designate as class representatives plaintiffs whose claims are especially compelling, denying individual attention to class members whose claims would be less likely to win on their own. Similarly, although some segregated schools were dramatically worse than others, the NAACP Legal Defense Fund declined to enforce the “separate but equal” doctrine, instead tying the fate of students in the worst segregated schools to that of all other victims of segregated education.¹⁵⁰ This idea has little applicability to amendments that benefit a different class than that which the base initiative would serve.

Finally, and most problematically, leaders occasionally reject a valid claim if they believe it would be too divisive. They declare that “we are all in this together” and resist any assertions to the contrary. Rather paradoxically, they privilege the value of social solidarity over the interests of those making the rejected claim.¹⁵¹ Not surprisingly, leaders expressing indifference toward the proposed interveners’ well-being while asking those interveners to commit to the well-being of those that the leaders represent often fail to persuade the interveners to fall into line. To keep these appeals to community spirit from exhausting their credibility, savvy leaders endeavor to invoke them as little as possible, avoid repeated invocations against the same interests, and provide relief in another form to mitigate the harm from being denied joinder.

¹⁵⁰ See generally MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961*, at 116-25 (1994).

¹⁵¹ See CARL M. BRAUER, JOHN F. KENNEDY AND THE SECOND RECONSTRUCTION 61-62 (1977) (describing President Kennedy’s sacrifice of civil rights legislation to improve the chance of success for his broader social and economic agenda).

6. Principles for Allowing Joinder of Policy Claims

The foregoing discussion suggests four principles for overriding a sponsor's preference to exclude an issue from consideration along with her initiative. These principles identify the most compelling types of appeals for joinder; many of these are also among those where joinder would do the least damage to underlying initiatives. The wider political community—those broadly open to both proposals on the merits but not specifically aligned with either—will need to weigh these arguments for joinder against the costs it could impose, as outlined above. Inevitably, these judgments cannot be entirely independent of substance. For example, concerns that joining an additional issue will bring down the base initiative with decisional overload (the second, third, and fourth concerns in the preceding subsection) are more plausible in regulatory matters than in fiscal ones, where every decision already implicitly affects every other one.¹⁵²

a. *Reciprocity or Estoppel*

The situation of an initiative's sponsors will rarely be symmetrical to that of people seeking admission to the debate. A narrow, mechanical application of reciprocity norms, therefore, will provide little guidance. Nonetheless, asking sponsors to follow the maxim that one who seeks equity must do equity can resolve several kinds of joinder problems. If an initiative's sponsors have invoked a group's interests to advance their cause, those sponsors would seem hypocritical if they brushed aside that group's interests in another context. Similarly, when those sponsors have tied their cause rhetorically to the one seeking joinder, they may be estopped from objecting to making that conjunction permanent. The appeals of a base initiative's sponsors to a political or geographic community to unite in solving a significant problem also may estop the sponsors from rejecting the urgent needs of other members within the same community. More broadly, when joinder would bring some benefit to the base initiative (even if it also brings some risks or complications), joinder seems far less parasitic.

¹⁵² See David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544, 2560-61 (2005) (distinguishing fiscal from regulatory federalism by the fungibility of all aspects of the former).

b. *Necessity*

The strength of the necessity of joining a would-be intervener's issue to an existing debate should be weighed in any calculation. In determinations under Rule 19—concerning which parties' presence is required for litigation to proceed—the original initiative's sponsors need only consider *procedural* necessity.¹⁵³ Assertions of *substantive* necessity—arguments that the proposed amendment is vital public policy—depend on personal norms and priorities about which no consensus is likely. Thus, if the degree of substantive necessity determined which issues would be included in a policy debate, resolution of joinder questions would be based on raw political power.

On the other hand, the likelihood that a related set of concerns cannot otherwise receive a decision on the merits is a powerful argument for joinder. This inability could result either because the base initiative's enactment creates irremediable obstacles¹⁵⁴ or because the proffered amendment could never gain salience on its own.¹⁵⁵ In the latter case, other political actors can assess whether this is the case through an examination of past efforts to press similar concerns. In assessing past failures, they must seek to distinguish between proposals considered and rejected on the merits, on the one hand, and those that never drew substantive consideration, on the other. A procedural-necessity doctrine need not be concerned with each excluded proposal's success but rather with its ability to receive consideration on the merits. If claims seeking admission to a debate never gain the political process's attention but do not face particularly strong opposition on the merits, they have a good case for joinder.¹⁵⁶

¹⁵³ FED. R. CIV. P. 19 (governing required joinder of parties).

¹⁵⁴ For example, if the plans for a construction project do not mitigate the project's environmental effects, no subsequent efforts could restore the destroyed ecosystems.

¹⁵⁵ Thus, Congress commonly addresses the special problems of Haitian immigrants together with those of Cubans. If it passed Cuban-only immigration legislation, Haitian immigrants' concerns likely would never subsequently achieve the salience to win similar relief. See Ramón Grosfoguel, *Migration and Geopolitics in the Caribbean: The Cases of Puerto Rico, Cuba, the Dominican Republic, Haiti, and Jamaica* (describing partially successful efforts to link Haitian refugee policy to policy toward Cubans), in *FREE MARKETS, OPEN SOCIETIES, CLOSED BORDERS?* 225, 234-39 (Max J. Castro ed., 1999).

¹⁵⁶ For example, proposals to protect small areas of habitat crucial to endangered but unphotogenic species have difficulty gaining salience on their own. Joinder with another, more salient environmental initiative, however, is unlikely to undermine support for that initiative. In contrast, gun-control proposals struggle with a lack of support, not a lack of salience; denying them joinder with an omnibus anticrime bill does not deny them a hearing on the merits.

c. *Defensive Claims*

A particularly strong claim for admitting a new concern to a debate arises where the base initiative is not only germane to the proffered amendment but also causes affirmative harm to the interests that amendment champions. For the most part, this means that amendments seeking to contain the externalities of the base initiative would receive preference over those seeking salience. Some of the latter, however, are in fact responses to *political* externalities. Although the base initiative does no harm to the substantive interests the proposed intervention seeks to advance, the base initiative's success would prevent the would-be interveners from gaining a decision on the merits. This could be because the political process is unlikely to give salience to two similar proposals in succession¹⁵⁷ or because the deals that must be struck to pass the first proposal will leave political capital insufficient to prevail on the second.

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

d. *Spreading Political Losses*

If the same group continuously finds consideration of its interests subordinated to the greater good, its claims for inclusion become stronger. Inefficiencies in the political process, and often systematic undervaluation of some kinds of interests, are inevitable.¹⁵⁸ The concentration of the resulting losses on one group often is not. A group previously asked to subordinate its interests to the greater good has a

¹⁵⁷ For instance, Congress might not be inclined to move two public-lands bills in rapid succession. If a sensitive parcel cannot gain inclusion in a conservation bill moving through Congress, it is unlikely to win protection later.

¹⁵⁸ See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (noting that the mechanisms of the regular political process may fail to protect the interests of "discrete and insular minorities").

better argument for joinder than one that generally has received decisions on the merits of its proposals. Compelling the base initiative's sponsors to endure some losses—such as greater complexity and an increased risk that their effort will fail—seems fairer than yet again wiping out the outside group's concerns. Rule 19 embodies this notion of shared burden by asking the trial judge to consider ways of narrowing the relief to the parties present in litigation as an alternative both to dismissing the litigation—fully protecting the absent party—or granting all the relief the active parties seek.¹⁵⁹

B. *Reasons to Admit Distributive Justice to Climate Change Debates*

Attempts to determine whether climate change legislation should offset the effects of increased carbon costs on low-income people by identifying which claims are logically or morally superior will be unavailing. For example, some argue that ecological claims are ethically superior to political, social, or economic ones because society's continuation depends on avoiding ecological calamity.¹⁶⁰ Others would leave the question open for political conflict, arguing that liberal democracy is a necessary precondition to ecological or distributional claims gaining any traction.¹⁶¹ Still others might argue that severe poverty is inconsistent with the creation of durable ecological policies or a stable liberal democracy because desperate people necessarily have short time horizons and are vulnerable to cooptation by illiberal or rapacious forces.¹⁶² Consensus that any one of these assertions is superior to the others is unlikely.

The principles developed in subsection II.A.6, however, strongly support including antipoverty concerns in climate change debates. First and foremost, claims for low-income offsets are defensive in nature, unlike most other claims seeking inclusion in climate change legislation. Other claims—ranging from compelling proposals to fund basic science research and habitat adaptation to appeals for infrastructure reconstruction—seek to enhance the response to the un-

¹⁵⁹ See *supra* subsection II.A.4.

¹⁶⁰ See John Ferris, *Ecological Versus Social Rationality: Can There Be Green Social Policies?* (describing arguments for the “moral precedence of ecological rationality”), in *THE POLITICS OF NATURE* 145, 145-47 (Andrew Dobson & Paul Lucardie eds., 1993); cf. *id.* at 154-56 (making an ecologically based argument for income redistribution).

¹⁶¹ See BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 31-69 (1980) (illustrating the importance of liberal political dialogue in ensuring fair distribution).

¹⁶² See MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT* 145-46, 280-84 (1996) (discussing the view that extreme poverty leads to lawlessness and civic disengagement).

derlying problem of climate change, not to mitigate harm that rising carbon prices would cause.¹⁶³ The other three principles dictate the same result. As subsection II.B.1 shows, the environmental movement has relied heavily on similar moral principles to those at the heart of arguments for distributive justice, and climate change legislation would benefit substantially from low-income offsets in both the near- and long-term. Subsection II.B.2 makes the case for necessity, showing that if climate change legislation excludes distributive justice concerns, those concerns would be unlikely to win a hearing through other means. Finally, subsection II.B.3 notes that climate change legislation cannot prevent some adverse effects on low-income people, strengthening the case for addressing the adverse effects that are within reach.

1. Reciprocity and Estoppel

Ideals of distributive justice have much to offer the environmental movement in general and the campaign to check climate change in particular. Their philosophical roots are similar to those of important strains of environmental ethics. Addressing distributive justice effectively would enhance the political legitimacy of the effort to check climate change, which is vital to its success. Vast wealth inequalities promote environmental waste by the affluent and impoverished alike while complicating the task of regulators. Thus, the stakes go beyond distributive justice. Some redistributions also improve allocative efficiency.¹⁶⁴ As will be explained in Part III, a properly designed system of low-income offsets would do just that. Finally, the environmental community's reliance on environmental justice arguments estops it from denying distributive justice's centrality to environmental concerns such as climate change.

To be sure, the reverse is also emphatically true: action on climate change is very important to low-income people. They disproportionately bear the burden of environmental degradation in general.¹⁶⁵

¹⁶³ One major exception is the proposal for subsidies to existing emitters. As Part II shows, however, those claims lack cardinal merit, which makes their ordinal status irrelevant.

¹⁶⁴ See MUELLER, *supra* note 105, at 51-53 (discussing how two parties may be "better off" after redistributing land).

¹⁶⁵ See Mohan Munasinghe, *Analysing Ethics, Equity and Climate Change in the Sustainability Trans-Disciplinary Framework* (discussing the "disproportionately greater environmental damages suffered by disadvantaged groups," such as "vulnerability to disasters and extreme weather events, crop failures, loss of employment, sickness, economic

More specifically, poverty both reduces the ability to adapt to climate change and increases vulnerability to its effects.¹⁶⁶

a. *Shared Political and Ethical Foundations*

The environmental movement's early ancestors showed remarkable insensitivity to racial oppression,¹⁶⁷ even when environmental interests and the interests of racial minorities were closely intertwined.¹⁶⁸ The modern environmental movement, however, built itself on the foundations of movements for racial and economic justice in the 1960s and 1970s.¹⁶⁹

Environmentalism and distributive justice share important normative premises.¹⁷⁰ Both place great ethical weight on Locke's assumption that the right to acquire property is limited by the ethical duty to leave enough for others.¹⁷¹ Each seeks to correct Locke's assumption

shocks, etc."), in *ETHICS, EQUITY AND INTERNATIONAL NEGOTIATIONS ON CLIMATE CHANGE*, *supra* note 73, at 47, 62-63.

¹⁶⁶ See Rodney G. Peffer, *World Justice, Carbon Credit Schemes and Planetary Management Authorities* (arguing that social justice and environmental ethics are closely linked), in *POLITICAL ECOLOGY* 141, 142-43 (Roger Keil et al. eds., 1998).

¹⁶⁷ See, e.g., MICHEL GELOBTER ET AL., *THE SOUL OF ENVIRONMENTALISM: REDISCOVERING TRANSFORMATIONAL POLITICS IN THE TWENTY-FIRST CENTURY* 8-9 (2008), available at http://www.envirojustice.org/docs/Soul_of_Environmentalism.pdf (describing this racial insensitivity).

¹⁶⁸ The most striking case of this was the displacement of Native Americans from their lands in the nineteenth century. The Native Americans were far better and more respectful stewards of nature than the settlers who replaced them; helping them enforce their treaty rights to hold onto more land could have done far more good than the creation of a few relatively small national parks. See ROBERT H. KELLER & MICHAEL F. TUREK, *AMERICAN INDIANS AND NATIONAL PARKS* 26-29 (1998) (describing the National Park Service's relative inability to effectively manage and preserve land). Additionally, in the South the full liberation of the former slaves would have yielded a class of small family farmers far less rapacious than the massive plantations revived after Reconstruction's collapse. See ARTHUR F. RAPER & IRA DE A. REID, *SHARECROPPERS ALL* 18-46 (1941) (contrasting the difficult conditions endured by poor, African-American tenant farmers in the 1920s and 1930s with the conditions of government-subsidized large plantations).

¹⁶⁹ See GELOBTER ET AL., *supra* note 167, at 10 (arguing that modern environmentalism was derived from the Civil Rights Movement).

¹⁷⁰ To be sure, the environmental movement "draws its force from a range of arguments whose ethical underpinnings are really quite divergent and difficult to reconcile." KATE SOPER, *WHAT IS NATURE?* 254 (1995).

¹⁷¹ See DAVID WELLS & TONY LYNCH, *THE POLITICAL ECOLOGIST* 107 (2000) (explaining "Locke's *proviso*" that "while we have the right to create property by mixing our labor with the land, we can only do so if we 'leave enough, and good enough, for others'").

of abundance¹⁷² to reflect life in modern economies, one with respect to natural resources and the other with respect to individual opportunity. Both seek to reform the early liberal suspicion of government, endeavoring instead to put government to work in creating the conditions of individual freedom.¹⁷³ Not surprisingly, then, a number of environmental theorists make arguments about distributive justice. Many of them focus on harms done to future generations¹⁷⁴ or to other species,¹⁷⁵ but some seek to identify ecological preservation as either a form of justice in itself or as a necessary condition to the functioning of a society capable of doing justice in all other respects.¹⁷⁶ Just as John Rawls suggested that, in the original position, each individual should prefer the allocation of wealth that does best by the least well-off (accepting only those differences in wealth that are advantageous for all, including the poor),¹⁷⁷ some of these environmental ethicists effectively argue for selecting policies from a still more basic original position in which none of us knows what species we will be.¹⁷⁸

¹⁷² Locke stated,

[N]o man's labour could subdue, or appropriate all; nor could his enjoyment consume more than a small part; so that it was impossible for any man . . . to intrench upon the right of another . . . who would still have room for as good and as large a possession . . . as before it was appropriated.

JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION § 36, at 115 (Ian Shapiro ed., Yale Univ. Press 2003) (1690). *But see* WELLS & LYNCH, *supra* note 171, at 127 (questioning "Locke's mistaken, if historically understandable, faith in environmental plentitude over scarcity").

¹⁷³ *See* WELLS & LYNCH, *supra* note 171, at 117 (asserting that modern liberals now act "not merely to protect rights, but also to act positively to help create those conditions which would allow genuine freedoms to flourish").

¹⁷⁴ *See* Terence Ball, *New Ethics for Old? Or, How (Not) to Think About Future Generations* (examining the ethical duty to minimize environmental impact for the benefit of future generations), in *POLITICAL THEORY AND THE ENVIRONMENT*, *supra* note 64, at 89, 89-90.

¹⁷⁵ *See* TIM HAYWARD, *POLITICAL THEORY AND ECOLOGICAL VALUES* 146-49 (1998) (arguing for a moral obligation to provide justice for, and minimize the suffering of, nonhumans as well as humans); Marcel Wissenburg, *The Idea of Nature and the Nature of Distributive Justice* (describing the relationship between humans and other species in theories of redistributive justice), in *THE POLITICS OF NATURE*, *supra* note 160, at 3, 8-14.

¹⁷⁶ *See* Wouter Achterberg, *Can Liberal Democracy Survive the Environmental Crisis? Sustainability, Liberal Neutrality and Overlapping Consensus* (explaining how sustainable development is consistent with Rawls's theory of justice), in *THE POLITICS OF NATURE*, *supra* note 160, at 81, 95-99.

¹⁷⁷ JOHN RAWLS, *A THEORY OF JUSTICE* 154-58 (1971) (making the case for the adoption of the maximin rule in weighing competing alternative choices in terms of their distributive consequences).

¹⁷⁸ *See* HAYWARD, *supra* note 175, at 158-60 (arguing that Rawls's "difference principle" should be expanded to take the well-being of nonhumans into account).

b. *Distributive Justice and Political Legitimacy*

Environmental interests and the interests of low-income people tend to be underrepresented in political debates for similar reasons.¹⁷⁹ The harms they each seek to avert fall largely outside the view of mainstream middle-class society and its media outlets. These groups depend on the uncertain and largely episodic support of altruists, many of whom have other commitments.¹⁸⁰ Both therefore share a strong need for political legitimacy: without it, some of their supporters who also believe in “good government” might defect while others might engage insufficiently for the cause to achieve salience.

Improving social equity can strengthen society and better equip it to handle the stresses of profound changes of the kind involved in climate change regulation.¹⁸¹ Regulation addressing climate change will work one of the most profound transformations on society of any public act in recent times. A deliberative process in which environmental groups seek consensus only among themselves may contribute to the “further marginalisation of disadvantaged groups and perspectives.”¹⁸² If that regulation is crafted without reflecting the interests of large numbers of low-income people, political legitimacy is likely to be lacking.¹⁸³

Pragmatically, a comprehensive response to climate change is impossible without addressing distributive justice concerns. Effective action against climate change requires international cooperation, and no international agreement that obstructs the economic development of poorer nations will win their assent. Indeed, Article 4.7 of the 1992 United Nations Framework Convention on Climate Change recognizes that economic and social development and the eradication of poverty are the primary priorities of developing countries.¹⁸⁴ Long-term

¹⁷⁹ See GRAHAM SMITH, *DELIBERATIVE DEMOCRACY AND THE ENVIRONMENT* 54-55 (2003) (arguing that environmentalists and other minority groups are “systematically excluded” from the political process).

¹⁸⁰ See Super, *supra* note 60, at 595 (attributing instability in antipoverty law to the unreliability of altruistic support).

¹⁸¹ See Munasinghe, *supra* note 165, at 56-57, 61 (arguing that decreases in social equity can “reduce the resilience of social systems and undermine governance”).

¹⁸² SMITH, *supra* note 179, at 59.

¹⁸³ See *id.* at 65 (describing how legitimacy for environmental policymaking can be undermined by a failure to “reflect the plurality of environmental values expressed by citizens”).

¹⁸⁴ United Nations Framework Convention on Climate Change art. 4.7, *opened for signature* May 9, 1992, S. TREATY DOC. NO. 102-38, 1771 U.N.T.S. 164, 166; see also

sales of carbon credits arranged by contemporary elites in developing countries may prove unsustainable when those elites lose power if the terms are perceived as locking the country into poverty.¹⁸⁵ On the other hand, allowing those nations to increase their per capita emissions to the current levels of affluent countries would doom efforts to restrain climate change. The political legitimacy that careful attention to distributive justice brings is therefore crucial.

Domestically, environmentalists depend on a broader appreciation of distributive justice's importance. Although "greater efficiency can go some way toward the goals of saving the environment and slowing resource depletion . . . all but the genuinely poor in the North will be required to consume [fewer] resources."¹⁸⁶ Any successful international regime, whether based on the Kyoto Protocol or not, therefore will have to require emissions reductions in affluent countries while allowing some, presumably moderated, growth in emissions in poor countries. That system will face the same nationalistic attacks that confronted the Kyoto Protocol. Apart from the realpolitik of international relations—which is both normatively unappealing and all but impossible to convey to the lay public—distributive concerns are the main justification for such arrangements. Accordingly, environmentalists need to find their collective voice on issues of distributive justice.

c. The Environmental Benefits of Reducing Wealth Inequality

For strategic reasons, even narrowly focused environmentalists should care about the distributional impact of climate change and resulting regulatory regimes. Huge overall wealth disparities are not good for the environment. With highly concentrated wealth typically comes highly concentrated political power, which is likely to be wielded selfishly to defend lucrative practices despite harm to the environment.¹⁸⁷ At the other end of the distribution, dire necessity motivates many environmentally destructive practices, from slash-and-burn agriculture to overlumbering to poaching endangered species. When the survival of someone's family is at stake, only the most repressive and costly enforcement regimes will have any chance of achieving

FARHANA YAMIN & JOANNA DEPLEDGE, *THE INTERNATIONAL CLIMATE CHANGE REGIME* 93 (2004) (discussing this provision).

¹⁸⁵ Cf. YAMIN & DEPLEDGE, *supra* note 184, at 156-57 (explaining the United Nations' efforts to build legitimacy for carbon-emissions regulation in developing nations).

¹⁸⁶ Peffer, *supra* note 166, at 143.

¹⁸⁷ Cf. Wissenburg, *supra* note 175, at 5 (noting that some attribute the danger that humans pose to nature to "capitalism, industrialism, consumerism . . . or individualism").

compliance with environmental rules. The environmental initiatives of elites that threatened the well-being of low-income people have been perceived as oppressive and spawned sharp resistance.¹⁸⁸ Put in more affirmative terms, low-income people are likely to have among the highest marginal expected rate of return from additional expenditures such as those on education or safer housing; the pursuit of these returns will motivate them to subordinate compliance with environmental regimes.¹⁸⁹

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

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

d. *Institutional Estoppel: The Environmental Justice Movement*

Over the past couple of decades, the environmental movement has received significant support from allies of low-income people through the environmental justice movement. This group has natural interests in the distributional aspects of carbon-emissions regulation. While mainstream environmentalists seek to reduce aggregate pollution,¹⁹⁰ the environmental justice movement's focus is distributional:

¹⁸⁸ See, e.g., Niraja Gopal Jayal, *Balancing Political and Ecological Values* (explaining the displacement of people as a direct consequence of the creation of national parks in India and the people's subsequent responses of political insurgency, violence, and incendiarism), in *POLITICAL THEORY AND THE ENVIRONMENT*, *supra* note 64, at 65, 72-82.

¹⁸⁹ See Wallack, *supra* note 58, at 172-73 (describing the problem of overvaluing the future harm associated with global warming while undervaluing our obligation not to allow present harm, which results in some present needs remaining unmet).

¹⁹⁰ See LUKE W. COLE & SHEILA R. FOSTER, *FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT* 1-9 (2001) (using a case study to compare the strategies and goals of modern environmentalists to the goals and strategies of the environmental justice movement).

the disproportionate concentration of polluters in low-income communities and, even more, in communities of color.¹⁹¹ The movement has attacked both the procedures for selecting these sites, because they exclude vulnerable communities' voices, and the disparate impacts that result from the greater presence of polluters in low-income communities.¹⁹² In doing so, the movement has brought democratic values and the terms of the social contract to the fore of environmental discourse.¹⁹³ Although the environmental justice movement's place within the broader environmental movement is by no means uncontroversial, most of the broader movement has welcomed this alliance. Having accepted distributional arguments that strengthen their agenda, a group could seem hypocritical objecting to these concerns' inclusion in climate change debates.

The U.S. Environmental Protection Agency (EPA) has defined environmental justice as preventing disproportionate effects of negative exposures.¹⁹⁴ Higher prices are a necessary but negative consequence of carbon-emissions regulation, and they will consume a disproportionate share of low-income people's resources. That negative exposure thus would seem to make this an issue of environmental justice. To date, however, the environmental justice movement has remained largely silent. Instead, it has continued to focus on geographically distinct communities, rather than on people of color and low-income people generally. Cap-and-trade systems' focus on aggregate emissions arouses deep opposition among environmental justice advocates who have seen past aggregate limits met by reducing pollution

¹⁹¹ See, e.g., CLIFFORD RECHTSCHAFFEN & EILEEN GAUNA, ENVIRONMENTAL JUSTICE 4 (2002) (discussing studies finding that a higher proportion of hazardous-waste facilities are situated in predominantly African American communities).

¹⁹² See *id.* at 3 (noting that the communities most impacted by environmental issues are often excluded from the process of decisionmaking as a result of a lack of resources and specialized knowledge).

¹⁹³ See *id.* at 4 (describing how environmental justice concerns have spurred executive and administrative action, such as the efforts of the EPA to include community residents in environmental policy decisions).

¹⁹⁴ See Robert R. Kuehn, *A Taxonomy of Environmental Justice*, 30 ENVTL. L. REP. 10,681, 10,682-83 (2000) (discussing the EPA's Office of Environmental Justice's standard definition of environmental justice); U.S. Env'tl. Prot. Agency, *Frequently Asked Questions: Environmental Justice*, <http://www.epa.gov/compliance/resources/faqs/ej/#faq2> (last visited Feb. 15, 2010) ("[N]o group of people, including racial, ethnic, or socioeconomic groups, should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations . . .").

in affluent, white areas.¹⁹⁵ More generally, some environmental justice advocates have become convinced that market-based regulation systematically disadvantages vulnerable communities,¹⁹⁶ and they advocate a command-and-control model.¹⁹⁷ Consequently, many environmental justice groups have opposed the basic regulatory concept,¹⁹⁸ leaving them ill-positioned to influence the design of particular legislation.

Yet while the environmental justice movement is not engaged, its critics may react to proposals to offset the regressive effects of higher carbon costs in a manner similar to their reaction to other environmental justice proposals. Some traditional environmentalists have rejected the environmental justice agenda as a special interest displacing core environmental concerns;¹⁹⁹ they could argue that addressing the distributional and fiscal consequences of carbon regulation could slow progress toward the goal of reducing greenhouse gas emissions either politically, by complicating the enactment of legislation, or practically, by attenuating incentives to conserve. Legislation often depends on “unholy alliances” between environmentalists and industry;²⁰⁰ bringing

¹⁹⁵ To be sure, the effects of carbon dioxide emissions are identical regardless of their geographic source. Environmental justice advocates believe, however, that many of the largest sources of carbon dioxide also produce “hot-spots” of other pollutants with strong local effects. Shutting down these sources thus would improve the environments of affected communities. See Lily N. Chinn, Comment, *Can the Market Be Fair and Efficient? An Environmental Justice Critique of Emissions Trading*, 26 *ECOLOGY L.Q.* 80, 95 (1999) (describing environmentalists’ concern about hot spots forming around facilities that choose to buy carbon-emissions credits rather than reduce their pollution).

¹⁹⁶ But see Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 *YALE L.J.* 1383, 1390 (1994) (arguing that market dynamics make it likely that low-income people and people of color will live near locally undesirable land uses); Lynn E. Blais, *Environmental Racism Reconsidered*, 75 *N.C. L. REV.* 75, 84-87 (1996) (discussing studies calling environmental justice advocates’ concerns over disparate minority impact into question).

¹⁹⁷ See Stephen M. Johnson, *Economics v. Equity: Do Market-Based Environmental Reforms Exacerbate Environmental Injustice?*, 56 *WASH. & LEE L. REV.* 111, 162 (1999) (suggesting that command and control are necessary as “safety nets” to ensure the protection of low-income communities).

¹⁹⁸ See Richard Toshiyuki Drury et al., *Pollution Trading and Environmental Injustice: Los Angeles’ Failed Experiment in Air Quality Policy*, 9 *DUKE ENVTL. L. & POL’Y F.* 231, 268-83 (1999) (citing Los Angeles’s negative experience with pollution trading as evidence that pollution trading can produce “immoral, unjust, and ineffective outcomes”).

¹⁹⁹ See RECHTSCHAFFEN & GAUNA, *supra* note 191, at 5 (presenting the view that the environmental justice movement should be seen as representing basic fairness rather than a special interest).

²⁰⁰ See Richard J. Lazarus, *Pursuing “Environmental Justice”: The Distributional Effects of Environmental Protection*, 87 *NW. U. L. REV.* 787, 813-14 (1993) (noting that commercial interests, perceiving a potential economic advantage, have formed alliances with some environmental interests).

more interests to the table threatens to disrupt those deals. The broad scope of concerns espoused by the environmental justice movement—including opposition to military occupation and oppression and sweeping support for political, economic, and cultural self-determination²⁰¹—has increased traditional environmentalists' concern that it would draw environmentalists far afield from their core concerns and embroil them in most contemporary political debates. These fears are likely to work against admitting the consequences for low-income people and the federal fisc into climate change debates.

On the other hand, some critiques of environmental justice have little applicability to low-income offsets in climate change legislation. Both the direct costs of the consultative processes and uncertainty about their outcomes make industry more resistant to regulation, possibly necessitating concessions on the substantive level of emissions reductions. Directing the proceeds of carbon regulation to low-income offsets and deficit reduction would not affect the underlying regulatory structure or, as a result, industry's costs. Others see bureaucratic review processes as dampening citizen activism;²⁰² an efficient system of low-income offsets need not provide such distraction. Debates about whether to emphasize *ex ante* chances or *ex post* results²⁰³ are also irrelevant to these economic subsidies.

2. Necessity of Legislative Response

The impacts of carbon-cost increases on low-income people are far too great to be resolved without legislation. Aid to low-income people in general requires legislation²⁰⁴ because the satisfaction of

²⁰¹ See FIRST NAT'L PEOPLE OF COLOR ENVTL. LEADERSHIP SUMMIT, PRINCIPLES OF ENVIRONMENTAL JUSTICE (1991), available at <http://www.ejnet.org/ej/principles.pdf> (spelling out seventeen concerns of the environmental justice movement, including nuclear testing, cultural self-determination, military occupation, and the United States' treatment of Native Americans).

²⁰² See CHRISTOPHER H. FOREMAN, JR., THE PROMISE AND PERIL OF ENVIRONMENTAL JUSTICE 114-21 (1998) (explaining how public-lobbying activism is "more hospitable to formal analysis" than grassroots activism).

²⁰³ See Vicki Been, *What's Fairness Got to Do with It?* *Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001, 1031 (1993) (describing *ex post* and *ex ante* schemes for compensating communities for net losses caused by locally undesirable land uses).

²⁰⁴ Redistribution commonly arises either as a form of insurance to protect those currently comfortable against the risk of destitution or in response to norms of fairness. See MUELLER, *supra* note 105, at 45-47, 49-51 (suggesting that redistribution arises because, in certain situations where a degree of uncertainty about the future exists, redistribution can sometimes be Pareto optimal). In this model, greater risk aversion

helping the less fortunate is a public good that cannot effectively be confined to those that pay.²⁰⁵ And just as collective action problems doom significant private redistributions of money, so too do they hamper redistributions of the political capital needed to win salience for antipoverty legislation.²⁰⁶

The proceeds from regulating carbon emissions could easily dissipate in ways similar to other past programmatic windfalls obtained without simultaneous requirements to redistribute the proceeds. The tobacco companies' vast settlement of their liability to Medicaid for tobacco-caused illnesses touched off budgetary feeding frenzies at both the federal and state levels. Both executive officials and legislators at the federal and state levels struggled to find principles for adjudicating the numerous proposals before them. In the end, Congress ducked the issue, ceding its share of the settlement to the states despite the fact that it had paid three-fifths of the costs giving rise to the settlement (as well as half of states' litigation costs).²⁰⁷ State allocations of tobacco-settlement funds ranged from visionary to embarrassing.²⁰⁸

A similar process occurred when states realized large savings from the deinstitutionalization of the mentally ill and the developmentally disabled. Assisted living, habilitation, and outpatient mental health services would have cost only a modest fraction of the savings and could have made deinstitutionalization an unqualified success. Instead, the savings from the closed facilities disappeared into states' general funds, divided among myriad spending and tax initiatives with stronger political support. Without the needed support, community-

can lead to greater redistribution. *See id.* at 604 ("Less extreme risk aversion leads to less extreme (egalitarian) principles of justice."). Nonetheless, low-income offsets for rising carbon prices are unlikely to succeed through an insurance model, as the harm against which they guard is chronic rather than acute.

²⁰⁵ *See id.* at 47-49 (describing the free-riding problem that may occur if redistribution is achieved through voluntary charity rather than through government intervention).

²⁰⁶ These difficulties in achieving salience should not be construed as failures on the merits. Amounts redistributed may be too small for more affluent people to notice. *See id.* at 575-76 (noting that individuals are sometimes indifferent to small changes in utility).

²⁰⁷ 42 U.S.C. § 1396b(d)(3)(B) (2006).

²⁰⁸ *See* Derrick Z. Jackson, Op-Ed., *The Governor's Game of Chance*, BOSTON GLOBE, Sept. 22, 2007, at A11 (comparing successful examples of allocating tax revenues for purposes like school assistance to state use of the tobacco settlement for purposes "that have nothing to do with stopping smoking").

based services could not handle the influx of deinstitutionalized people, and many ended up living on the streets.²⁰⁹

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

Policymaking disproportionately disadvantages low-income people and people of color because, all too often, low-income people lack the political power to block policies that disregard their interests. The affluent, on the other hand, hold sufficient political power to protect their interests. Moreover, because most policymaking begins from the baseline of current policy—current law, last year's funding level, the results of past political battles—the historical disadvantages in policymaking that low-income people and people of color have experienced are compounded. They have less to offer in exchange for any new accommodations they seek. Further, they enjoy fewer countermajoritarian protections from the Takings Clause,²¹⁰ and their interests may be subject to countermajoritarian threats from tax-limitation rules at the state and local level and from federal budget-process rules that disfavor progressive fiscal policies.²¹¹

The process of negotiating climate change policy could easily follow—and compound—this pattern. Such regulation is, in a broad sense, a public good.²¹² Although providing a new public good financed in a distributionally neutral manner does not affect the need for redistribution if the public good is a perfect substitute for private consumption,²¹³ moderating climate change is unlikely to be such a substitute.

²⁰⁹ The much-anticipated “peace dividend” resulting from the end of the Cold War is arguably a third example, with programs to fund peaceful employment for Russian nuclear physicists underfunded even as demands for defense spending plummeted. See Jeff Nesmith, *A Case of Russian Roulette?*, ATLANTA J.-CONST., Mar. 15, 1998, at B4. On the other hand, because the United States was running huge budget deficits at the time, reductions in defense spending did not free up funds so much as they reduced unsupported spending.

²¹⁰ See Edward Imperatore, Note, *Discriminatory Condemnations and the Fair Housing Act*, 96 GEO. L.J. 1027, 1038-39 (2008) (noting that the ability of legislators to condemn “blighted” areas, broadly defined, has a disparate impact on minorities).

²¹¹ Super, *supra* note 152, at 2614-40. Federal budget rules favor the affluent by exempting tax expenditures from the automatic reductions they impose to enforce budget targets. See 2 U.S.C. §§ 901(a), 902(c)(1) (2006).

²¹² For a conceptual discussion of the effect supply of public goods has on income distribution, see generally Louis Kaplow, *Public Goods and the Distribution of Income*, 50 EUR. ECON. REV. 1627 (2006).

²¹³ *Id.* at 1643.

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

C. *Admitting Fiscal Concerns to the Climate Change Debate*

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

A claim for deficit reduction is not defensive in the simplistic sense: no one is proposing climate change legislation that would add to the federal deficit.²¹⁴ Climate change legislation could, however, severely undermine deficit reduction politically. With one major political party defining itself by its opposition to taxes and the other treating the topic gingerly, two major rounds of tax increases are un-

²¹⁴ This is not so at the state and local level: increasing carbon costs could devastate state and local governments. Accordingly, compensatory intergovernmental aid may be an important component of carbon-emissions legislation. See Super, *supra* note 152, at 2571-74 (describing how the model of federal compensation can be used to reduce the negative externalities imposed on state and local governments through federal regulation). The claim here, however, is to devote the proceeds of emissions regulation to *federal* deficit reduction, and that claim is not truly defensive.

likely to pass within a few months, or even years, of one another.²¹⁵ Enactment of a carbon tax or a cap-and-trade system perceived to be the equivalent of a tax will therefore eliminate one of the two main tools for deficit reduction. Eliminating with spending cuts alone a structural deficit of the kind this country had built even before the financial crisis would be difficult or impossible and, in any event, would almost certainly be highly regressive.²¹⁶

Estoppel arguments for deficit reduction will also be controversial. Some environmentalists resist attempts to compare environmental protection with other values; this concern becomes especially acute with regard to monetized nonenvironmental values.²¹⁷ On the other hand, the environmental movement's effectiveness depends on its ability to reconcile groups with sharply differing worldviews,²¹⁸ and in important respects many environmentalists share ethical assumptions with deficit hawks. Both emphasize ethical duties to future generations²¹⁹ and the risk of bequeathing to those generations problems much more easily solved in our time. Both groups are broadly critical of unbridled consumption. Thus, devoting most of the proceeds of carbon-emissions regulation to reducing the deficit reinforces important themes on which the environmental movement depends; declining to do so could cause some to question the sincerity of the movement's commitment to future generations.

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

²¹⁵ Even if a second round of tax increases were politically feasible, they might well be devoted to broadening health care coverage rather than reducing the deficit.

²¹⁶ To the extent spending cuts would be the result, this analysis converges with that in Section III.B.

²¹⁷ See SMITH, *supra* note 179, at 37-40 (“[E]nvironmental and other values are often incommensurable, and the representation of these different values by . . . [a monetary valuation] is illegitimate.”).

²¹⁸ See *id.* at 21-27 (“We are faced with living alongside people with different perspectives on the significance of environmental values. But, we need common action on enterprises such as protecting the environment.”).

²¹⁹ See *supra* note 174 and accompanying text.

Deficit reduction cannot be achieved without legislation. And as noted above, the lack of a large constituency committed to deficit reduction contributes to legislative inaction despite the rhetorical salience of the issue in political discourse and the media. In deficit-reduction packages, the appeal of the whole far exceeds that of the sum of its parts. The long odds of passing legislation, coupled with the political costs of proposing specific spending cuts or tax increases, even absent enactment, keeps most legislators from offering specific deficit-reduction proposals. When deficit reduction does occur, it typically is in a panicky, ill-considered, and regressive manner. Thus, getting thoughtful deficit reduction considered on the merits outside the context of the climate change legislation, although possible, remains quite unlikely.

Finally, deficit reduction has repeatedly been subordinated to other interests, including environmental ones. President Bush repeatedly won support for tax cuts that he argued would stimulate the economy. These cuts, however, eliminated a substantial budget surplus and created large deficits. President Bush and Congress also approved dramatic increases in spending for homeland security and wars overseas, further exacerbating the deficit. Significantly, during the Clinton administration, arguments about the importance of environmental programs played a significant part in blocking domestic spending reductions.²²⁰ Most recently, congressional leaders won House passage of the \$700 billion bailout bill for the financial industry by incorporating over \$100 billion of popular tax cuts in the package.²²¹ Among these were environmental measures such as tax credits for developing alternative fuels. Postponing deficit reduction again in passing carbon-emissions legislation would only confirm its status as a political afterthought.

III. ACCOMMODATING ENVIRONMENTAL, DISTRIBUTIONAL, AND FISCAL CONCERNS

Even if distributional and fiscal concerns are admitted to the climate change debate, their success is far from assured. Both compete for funding with numerous other interests, many of which also have

²²⁰ See Elaine S. Povich & Martin Kasindorf, *A Balance by 2002: Budget Accord Would Wipe Out Federal Deficit*, *NEWSDAY* (New York), May 2, 1997, at A3 (noting President Clinton's repeated invocation of environmental programs in resisting Republicans' budget proposals).

²²¹ See Maura Reynolds et al., *Senate OKs Sweetened Bailout Bill*, *L.A. TIMES*, Oct. 2, 2008, at 1.

legitimate claims to consideration under these same criteria. Because of this country's massive long-term fiscal imbalance, if deficit reduction cannot defeat most other claims for the proceeds of a carbon-emissions regulatory regime, a fiscally responsible climate change policy will be impossible. Low-income subsidies are comparatively affordable but are conceptually, administratively, and politically more complex. To avoid causing severe hardship and political resistance to increasing carbon costs, a subsidy system must reach all, or at least the vast majority of, people most at risk of being disadvantaged by rising energy costs. Further, it must do so without undermining the larger legislation's incentives for carbon-emissions reduction, without creating a new bureaucracy that could become a lightning rod for criticism, and without restarting any of the emotional political battles that have surrounded antipoverty policy.

This Part asserts that a fiscally responsible and distributionally sensitive climate change policy can meet those demands. Section III.A shows how many of the supposedly targeted subsidies competing for the money that climate change legislation will make available are in fact inefficient to the point of futility. Section III.B shows that the low-income subsidies in major proposals are also woefully inefficient and that existing antipoverty programs are too brittle to be able to prevent these new subsidy funds from supplanting their existing resources. This Section demonstrates how those programs can nonetheless be reorganized and consolidated to provide an effective and well-targeted response to the burdens climate change regulation will impose on low-income people.

A. *Fiscally Responsible Climate Change Policy*

A carbon tax makes as much sense fiscally as it does environmentally. The federal budget faces severe structural imbalances. Six years into the recent economic expansion, at a point in the business cycle when the federal government ought to have been accumulating large surpluses to pay down the national debt, it was still running large deficits. The severe structural deficits these figures suggest are far more troubling than the cyclical deficits that have emerged during the past two years as the economic slowdown reduces revenues and increases claims for unemployment compensation and for need-based benefits such as food stamps and Medicaid.²²² Even more ominously, the con-

²²² In 2008, Congress renamed food stamps the "Supplemental Nutrition Assistance Program" (SNAP). See Food, Conservation, and Energy Act of 2008, Pub. L. No.

fluence of demographic changes and exploding health care costs is projected to overwhelm the federal budget once the baby boomers begin retiring in large numbers in less than five years.

Whether Congress addresses these deficits through tax increases, spending cuts, or a combination of the two, the effect will be deflationary. Put another way, the federal government's current hyperstimulation of the economy is unsustainable. If increasing the drag on the economy is inevitable, doing so in a way that steers us toward lower carbon emissions is logical. Conversely, manipulating climate change policy to avoid macroeconomic effects only to recreate those same effects a few years later would accomplish little.

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

A significant part of a fiscally responsible climate change policy is fending off the countless suitors for funds raised. The deficiencies of claims to subsidize existing emitters under the guise of compensation are discussed above.²²³ Another major claim on these resources is for funding a wide variety of state, local, and private sector activities related to climate change. Some involve research and development into cleaner energy technologies, techniques for sequestering carbon, or methods for helping humans or wildlife adapt to climate change that is not now preventable. Others involve operating subsidies for state, local, and private sector efforts at mitigation of or adaptation to climate change. Together, these claims could consume all resources, and many have been joined liberally in the pending proposals. Beyond the aesthetic defects of this interest group feeding frenzy, serious procedural and substantive concerns counsel against granting many of these claims.

Procedurally, the negotiations are taking place among too constrained a universe of interests. The burdens of climate change regu-

110-234, § 4001(b), 122 Stat. 923, 1092. To minimize confusion, this Article follows the still-prevalent custom of referring to the program as "food stamps."

²²³ See *supra* Section I.C.

lation will not be limited to ecological interests, and decisions about how to manage its fiscal and economic consequences should not be so limited. Issues this fundamental are proper subjects of society-wide dialogue.²²⁴ Climate change regulation itself will be widely discussed, but these spending decisions are being addressed in the fine print of this legislation.

An important feature of the House bill and the emerging Senate bill is the creation of dedicated funds devoted to one or another environmental purpose.²²⁵ Alas, dedicated funds tend to skew public priority setting. They foster the artificial sense that spending up to the amount in the fund is costless. This hinders comparisons between the value of projects eligible for the special fund and the value of putting the funds to some other public or private use. The reduced political competition can engender sloppy, inefficient public management. Rarely is the amount of money raised by the segregated revenue stream a good proxy for the sums needed for the designated activities. In practice, these funding arrangements can operate as floors: they ensure that spending will at least equal receipts from the specified source but impose little political barrier to the pursuit of more from the general fund. Attempts to divert funds for other priorities are denounced as “raids,” almost as if they were takings of private property.²²⁶ Some state governments have found their ability to meet public needs without taxing at politically untenable levels hampered by permanent earmarks, which are often enacted by voter initiatives.²²⁷ Dubious spending from the highway trust fund²²⁸ and public confu-

²²⁴ Cf. ACKERMAN, *supra* note 161, at 4-19 (locating open, mutually respectful dialogue at the core of liberal democracy).

²²⁵ See American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong., § 321 (providing for the distribution of emission allowances for certain adaptations); Clean Energy Jobs and American Power Act, S. 1733, 111th Cong., § 370 (2009) (providing allowances to states to perform natural-resources adaptation activities).

²²⁶ At times, skillful political actors have managed to enshrine these limitations into contracts with private parties, making them enforceable under the Contracts Clause. See ROBERT A. CARO, *THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK* 624-26 (1974) (detailing the effort of Robert Moses to use bond contracts to expand the power of New York public authorities).

²²⁷ See Super, *supra* note 152, at 2617-20 (describing how dedicated funding streams can crowd out spending on other basic programs).

²²⁸ See ROBERT GREENSTEIN, *CTR. ON BUDGET & POLICY PRIORITIES, GETTING SERIOUS ABOUT DEFICITS? CALLS TO OFFSET HURRICANE SPENDING MISS THE POINT; BALANCED SET OF FIRST STEPS TOWARD FISCAL DISCIPLINE NEEDED* 8-9 (2005) (discussing the more than \$22 billion in earmarked projects, many of which are unmeritorious, within highway legislation).

sion about the meaning of the Social Security and Medicare trust funds show that the federal system is not immune to these problems.²²⁹

A general substantive concern with many claims for the proceeds of a carbon tax or permit sale is that the claims' justification assumes an unrealistically static baseline. Proposals for the federal government to fund an activity naturally and appropriately give rise to the question of why the private sector or other levels of government are not doing so. Absent obvious cases of impossibility (e.g., funding national defense or foreign policy), the most common answer is that, for whatever reason, no one else is in fact providing the needed funding. If all other potential funders' preferences were fixed, this might be reasonably persuasive. Here, however, it ignores the highly dynamic nature of both the regulation of greenhouse gas emissions and the underlying process of climate change itself. For example, although emissions reduction clearly would benefit from more research on alternative energy sources than is now being funded, emissions regulation will make that research far more remunerative for private industry.²³⁰

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

²²⁹ See HENRY J. AARON & ROBERT D. REISCHAUER, COUNTDOWN TO REFORM: THE GREAT SOCIAL SECURITY DEBATE 51-53 (2001) (describing confusion over the nature of Social Security and Medicare reserves stemming from the view that the reserves do nothing more than hold "paper" assets).

²³⁰ A technique for reducing consumption that would cost five dollars for every gallon of gasoline saved might not seem worth developing in the United States if economic conditions are likely to remain as they are. With emissions regulations sure to raise the cost of gasoline well above that threshold, however, this technique is likely to draw eager corporate attention.

disproportionately on them.²³¹ The federal government enjoys no particular advantage in funding these activities relative to state and local governments (beyond its possession of a generally more efficient revenue structure).²³² Furthermore, no special need for federal leadership in the design of state and local programs is evident; if anything, states and localities have been well ahead of the federal government in responding to climate change.²³³

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

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

²³¹ See Super, *supra* note 152, at 2571-74 (describing the compensatory model of fiscal federalism under which the federal government pays states and local governments for the costs its actions impose). An exception may be regions heavily dependent on coal mining. Both the states of the coal belts and the people economically dependent on coal mining may need funds to adjust to these economic changes.

²³² See *id.* at 2574-77 (describing the superior-capacity model in which the federal government assists states with functions that their revenue bases are insufficient to handle). For example, most costs associated with climate change mitigation and adaptation are either procyclical—becoming worse when the economy is strong and consumers have more money to spend on emissions-producing activities—or noncyclical. The federal government's superior capacity to engage in countercyclical spending is thus not implicated.

²³³ See *id.* at 2577-79 (describing the leadership model under which the federal government uses its resources to further national priorities).

the new federal funds and yielding only a small expansion of the desired activities.

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

When multiple donors contribute to the same project, each will have a different set of competing uses for its funds and different norms guiding its evaluation of those uses.²³⁴ Therefore, each will place a different value on what could be accomplished by an additional contribution to its shared project, *and* each will have a different threshold that such contributions must be able to meet to prevail over other uses for the funds. When a new donor begins to contribute to a project, its funds support activities that existing donors had not deemed sufficiently valuable to support. If the original donor then reduces its contributions, it can divert those funds to other activities that it values more highly than the newly funded activity of the shared program. The original donor may reduce its contributions by the entire amount that the new donor provided. Alternatively, it may allow the shared program to experience some increase in income, either to induce continued support from its funding partner or because it has a limited number of appealing competing priorities for the money that it could withdraw.

Consider a simple example in which two donors are weighing five projects, each of which costs the same.²³⁵ Table 2 suggests how the respective donors might value the projects' likely results. Suppose the original donor funds Projects *A*, *B*, and *C* but does not fund Project *D*, valued at 10, because it has another, unrelated activity that it values at 13 that it can support with the same funds. When the second donor appears, with its different valuations of the possible projects, its only question is whether to fund Projects *D* and *E* when the other three projects are already underway. If the second donor has no options

²³⁴ One locality may think an additional production at the opera company is more important than a visiting exhibition at the art museum; another may reverse these priorities; and a third may have no opera company or art museum to fund.

²³⁵ Dropping the assumption that the cost of each project is identical adds an additional step to the calculations but does not change the results.

worth more than 12, it will find it advantageous to provide funds sufficient for one additional activity, namely Project *D*. When the original donor sees this, however, it may consider cutting its funding by one-third. This will reduce total program funding to the level sufficient to support three projects, which surely will be *A*, *B*, and *C*. The first donor's withdrawal of funding will sacrifice Project *D* but will enable it to fund the unrelated project that it values more.

The original donor's withdrawal of one-third of its funding then poses a dilemma for the new donor. Project *D* is, again, unfunded. The new donor may still be spending money elsewhere on activities it values less than 12 and hence may be inclined to transfer its funding into the joint program to resuscitate Project *D*. Doing so, however, may induce the original donor to withdraw further funds if that donor still has other, outside activities it prefers to Project *D*. If the second donor resents this, or if the donor measured the cost-effectiveness of its funding relative to the program's operations before it became involved, it will withhold additional funding and may even abandon the program altogether. On the other hand, the second donor may not understand the dynamics of the original donor's behavior or may use a more recent baseline and not notice the withdrawal. If so, this see-saw process in which the new donor increases its contributions while the prior one withdraws funding will continue until either one donor has completely exited the program or both donors' thresholds for additional contributions lie between the value to them of the last funded activity and that of the first unfunded function.

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

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

This example assumes that both donors apply the same *ordinal* ranking to the program's activities, even if they assign different *absolute* values to those activities. This assumption will hold in many kinds

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

**Table 3: Donors' Valuation of Jointly Funded Program
(Ordinal Dissensus)**

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

Negotiation may ameliorate some of these problems. Perhaps the two donors will agree to split the cost of Project *A* and then each fund some other activities in shares reflecting the priority each assigns to it. The incentives for dissembling in such negotiations, however, are quite strong. In addition, each donor may continually endeavor to surreptitiously reduce its real contribution. For example, one may arrange to contribute overvalued assets in kind or to double count money it gives the program's operators for other purposes. This tendency will create the need for unusually burdensome accounting and a periodic need for renegotiations to address new financial gimmicks that one or the other donor has devised. Moreover, any pact is likely to collapse any time either donor experiences a substantial increase or decrease in available resources or a major change in priorities or competing candidates for its funds.

In translating this model into the real world, additional difficulties arise in arranging negotiations and enforcing the results. When two sets of congressional committees try to pool their resources to support a common priority, the more nimble committee is generally able to leave its counterpart holding most of the bag. Because they legislate annually, appropriations committees typically can outmaneuver authorizing committees. Thus, when authorizing committees seek to supplement an activity with mandatory funds, the appropriations committees respond by reducing the program's discretionary funding in subsequent annual appropriations bills.²³⁶ Because the appropriations committees act every year and most mandatory programs are reauthorized or reviewed only at several-year intervals, they have little immediate fear of a tit-for-tat response from the authorizers whose contributions they purloined.²³⁷ Authorizing committees that wish to increase funding for an activity receiving discretionary appropriations may have to convert the entire program, or at least clearly definable portions of it, to mandatory funding. This is very costly for them and provides a large windfall to the appropriators unless the authorizing

²³⁶ Alternatively, the appropriators can cancel the mandatory money each year and count the savings to increase their net allocation for discretionary spending: a so-called "ChIMP" (Change in Mandatory Programs).

²³⁷ Shared responsibility between two equally nimble committees, such as two appropriations subcommittees, has somewhat better prospects of yielding stable results.

committee can persuade the budget committees to reduce the appropriators' allocations correspondingly.²³⁸

When the federal government shares fiscal responsibility with other levels of government, it typically tries to prevent state and local governments from withdrawing resources to offset federal funding.²³⁹ Matching or maintenance-of-effort requirements are common means to this end. These devices are only moderately effective and often engender considerable conflict.²⁴⁰ Alternatively, the federal government can attempt to target its funding to one narrowly defined component of an activity and leave state and local governments to pay for the rest of the program.²⁴¹ The effectiveness of this strategy depends on the precision with which the federal function can be defined, whether state or local governments regard the federal function as a substitute for the activities they fund, and whether accounting systems can be defined that will expose efforts to cross-subsidize other state and local activities from the federally supported activity.

Preventing supplantation when government subsidizes activities that have received private support is even more difficult, in part because of the greater number and variety of private actors and in part because accounting restrictions that are politically acceptable when applied to other levels of government may be seen as overly intrusive if imposed on the private sector.²⁴² An additional difficulty with sharing financing with private for-profit entities—and some public and nonprofit ones—is preventing them from expropriating many of the

²³⁸ See 2 U.S.C. § 633(a)(1) (2006) (providing for the allocation of spending among committees). The budget committees, with OMB's concurrence, also could make a technical readjustment of the appropriators' baseline to reflect the fact that the latter no longer has responsibility to fund the activity in question. Needless to say, the appropriators, who have several seats on the budget committees and vast power generally, vehemently resist such changes.

²³⁹ The reverse, of course, is also true. Suspicions that policymakers rely on support that programs receive from other sources in order to limit federal contributions can deter some state, local, and private support for programs. Cf. *Quattlebaum v. Barry*, 671 A.2d 881, 890 (D.C. 1995) (en banc) (rejecting a claim that local welfare cuts—imposed after a debate in which resulting food stamp increases were discussed—violated federal law prohibiting state and local governments from counting food stamps as income to reduce other benefits).

²⁴⁰ See *Super*, *supra* note 152, at 2568-79, 2586-88 (discussing the problems with various cost-shifting mechanisms in areas of joint concern to federal and state governments).

²⁴¹ See *id.* at 2568-71, 2589-91 (examining problems with unmatched aid programs).

²⁴² Although not directly pertinent to the public policy issues discussed in this Article, sharing financial responsibility among private donors is also often complicated by the sheer number of donors to be coordinated and by the diversity of their preferences, financial capacity, and sophistication.

benefits that motivated the public financing. The federal government would be unlikely to subsidize an art museum open only to members of an exclusive private club. Yet the government funds a considerable amount of research whose resulting intellectual property is closely held by private firms or universities.

B. *Protecting Low-Income People from Regressive Cost Increases*

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

Subsection III.B.1 seeks lessons on program design from the uneven history of energy-assistance efforts over the past several decades. Subsection III.B.2 synthesizes those lessons and considerations peculiar to climate change regulation into three principles that should guide any system of low-income offsets. Subsection III.B.3 then draws on these principles to propose such a program.

1. Lessons from Prior Efforts to Relieve Energy Costs

We can gain considerable insight from existing policies for helping low-income people cope with high energy costs. Although this country has no coordinated response to this problem, it does have four programs worthy of note. These programs vary widely as to mission, administration, financing, coverage, benefits, and incentive structures. Comparing these efforts provides valuable insights for the design of a new system for offsetting the regressive effects of climate change regulation.

First, the energy crisis of the early 1970s prompted Congress to establish the Weatherization Assistance Program (WAP).²⁴³ WAP is a relatively small program in the U.S. Department of Energy funded with annual discretionary appropriations. State and local human services agencies administer WAP, exercising broad discretion over program eligibility and benefits within fixed federal allocations. Assistance includes installing storm windows, sealing gaps around windows

²⁴³ Energy Conservation and Production Act of 1976, Pub. L. No. 94-385, §§ 411-422, 90 Stat. 1125, 1151-58 (codified in scattered sections of 12, 15, 29, and 42 U.S.C.).

and doors, replacing inefficient heaters and air conditioners, and insulating attics and walls.²⁴⁴ Because of funding constraints, WAP has served only sixteen percent of the more than twenty-seven million households eligible for aid.²⁴⁵ Federal administrators have sought contributions from states and utility companies, with very limited success.²⁴⁶

Second, the energy crisis of the late 1970s spawned the Low-Income Home Energy Assistance Program (LIHEAP).²⁴⁷ Congress created what became LIHEAP in 1979 as a temporary stop-gap with the proceeds of the windfall-profits tax it enacted on oil companies.²⁴⁸ Congress subsequently reauthorized LIHEAP as an ongoing block grant to states funded through annual appropriations. States have no particular expertise in designing means-tested programs, as the results in LIHEAP demonstrate. Some provide thin, almost irrelevant, subsidies to large numbers of people; others offer more substantial aid but only to a tiny fraction of low-income families.²⁴⁹

Due to this wide variation among states, federal appropriators have little idea which kinds of families are likely to benefit from an increase in funding. Whether for that reason or because the appropriations process has a notoriously short memory for commitments made to those without political capital, LIHEAP's purchasing power has severely eroded over the years (adjusting for changes in home-energy costs and the number of people living below the poverty line). Real per-poor-person funding averaged about 80% of the 1980 level from 1982 through 1987, but then began to fall precipitously—averaging 60% from 1988 to 1991 before bottoming out at just 35% in 1996.²⁵⁰

²⁴⁴ See U.S. Department of Energy, DOE Weatherization Assistance Program: History of the Weatherization Assistance Program, <http://apps1.eere.energy.gov/weatherization/history.cfm> (last visited Feb. 15, 2010) (discussing the measures taken to weatherize the homes of low-income people).

²⁴⁵ U.S. Department of Energy, DOE Weatherization Assistance Program: Reducing the Energy Burden on Needy Families, <http://apps1.eere.energy.gov/weatherization/reducing.cfm> (last visited Feb. 15, 2010).

²⁴⁶ *Id.*

²⁴⁷ Pub. L. No. 96-223, 94 Stat. 288 (1980) (repealed 1981).

²⁴⁸ Department of the Interior and Related Agencies Appropriations for Fiscal Year 1980, Pub. L. No. 96-126, 93 Stat. 954, 978 (1979) (codified in scattered sections of the U.S.C.). Congress enacted the windfall-profits tax in response to the combined effects of deregulation of oil prices and OPEC's decision to raise crude oil prices by forty percent that summer.

²⁴⁹ See DIV. OF ENERGY ASSISTANCE, DEP'T OF HEALTH & HUMAN SERVS., LOW INCOME HOME ENERGY ASSISTANCE PROGRAM: REPORT TO CONGRESS FOR FISCAL YEAR 2003, at 39-40 (2003) (analyzing state allotment schemes).

²⁵⁰ Author's calculations are based on federal budget authority by fiscal year, Census Bureau estimates of the poverty population by calendar year, and the household-

Despite the attention that high energy costs have received since the outset of the Second Gulf War, LIHEAP's appropriations have rebounded to only 43% of their 1980 purchasing power.²⁵¹ Since 1981, the number of low-income families meeting federal LIHEAP eligibility standards has risen from nineteen million to more than thirty-five million while the number actually receiving aid has actually *dropped*, from around seven million to five million.²⁵² Although the LIHEAP statute seeks to create incentives for states to contribute to the program, such contributions provide only a trivial portion of the program's resources. This may reflect states' sense that energy assistance has historically been a federal responsibility or the fact that the sweeping flexibility they enjoy under LIHEAP's block grant structure allows them to address their priorities without spending their own funds.

A third major form of low-income energy assistance in this country comes from the federal rental-housing-subsidy programs. These programs, the largest and most important of which are public housing, project-based Section 8 subsidies, and Section 8 housing vouchers,²⁵³ provide relatively deep subsidies to about five million households, a small minority of eligible low-income families with children, elderly persons, and persons with disabilities.²⁵⁴ Beginning in the late 1960s,

energy costs component of the Consumer Price Index for All Urban Consumers (CPI-U) for October of each year.

²⁵¹ This figure is for 2008, the most recent year for which estimates of the poverty population are available.

²⁵² See C-SNAP, *supra* note 38, at 4 fig. (displaying the widening gap between those eligible for LIHEAP and those who actually receive aid).

²⁵³ U.S. Housing Act of 1937, 42 U.S.C. §§ 1437 to 1437z-7 (2006). USDA's Rural Development division operates similar but far smaller programs, primarily in rural areas. This division operates on a utility allowance system closely paralleling that in HUD's programs. See 7 C.F.R. pt. 3560 (2008) (setting forth loan grant requirements for low-income households); U.S. DEP'T OF AGRIC., DIRECT SINGLE FAMILY HOUSING LOANS AND GRANTS: FIELD OFFICE HANDBOOK (rev. 2007), *available at* <http://www.rurdev.usda.gov/regs/handbook/hb-1-3550/hb-1-3550.pdf> (providing a reference of guidelines for the disbursement of loans and grants to low-income households in rural areas).

A separate program, the Low-Income Housing Tax Credit (LIHTC), provides ten-year tax subsidies to developers of low-income housing. Because it focuses on initial capital costs, it has less relevance to energy costs specifically and is of questionable effectiveness overall. See CONG. BUDGET OFFICE, CBO STAFF MEMORANDUM: THE COST EFFECTIVENESS OF THE LOW-INCOME HOUSING TAX CREDIT COMPARED WITH HOUSING VOUCHERS (1992), *available at* <http://www.cbo.gov/doc.cfm?index=6216&type=1> (discussing the efficacy of the LIHTC); Janet Stearns, *The Low-Income Housing Tax Credit: A Poor Solution to the Housing Crisis*, 6 YALE L. & POL'Y REV. 203, 212-14 (1988) (analyzing the "substantive and procedural flaws" of the LIHTC).

²⁵⁴ See DOUGLAS RICE & BARBARA SARD, CTR. ON BUDGET & POLICY PRIORITIES, DECADE OF NEGLECT HAS WEAKENED FEDERAL LOW-INCOME HOUSING PROGRAMS 9

Congress required these programs to limit tenants' housing costs to not more than thirty percent of their incomes. Because HUD had defined housing costs to include utilities, this made these programs guarantors against high energy costs to those low-income people fortunate enough to gain subsidies. As the number of people living in poverty has increased, the purchasing power of appropriations for assisted housing has decayed. The number of low-income families HUD determined had severe housing-affordability problems increased thirty-two percent from 2000 to 2007, yet beginning in 2004, federal deficit pressures led to eight percent, or two billion dollars, in real cuts in the budget for assisted housing.²⁵⁵

In response to the energy crisis of the late 1970s, HUD ordered public housing authorities (PHAs) to convert as many units as possible to individual metering.²⁵⁶ This was intended to give tenants incentives to conserve energy. To maintain compliance with the thirty-percent limit on overall housing costs, PHAs gave each household a "utility allowance" as a credit against its rent.²⁵⁷ HUD required the utility allowance to represent the "reasonable" utility costs for units in a given class.²⁵⁸ Roughly three in five public housing residents and four in five housing-voucher holders are in the utility-allowance system;²⁵⁹ the remainder live in buildings that have central heating systems or that are otherwise not suitable for individual metering.

These allowance calculations have posed persistent problems.²⁶⁰ PHAs have differed in their definition of "reasonableness," in how reliably they update allowances for changes in utility rates, and in which factors they consider when determining the allowance for a particular unit.²⁶¹ Even when a PHA endeavors to set utility allowances properly,

fig.5 (2009), available at <http://www.cbpp.org/2-24-09hou.pdf> (illustrating where aid from major federal low-income housing programs is being distributed).

²⁵⁵ *Id.* at 2-6.

²⁵⁶ 24 C.F.R. §§ 965.401-410 (1993); see also *Crochet v. Housing Auth.*, 37 F.3d 607, 611 (11th Cir. 1994) (explaining the causes and reasoning behind the switch to individual metering).

²⁵⁷ 1 U.S. GEN. ACCOUNTING OFFICE, ASSISTED HOUSING: UTILITY ALLOWANCES OFTEN FALL SHORT OF ACTUAL UTILITY EXPENSES 11 (1991) (describing HUD's policy to include a reasonable amount of utilities in the definition of rent).

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 18.

²⁶⁰ See, e.g., *id.* at 33-51 (explaining that, given the differences in rental-housing stock, the calculation of allowances is inherently inexact and that many households' actual expenses thus differ from their utility allowances).

²⁶¹ See *id.* at 40-48 (noting that some PHAs intentionally keep allowances too low and that PHA practices lead to inequitable treatment of some households).

doing so requires difficult calculations about what rates of energy consumption are achievable for various kinds of units.²⁶² In theory, they should adjust utility allowances for as many factors as possible *other than* individual effort at conservation. Merely accounting for the number of rooms in a unit and whether it is detached, semi-detached, or bracketed by other units will ignore several important sources of variability. For example, a wasteful family in a well-maintained, well-insulated apartment may use far less energy than a frugal one in a drafty, decrepit unit with the same number of rooms.²⁶³ This seems especially inequitable because the PHA assigns tenants to particular dwelling units and is responsible for the repair and insulation of those units. Unusually warm winters can vitiate the utility-allowance system's incentives for conservation; unusually cold weather can leave most tenants' allowances insufficient.²⁶⁴ Because the housing assistance programs operate under fixed appropriations, PHAs generally lack the means to supplement allowances when severe weather strikes.²⁶⁵

Seasonal variations can cause serious problems for low-income tenants even when their PHA establishes an appropriate utility allowance. To avoid having to recompute tenants' rents every month, PHAs generally provide a uniform monthly utility allowance year-round.²⁶⁶ This requires tenants to save (and to continue conserving energy) during the summer months in order to be able to afford their winter bills.²⁶⁷ Low-income people, by definition, face numerous pressing expenses that make saving difficult.²⁶⁸ As a result, many risk utility terminations each year. In theory, budget plans—providing equal monthly bills throughout the year based on estimates of usage—can eliminate this imbalance. In practice, these plans' reliance on estimates mimicking those the PHAs make is error-prone and can present tenants with large supple-

²⁶² See *id.* at 4 (“[A]llowances are generalized estimates of units’ energy consumption characteristics that can vary markedly because of differences in unit construction and location.”).

²⁶³ See *id.* at 36 (explaining that “[a]n older, unrenovated unit may have older, energy-inefficient appliances, while a similar unit in the same building may have been modernized, and have newer, more energy-efficient appliances”).

²⁶⁴ See *id.* at 36-37 (noting that “none of the agencies made adjustments for warmer- or cooler-than-normal seasons”).

²⁶⁵ *Id.* at 37.

²⁶⁶ *Id.* at 39-40.

²⁶⁷ See *id.* at 28 (“[H]ouseholds have to budget so that they will have sufficient funds to pay utility bills in high consumption months . . .”).

²⁶⁸ See *id.* (“This budgeting may be difficult for lower-income households because, by definition, they have less income to pay for living expenses than higher-income households.”).

mental bills after the year-end reconciliation.²⁶⁹ The plans also attenuate tenants' incentives to conserve energy and may confuse some tenants about how effective their efforts have been.

The fourth major federal effort to help low-income families meet energy costs is even less well-known, although it serves by far the largest number of low-income families. It is the Food Stamp Program's excess-shelter-cost deduction. The Food Stamp Program bases benefit levels on household size and income.²⁷⁰ In computing a household's income, the program deducts certain largely nondiscretionary expenses that can affect the ability to purchase food. One of these deductions is for shelter costs exceeding half of the household's income after all other deductions.²⁷¹ Almost seventy percent of food-stamp households' shelter costs exceed this threshold; almost eight million households receive \$9 billion per year in additional food stamps because of this deduction.²⁷²

Like the HUD programs, the Food Stamp Program defines shelter costs to include utilities as well as rent or mortgage payments.²⁷³ Like the HUD programs but unlike WAP and LIHEAP, it provides the same level of assistance to households whose utility costs are included in their rent.²⁷⁴ Unlike HUD but like LIHEAP, the food-stamp excess-shelter-cost deduction ("food-stamp shelter deduction") provides a very shallow subsidy, offsetting only a small fraction of energy costs for participating households: its value generally is equal to about thirty percent of that fraction of a household's shelter costs that exceed half of its income.²⁷⁵ Paradoxically, it provides little or no aid to the very

²⁶⁹ See *id.* at 39-40 (explaining that households with payments vastly lower than the amount consumed may be unable to satisfy their year-end reconciliation payments).

²⁷⁰ See 7 U.S.C. §§ 2012(o), 2017(a) (2006) (explaining that the value of allotment equals the cost of the food plan, based on household size, reduced by an amount equal to thirty percent of the household's income).

²⁷¹ *Id.* § 2014 (e) (6).

²⁷² Author's calculations, based on data in KARI WOLKOWITZ & CAROLE TRIPPE, U.S. DEP'T OF AGRIC., REP. NO. SNAP-09-CHAR, CHARACTERISTICS OF SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM HOUSEHOLDS: FISCAL YEAR 2008, at 40 tbl.A-9, 41 tbl.A-10, 42-43 tbl.A-11 (2009).

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

²⁷⁴ See *id.* § 273.9(d) (6) (treating rent, mortgage, and utility charges alike for the purpose of calculating the shelter deduction).

²⁷⁵ See 7 U.S.C. § 2014(e) (6) (providing a deduction in calculating net income generally equal to the amount by which shelter costs exceed half of the household's income after allowing for all other applicable deductions); *id.* § 2017(a) (reducing benefits by thirty percent of the amount of net income).

poorest households, whose incomes entitle them to the maximum food-stamp benefit without the shelter deduction.²⁷⁶

Unlike any of the other major federal energy assistance programs, the food stamp excess shelter deduction is both a budgetary entitlement (not dependent on the annual appropriations process) and a responsive entitlement (available to as many people as meet its eligibility criteria and apply),²⁷⁷ guaranteeing that funding will be sufficient to meet the claims of all eligible people seeking benefits.²⁷⁸ Because it only offsets a minority fraction of marginal housing costs, the excess shelter deduction has a relatively modest impact on households' incentives to conserve. In addition, all states calculate the utility portion of households' shelter costs with a "standard utility allowance" (SUA), which approximates reasonable usage patterns. SUAs are far less individualized than PHAs' utility allowances: some states differentiate only between households with and without responsibility for primary heating or cooling costs; at most, they may vary by the number of people in the household and the region of the state.²⁷⁹ This imprecision has aroused less criticism than PHAs face, in part because of the excess-shelter deduction's lower profile and in part because its status as a very partial subsidy lowers the stakes. Of greater concern has been the states' noncompliance with federal regulations requiring them to update their SUAs annually to reflect changing utility rates.²⁸⁰ In any event, because few food-stamp households' benefits depend on their actual usage, the SUA further reduces the deduction's impact on incentives to conserve or to seek energy-efficient housing.

²⁷⁶ Some 730,000 households with no gross income receive no benefit from the shelter deduction. Most of the 2,690,000 households with high shelter expenses that receive the maximum food-stamp allotment benefit from only a part of the deduction for which they qualify. See WOLKWITZ & TRIPPE, *supra* note 272, at 40 tbl.A-9 (listing the distribution of participating households by type of deduction and household consumption, income source, and Food Stamp Program benefit amount).

²⁷⁷ See David A. Super, *The Political Economy of Entitlement*, 104 COLUM. L. REV. 633, 652-55 (2004).

²⁷⁸ See 7 U.S.C. § 2014(a) ("Assistance under this program shall be furnished to all eligible households who make application for such participation."). *But see id.* § 2027(b) (providing the authority—which the USDA has never exercised—for allotment reductions in case of insufficient appropriations).

²⁷⁹ A list of SUAs by state is available at the USDA's website. See Food & Nutrition Serv., U.S. Dep't of Agric., Supplemental Nutrition Assistance Program Standard Utility Allowances as of October 1, 2009, http://www.fns.usda.gov/fsp/rules/Memo/SUA_Table.pdf (last visited Feb. 15, 2010).

²⁸⁰ *Compare id.* (showing that many states are one or two years behind in updating their allowances), with 7 C.F.R. § 273.9(d)(6)(iii)(B) (2008) (requiring states to update their standards annually).

Four House and three Senate Committees write legislation authorizing these programs; three different Appropriations Subcommittees oversee their funding. Each of these four programs is administered by a different federal department; state and local administration is similarly fragmented. No overarching federal law prohibits households from benefiting from more than one of these programs, although households receiving HUD subsidies will rarely have shelter costs high enough to qualify for the food-stamp shelter deduction. Questions about the relationship among these programs have spawned considerable controversy.²⁸¹

2. Principles for Designing Low-Income Subsidies

Although accepting the importance of offsetting the regressive effects of increased energy costs is a crucial first step, it is far from sufficient to guard against those effects. As the abundant critics of social-welfare programs never tire of reminding us, many existing programs suffer from serious design limitations. Even if legislation sets aside an appropriate amount for aid to low-income people, if it lacks an appropriate delivery mechanism, that aid either will fail to survive the political process or will be misdirected.

This subsection offers three principles to guide the design of a low-income subsidy program. These principles reflect a combination of political, administrative, and aspirational considerations. This subsection begins by identifying the basic features of a low-income energy-cost-offset program that are necessary for the enactment and future survival of such a program. Next, this subsection focuses on how to match subsidy funds both with their specific purpose and with the general goals of climate change legislation. This subsection concludes by addressing the administration of the new offset program. This is cru-

²⁸¹ See, e.g., *West v. Sullivan*, 973 F.2d 179, 188-89 (3d Cir. 1992) (permitting the limitation of food-stamp SUA benefits to households whose utility costs exceeded the rebated portions of their PHA utility allowances); *Rodriguez v. Cuomo*, 953 F.2d 33, 42-44 (2d Cir. 1992) (upholding a state regulation that made recipients of utility allowances ineligible for LIHEAP benefits); *West v. Bowen*, 879 F.2d 1122, 1130-32 (3d Cir. 1989) (prohibiting the inclusion of PHA utility allowances in income for the purpose of determining food-stamp benefits); *Dep't of Health & Welfare, Idaho v. Block*, 784 F.2d 895, 900-01 (9th Cir. 1986) (considering vendor-paid energy costs under the LIHEAP when computing the food-stamp shelter deduction); *Clifford v. Janklow*, 733 F.2d 534, 538-40 (8th Cir. 1984) (disallowing consideration of HUD subsidies when computing LIHEAP benefits); cf. *Md. Dep't of Human Res. v. U.S. Dep't of Agric.*, 976 F.2d 1462, 1470-73 (4th Cir. 1992) (permitting the inclusion of state energy assistance in computing food-stamp benefits).

cial because administrative shortcomings have been major sources of both substantive failure and political attacks in existing social-welfare programs.

a. *Political Efficiency*

The challenges of winning a program's initial enactment and of preserving it over time are quite different. Conventional political science emphasizes the advantage flowing to the party defending the status quo on an issue: it is easier to block changes than to initiate them. This lesson is only partially applicable to spending programs, whose supporters require continual government action. At each juncture, the program's health depends on leveraging funds with available political support. Initiating a program requires a great deal of funding, but it also comes at a time when attention to and support for the program's mission are at their apogee. The amounts of funding at issue in any particular battle over preserving a program's effectiveness are far smaller—absent a political sea change, not many programs lose more than a few percentage points of their nominal funding in any given year—but bringing political support to bear is far more difficult. This is particularly true of programs whose support depends on the general public's altruism: maintaining the public's consistent focus on most issues, certainly including low-income people's well-being, is difficult to impossible. These programs rarely have natural support from powerful interest groups and must compete with programs that do. Thus, a program's designers must consider both what they can enact initially and what they can maintain under very different political conditions in the future.

i. Initiating a Program

The keys to converting strong but transient public sympathy into legislation are speed and simplicity. Speed is crucial because the public's altruism will not remain focused on a particular cause for long. Although altruistic concerns are not wholly fungible, if delays prevent public-spirited voters from achieving satisfaction through addressing one social ill, they are likely to move on to another.²⁸² Antipoverty advocates discovered this in the 1970s when they helped to defeat first

²⁸² In economic terms, one can conceive of the public-spirited electorate as seeking to trade attention and funding for satisfaction. If votes cannot close the deal with one "vendor"—one social cause—a competitor is likely to enter the market, offering a better "price"—requiring less sustained attention—to achieve a sense of accomplishment.

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

Simplicity, in turn, is important because an altruistic electorate is unlikely to have the inclination or capacity to engage in detailed policy analysis. If voters cannot easily understand the proposal, they may either doubt that it addresses the identified problem or suspect that their good will is being manipulated for unclear ends. The greatest weakness of President Clinton's proposed 1993 health care plan was not any particular design defect but rather the fact that, at more than 1500 pages and built to defy simple explanations, the public could not understand it. Aside from policy wonks, people had no basis on which to distinguish the Clinton plan from its competitors or to judge the merits of the many accusations regarding its contents. The health care reform plans that the House and Senate recently passed have similar shortcomings.

A proposal need not be simple on its face as long as the public can be given a clear and credible version of what the legislation does. The need to present such a picture explains the appeal of bipartisanship even when the majority party does not immediately need the opposition's votes: voters seeing supporters from both parties are more likely to accept that a simple account of the proposal is an accurate one.

Speed and simplicity are closely related. The more time a proposal lingers, the more opportunities interest groups have to lobby for provisions increasing its complexity (or cost), and the more opportunities critics have to raise doubts about the simple explanation its sponsors have offered. Simpler proposals, in turn, can be drafted, costed, and negotiated more quickly.²⁸³

ii. Maintaining a Program

A program's designers can pursue several different strategies for ensuring its future durability. One is to try to develop a self-interested constituency that can defend the program when the public's attention wanes. For a variety of reasons, social welfare programs' front-line administrative staff have not proven formidable champions of the programs' funding.²⁸⁴ Utility companies have lent some political sup-

²⁸³ Simpler proposals also can be implemented more quickly, reducing the dangers of a quick repeal.

²⁸⁴ See William H. Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198, 1260-69 (1983) (noting that the interests of those who work for benefits pro-

port to LIHEAP and the earned-income tax credit (EITC) because they help recipients pay bills. Once climate change regulation begins, however, those companies' political agendas are likely to fill with matters more central to their profitability.

Providing benefits to higher-income people, who tend to be more politically active, is another oft-discussed approach. Certainly the strength of the most important single redistributive program in this country—Social Security—springs from its strong self-interested support from middle-income voters. Medicaid, too, may have avoided being block-granted in 1995 and 1996 because its long-term-care component serves large numbers of middle-income families.

Nonetheless, designing programs to be universal—to provide benefits without regard to claimants' means—faces several obstacles. Middle-income Americans are very selective about which benefits they want to receive from the government. If they do not feel a strong need for a benefit, they are likely to resent the taxes that fund it more than they appreciate the benefit itself. The fate of the all-too-aptly named “catastrophic health care” plan of 1988—public insurance against the otherwise unreimbursed costs of a major illness that Congress quickly repealed after Medicare beneficiaries rebelled against the required premiums²⁸⁵—shows the divergent political valences of taxes and benefits. Many regard cash and near-cash transfers as acceptable only if they can be understood as social insurance. Ongoing offsets for higher prices resulting from carbon-emissions regulation fit that model badly and thus cannot be expected to win strong middle-income support.

A common response both to the political weakness of low-income people and to the middle-income people's disdain for wealth transfers is to rely on the tax system. Tax expenditures receive far less analytical and political scrutiny than spending programs.²⁸⁶ The tax system, however, tends to be a rather inefficient tool for these purposes. First, most devices for transferring wealth to low-income people also spend significant sums on higher-income individuals. As a result, they reduce the subsidies that can be provided at any given funding level.

grams and the beneficiaries of such programs often have divergent interests, partially as a result of the two groups coming from different economic and ethnic backgrounds).

²⁸⁵ David Dahl, *Catastrophic Coverage: Lawmaking Gone Awry*, ST. PETERSBURG TIMES, Dec. 17, 1989, at 1D (describing the many flaws in the Catastrophic Coverage Act, including the fact that it funded the health care of seniors with a surtax on other seniors).

²⁸⁶ See JACOB S. HACKER, *THE DIVIDED WELFARE STATE* 11 (2002) (noting that tax expenditures, although equivalent to government spending, receive very little public scrutiny).

Because these amounts are spread across large numbers of people, even a badly leaking tax preference is unlikely to benefit any particular middle-income taxpayer enough to increase its political support appreciably. Second, the IRS's administrative structure limits the ability to effectively target benefits to need.²⁸⁷ Third, the most prominent device for offsetting costs through the tax code—the deduction—is regressive. A \$1,000 deduction translates into far more tax savings for an affluent person in a high tax bracket than for a family of modest means.²⁸⁸ Finally, reaching low-income people through tax policy requires an additional, often difficult, political step: making the preference refundable for those with no net tax liability. This largely rules out deductions, but even redistributive credits are often not fully refundable. For example, the child tax credit (CTC) is only partially refundable,²⁸⁹ and the dependent-care tax credit is not refundable at all.²⁹⁰ House Republicans harshly criticized efforts to accelerate portions of the 2001 tax cuts that primarily benefited households through refundability.

With little realistic prospect of enlisting politically powerful self-interested backers, the preservation of any low-income offset program will depend on mobilizing altruistic public opinion. Because the electorate's future responsiveness is uncertain—some other cause may be occupying its attention at the pivotal juncture—minimizing the number of challenges is far more important for this sort of program than for those with reliable rent-seeking constituencies. Thus, establishing the program as a budgetary entitlement²⁹¹ independent of annual appropriations battles is pivotal: few discretionary programs for low-

²⁸⁷ See Anne L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533, 564-89 (1995) (discussing the consequences of the IRS's institutional limitations in administering a tax-and-transfer benefit program); David A. Super, *Privatization, Policy Paralysis, and the Poor*, 96 CAL. L. REV. 393, 434 (2008) (describing institutional limitations of the IRS, including the fact that "[t]he IRS has no system of local offices to help claimants apply, to answer their questions about the program's rules, or to examine verification of their eligibility"); see also *infra* subsection III.B.2.b (describing how benefits might be targeted more efficiently).

²⁸⁸ See Lily L. Batchelder et al., *Efficiency and Tax Incentives: The Case for Refundable Tax Credits*, 59 STAN. L. REV. 23, 24 (2006) (proposing a uniform refundable tax credit).

²⁸⁹ See 26 U.S.C. § 24(d) (2006) (providing for the partial refundability of the child tax credit); Batchelder et al., *supra* note 288 at 36-37 (describing the history and refundability of the credit).

²⁹⁰ Batchelder et al., *supra* note 288, at 55.

²⁹¹ See Super, *supra* note 277, at 652-53 (describing a budgetary entitlement as a program "whose funding level is not ordinarily determined through the annual competitive appropriations process").

income people have avoided steady erosion.²⁹² Similarly, if the program is not designed to adjust automatically for inflation, its supporters are unlikely to mobilize effectively for annual battles to protect its real value.²⁹³

To mobilize sympathetic voters to help fend off periodic challenges, simplicity of concept is almost as important to preserving a program as it is to creating one. A gangly program with many features whose interrelationships are difficult to fathom can be dismembered piece by piece without the public comprehending what is happening. These silent reductions can affect either the number of people receiving benefits or the amount of assistance beneficiaries receive. By far the best security against the former danger is to design a program as a responsive entitlement: a program in which participation depends solely on the number of applicants meeting eligibility criteria, not the amount appropriated.²⁹⁴ A responsive entitlement requires that any reductions in eligibility be achieved through relatively transparent designations of those affected. A program's architects can guard against benefit erosion by establishing it as a functional entitlement, specifying its benefits not as an arbitrary amount but as whatever is sufficient to accomplish some specific function.²⁹⁵ Thus, for example, a carbon-regulation offset established in dollar terms is likely to become frozen, thus causing its real value to erode over time.²⁹⁶ By contrast, basing

²⁹² The Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) is an exception, but the extraordinary qualities that have allowed it to do so highlight the difficulty of this task. WIC delivers an exceptionally appealing commodity (high-nutrition foods) to exceptionally sympathetic people, competes for funding in an exceptionally unsympathetic appropriations bill (agriculture), and is one of the few social programs with compelling research evidence that it is cost-beneficial even under a stringent definition of that term. See PETER H. ROSSI, FEEDING THE POOR 51-63 (1998) (discussing WIC's effectiveness). Some other programs, such as LIHEAP, erode in most years but occasionally regain prominence and receive one-time increases only to begin to shrink again. See *supra* notes 250-252.

²⁹³ The cost of adding adjustments for inflation compounds in future years, making it very difficult to offset. Even a proposal as popular as adjusting the threshold for the alternative minimum tax (AMT) has so far proven impossible to pass on an ongoing basis. See AVIVA ARON-DINE, CTR. ON BUDGET & POLICY PRIORITIES, EXTENDING THE PRESIDENT'S TAX CUTS AND AMT RELIEF WOULD COST \$4.4 TRILLION THROUGH 2018, at 3 (2008) available at <http://www.cbpp.org/files/1-31-07tax.pdf> (discussing the extraordinary cost of extending relief from the AMT).

²⁹⁴ See Super, *supra* note 277.

²⁹⁵ A functional entitlement is an entitlement that includes a guarantee that it will meet some conceptually defined need of its beneficiaries. Medicaid, for example, assures access to necessary health care services. See Super, *supra* note 277, at 655-58, 678-80.

²⁹⁶ Even if this amount is indexed in the initial legislation, indices in low-income benefits programs have proven politically easy to repeal, perhaps due to the electo-

benefits on the estimated cost increase for the average family of a specified type would allow benefit levels to adapt automatically to changes in the regulatory regime.²⁹⁷ It also would force those who would cut benefits to explain why that principle should no longer apply, in turn triggering a debate that should be relatively transparent to the news media and voters.

b. *Target Efficiency*

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

In several important respects, however, targeting can be improved without seriously undermining either the practical or the expressive effects of incentives. The remainder of this subsection explores these possibilities.

i. Balancing Targeting and Incentives

Debates about the design of major means-tested programs in this country long have been dominated by the conflict between the goals of targeting and incentives. Unlike many debates in antipoverty law, this one does not break down on left/right grounds: Ronald Reagan

rate's lack of quantitative sophistication and indices' lack of dramatic impact in any given year. See David A. Super, *The Quiet "Welfare" Revolution: Resurrecting the Food Stamp Program in the Wake of the 1996 Welfare Law*, 79 N.Y.U. L. REV. 1271, 1373 (2004) (describing the difficulty of reinserting inflation adjustments into the Food Stamp Program after the 1996 welfare law removed them).

²⁹⁷ See 7 U.S.C. § 2012(o) (2006) (defining the maximum food-stamp benefit in such terms). To be sure, an unsympathetic and determined administration could attempt to change the formula by which carbon regulation's impact is estimated. This, however, is vulnerable to being portrayed as "cooking the books": the Reagan Administration's attempt to reduce school-meal subsidies while counting ketchup as a vegetable collapsed at considerable political cost to that administration. See DOUGLAS R. IMIG, *POVERTY AND POWER* 18 (1996) (describing the liberal backlash to Reagan's attempt to cut school-lunch programs).

and Daniel Patrick Moynihan advocated targeting;²⁹⁸ Newt Gingrich and David Ellwood focused on incentives.²⁹⁹ Targeters maintain that the limited public funds available for social programs can be spent most efficiently—i.e., can do the most good—if concentrated on those in greatest need.³⁰⁰ Some conservatives also emphasize targeting by disputing the appropriateness of public interventions absent any but the direst deprivations and by arguing that receipt of direct public aid is demeaning and should be confined to as few people as possible. Thus, President Reagan justified his sweeping cuts of low-income programs as an effort to limit them to the “truly needy,” who, he said, would retain a “safety net.”³⁰¹ Pragmatic progressives may see targeting as protection against critics’ efforts to induce taxpayers’ jealousy by portraying recipients of benefits as better off than those whose taxes fund that aid. Those with direct experience working in low-income communities may favor targeting both because such a practice eliminates the most wrenching crises and because they are skeptical that incentives built into public-benefits-program rules have much practical effect.

Incentivizers, by contrast, see public benefits programs in more economic terms, taking a dynamic view of low-income people’s relationships with those programs.³⁰² They want to give more aid to those engaged in certain socially desirable activities. To the extent that these activities make the claimant better off financially, rules that reward the activities produce results precisely opposite to those targeting benefits based on need. Work has long been the main, although

²⁹⁸ See R. KENT WEAVER, *ENDING WELFARE AS WE KNOW IT* 238 (2000) (describing Moynihan’s endorsement of prioritizing aid for the lowest-income families); Martin Anderson, *The Objectives of the Reagan Administration’s Social Welfare Policy* (describing Reagan’s policy of targeting the poorest people with social welfare programs), in *THE SOCIAL CONTRACT REVISITED: AIMS AND OUTCOMES OF PRESIDENT REAGAN’S SOCIAL WELFARE POLICY* 15, 23 (D. Lee Bawden ed., 1984).

²⁹⁹ See DAVID T. ELLWOOD, *POOR SUPPORT* 19-25 (1988) (supporting an incentive-based approach to welfare); RON HASKINS, *WORK OVER WELFARE* 59-81 (2006) (describing Gingrich’s focus on incentives in designing welfare policy).

³⁰⁰ See Anderson, *supra* note 298, at 23 (noting that Reagan’s policies targeted those most in need “so that the available resources [could] be focused on those least able to take care of themselves”).

³⁰¹ *Id.* at 17-18; see also Robert B. Carleson & Kevin R. Hopkins, *Whose Responsibility Is Social Responsibility? The Reagan Rationale*, *PUB. WELFARE*, Fall 1981, at 8, 9 (presenting Reagan’s views on welfare reform).

³⁰² See ELLWOOD, *supra* note 299, at 81-104 (discussing the relationship between low-income two-parent families and social policies).

not the exclusive, focus of incentives in public benefits programs.³⁰³ David Ellwood advocated making work pay better than welfare by increasing supports to the working poor;³⁰⁴ Newt Gingrich sought to achieve the same goal by cutting welfare.³⁰⁵ Even where evidence calls into question recipients' actual responsiveness to programs' incentives, incentivizers may dislike the expressive effects of a program treating people engaged in desirable behavior better than those that are not. Conservatives that see financial poverty as a consequence of behavioral poverty favor strong incentives; some suggest that eliminating means-based programs altogether provides the strongest possible work incentive. Pragmatic progressives may prefer programs with strong behavioral incentives because they attract recipients whose actions arouse more sympathy among middle-class voters distrustful of the poor.

The tension between targeting and incentives takes on an additional dimension in remedying the distributional effects of climate change policy. High energy costs are both an important determinant of need for subsidies and sometimes the result of behavior the policy seeks to discourage. Price increases cause the sharpest reductions in consumption among low-income families,³⁰⁶ who lack the means to absorb those costs. These reductions are just what climate change policy desires, but they can cause severe hardship if the families cannot afford alternative, more energy-efficient ways of meeting their basic needs.

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

³⁰³ See, e.g., HASKINS, *supra* note 299, at 48-54 ("As with all our bills, the heart of Santorum's welfare reform agenda was the work requirement.").

³⁰⁴ See ELLWOOD, *supra* note 299, at 237-38 (recommending welfare reforms designed to encourage work, such as increasing the earned-income tax credit and raising the minimum wage).

³⁰⁵ See HASKINS, *supra* note 299, at 27-31 (describing Gingrich's support of a welfare bill with strong work requirements).

³⁰⁶ C-SNAP, *supra* note 38, at 2.

Incentives in public-benefits programs inevitably are crude instruments.³⁰⁷ They almost always fall on some individuals who lack the capacity to act in the preferred manner, such as work incentives applied to households in which all members are children or adults having to care for seriously infirm individuals.³⁰⁸

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

A more difficult question is whether to adjust for the household's location. Urban areas have dramatically lower per capita fuel consumption than rural areas.³⁰⁹ Various federal subsidies help keep alive many rural communities that experience harsh winters on the Great Plains. Significant savings thus could be achieved if more people moved to cities. Nostalgia for rural America and the strong representation of those states in the Senate ensure that concept will never gain traction in U.S. politics. Whether a low-income offset program would need to adjust its benefits for higher rural costs, however, is less clear.

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

³⁰⁷ See Alstott, *supra* note 287, at 545 ("Economic theory can establish the existence of disincentives to work or to marry, but empirical study is needed to establish whether and how those disincentives actually affect people's decisions to work or to marry.").

³⁰⁸ See, e.g., *Beno v. Shalala*, 30 F.3d 1057, 1073 (9th Cir. 1994) ("[T]he idea of imposing a work-incentive benefits cut on individuals whose disabilities preclude work can only be called absurd.").

³⁰⁹ Light, *supra* note 64, at 22-23.

ii. Temporal Targeting

Separate targeting and incentive issues arise on very different dimensions: horizontal and temporal.³¹⁰ Horizontal targeting compares different claimants and seeks to get more benefits to those in greatest need.³¹¹ Horizontal incentives, similarly, compare claimants and reward those acting in a more desired manner than their peers. Temporal targeting, by contrast, seeks to help claimants during their greatest periods of need rather than wait until the worst of a crisis has passed.³¹² Temporal incentives, by extension, activate or deactivate additional benefits whenever a claimant begins or ends compliance with desired norms.

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

This raises serious concerns about proposals to deliver relief from higher energy prices through the tax system.³¹³ At present, a full-time,

³¹⁰ See Super, *supra* note 296, at 1327-29 (discussing horizontal and temporal targeting).

³¹¹ *Id.* at 1327.

³¹² *Id.*

³¹³ See, e.g., ROBERT GREENSTEIN ET AL., CTR. ON BUDGET & POL’Y PRIORITIES, DESIGNING CLIMATE-CHANGE LEGISLATION THAT SHIELDS LOW-INCOME HOUSEHOLDS FROM INCREASED POVERTY AND HARDSHIP 12-13 (rev. ed. 2008), available at <http://www.cbpp.org/10-25-07climate.pdf> (noting that a purely tax-based assistance program would not serve around half of the low-income population); GILBERT E. METCALF, BROOKINGS INST. & WORLD RES. INST., A GREEN EMPLOYMENT TAX SWAP: USING A CARBON TAX TO FINANCE PAYROLL TAX RELIEF 2-3, 6 tbl.6 (2007), available at

year-round, minimum-wage worker supporting a family of four derives more than twenty-six percent of her annual income from the earned income tax credit (EITC) and refunds of the child tax credit.³¹⁴ Thus, a family goes through the year living about seventeen percent below the poverty line only to receive a lump sum a few months after the year is over. Analysts commonly add this delayed payment retroactively to the household's prior year's income when comparing the household to the poverty line. About half the states have their own EITCs, many adding between 3.5 and 35 percent to the federal credit.³¹⁵ Moreover, the fraction of annual income that low-income families receive through the tax system is likely to rise if important tax expenditures benefiting middle-income families are extended to low-income families through conversion to refundable credits.

In practice, EITC recipient families commonly run up debts during the year, often incurring onerous interest payments, and then try to dig themselves out when their tax refund arrives the following spring. Regulators in some northern states prohibit utility companies from terminating service during the winter months;³¹⁶ many families with large arrearages anxiously await their tax refunds, hoping they will arrive before the year's moratorium comes to an end. The temporal mismatch in PHA utility allowances is far less severe than that in an annual tax refund, yet it has resulted in many households falling seriously behind on their utilities and facing shutoffs.

In sum, the tax system is an inefficient method of delivering energy assistance. To the extent that we can increase the share of low-

http://pdf.wri.org/Brookings-WRI_GreenTaxSwap.pdf (discussing the distributional effects of a carbon tax).

³¹⁴ Author's calculations are for tax and fiscal years 2009. These calculations assume that the worker is paid for fifty weeks of work (a realistic assumption given the scarcity of paid leave in minimum-wage jobs), that the family pays the federal withholding tax but no state or local income taxes, and that the household receives food stamps, which are calculated with a typical excess-shelter-cost deduction for a working family. See WOLKWITZ & TRIPPE, *supra* note 272, at 41 tbl.10 (reporting the average excess-shelter-cost deduction values for fiscal year 2008). The combined value of earnings less withholding, EITC, and food stamps leaves the hypothetical family thirteen percent above the poverty line, in part as a result of temporary increases enacted as part of the stimulus legislation. See American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, div. A, tit. I, § 101, 123 Stat. 115, 120 (codified in scattered sections of U.S.C.).

³¹⁵ JASON LEVITIS & JEREMY KOULISH, CTR. ON BUDGET & POL'Y PRIORITIES, A MAJORITY OF STATES WITH INCOME TAXES HAVE ENACTED STATE EARNED INCOME TAX CREDITS I, 5 tbl.1 (2007).

³¹⁶ See e.g., 52 PA. CODE § 56.100 (2009) (preventing the termination of heat-related service between December 1st and March 31st).

income families' annual income derived from the tax system, we should do so to reduce those families' implicit marginal tax rates. The tax system should be assigned new non-tax-related functions only as a last resort.

iii. Reaching All Affected Low-Income People

Trying to design a system for offsetting the increased costs of energy to low-income people highlights how severely damaged our social safety net has become. Because of this country's heavy reliance on the private sector for social provision³¹⁷ and its sharply moralistic approach to public provision,³¹⁸ several large categories of low-income people have no contact with any major federal or federal-state means-tested public benefits program.

One large excluded group consists of nonelderly, childless adults who do not have a disability sufficiently severe to qualify for Social Security. These people never qualified for federal cash assistance or Medicaid, but they were eligible to receive modest state cash aid—commonly called “general assistance” or “general relief”—in many states until these programs were abolished as states struggled to cope with the recessions of the early 1980s and the early 1990s.³¹⁹ Most also have been unable to receive federal food stamps since the 1996 welfare law.³²⁰

³¹⁷ See HACKER, *supra* note 286, at 16 (“American social welfare practice is exceptional . . . not because social spending is distinctly low in comparative perspective, but because so much of that spending comes from the private sector.”).

³¹⁸ See David A. Super, *The New Moralizers: Transforming the Conservative Legal Agenda*, 104 COLUM. L. REV. 2032, 2066-72 (2004) (describing and critiquing the moralistic approach to regulation).

³¹⁹ See MICHAEL B. KATZ, *IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA* 283-85 (1986).

³²⁰ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 7, 8, 21, and 42 U.S.C.). In theory, the welfare law allowed them to receive food stamps for three months every three years while unemployed and for additional months while working at least twenty hours a week or working off their benefits in a workfare program. See 7 U.S.C. § 2015(o) (2006) (imposing a three-month time limit for receiving food stamps but exempting children, those over fifty years of age, those certified as physically or mentally unfit, and parents of dependent children). In fact, the law did not require states to establish workfare programs, and most did not, despite strong financial incentives. See *id.* § 2025(h)(1) (reimbursing state costs incurred by providing work slots to persons affected by the three-month time limit); Super, *supra* note 296, at 1344-47 (describing unsuccessful efforts to persuade states to allow childless adults to work in exchange for continued food stamps). Because most are single or only have a spouse, childless adults qualify for relatively few benefits while employed, and they seldom bother to apply. Denying this group assistance during periods of unemployment effectively removes them from the program. Today, nonelderly childless adults partic-

Some may receive unemployment compensation; however, the unemployment-compensation system is ill-equipped to administer a low-income offset program because it does not collect information on individuals' or households' incomes.³²¹ Thus, someone with large unearned income, or someone in a household with a high-salaried worker, can nonetheless collect unemployment compensation. Conversely, the unemployment-compensation system's coverage of relatively low-income workers has been declining steadily for decades as the low-end labor market has become increasingly contingent and ineligible for unemployment-compensation benefits.³²² Unemployment compensation therefore does not offer a viable mechanism for reaching low-income families in need of subsidies.

iv. Preventing Supplantation

Whatever funds can be secured for low-income offsets will provide a low return on the political capital invested to secure them if other entities can effectively divert these funds. The most likely method for diversion is supplantation, in which the intermediary reduces its own contributions apace with the infusion of offset funds. Funneling offset funds into a discretionary program such as LIHEAP or Section 8 invites appropriators to reduce the contributions they otherwise would have provided.³²³ Similarly, block grants such as LIHEAP and TANF allow states sufficient flexibility to divert increased federal funding to replace their own spending, releasing money back to their general funds.³²⁴

ipate in food stamp programs in substantial numbers only in areas where states have won waivers of the time limit due to exceptionally high unemployment. The conclusions here are based on a comparison of the data in WOLKWITZ & TRIPPE, *supra* note 272, at 67 tbl.B-5, with copies of waiver approval letters obtained from USDA.

³²¹ See STAFF OF H. COMM. ON WAYS & MEANS, 110TH CONG., 2008 GREEN BOOK: BACKGROUND MATERIAL AND DATA ON THE PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS, at sec. 4, at 4-6 to 4-11 (Comm. Print 2008), available at <http://waysandmeans.house.gov/singlepages.aspx?NewsID=10490> (discussing eligibility requirements for unemployment compensation benefits that take only earned income into account).

³²² See CHAD STONE ET AL., CTR. ON BUDGET & POL'Y PRIORITIES, ADDRESSING LONGSTANDING GAPS IN UNEMPLOYMENT INSURANCE COVERAGE 1-2 (2007) (describing gaps in the coverage of unemployment compensation such as the denial of compensation for those who experience prolonged periods of unemployment).

³²³ See *supra* notes 236-237 and accompanying text. No doubt a promise could be extracted from appropriators not to do so immediately. After a year or two, however, it will become impossible to know how they would have acted absent the offset program. Moreover, fashioning a remedy for such a breach would be most challenging.

³²⁴ See U.S. GEN. ACCOUNTING OFFICE, WELFARE REFORM: CHALLENGES IN MAINTAINING A FEDERAL-STATE FISCAL PARTNERSHIP 16 (2001), available at <http://>

Proposals to pay utility companies to aid low-income customers face a similar likelihood of leakage. The uncompensated-care requirement of the Hill-Burton Act provides a useful caution in this regard. The Hill-Burton Act conditioned federal funds for hospitals' major capital investments on recipient institutions providing uncompensated care to low-income patients in specified amounts.³²⁵ Although some hospitals took this requirement to heart and welcomed uninsured low-income patients, others continued to rebuff patients who appeared unable to pay. These hospitals treated Hill-Burton as a bookkeeping requirement and charged off their unanticipated bad debt. Similarly, separating actions the utility companies would have taken in the ordinary course of business from subsidies motivated by the carbon-regulation-offset program will be impossible. The reliance of the House bill and other proposals on having utility companies distribute energy assistance³²⁶ is thus misguided: few of those funds are likely to serve their intended purpose.

c. Administrative Efficiency

Administrative simplicity is important for several reasons. Most directly, funds spent on program administration are unavailable for benefits. In addition, an arduous or simply unfamiliar administrative process can compel claimants to spend a significant portion of their benefits on establishing and maintaining their eligibility.³²⁷ A program's administration is a relatively vulnerable political target for critics who may fear a backlash if they attack the program's core mission. Finally, a complex administrative structure delays a program's implementation, which is both a substantive and a political problem: pro-

www.gao.gov/new.items/d01828.pdf ("The programmatic and fiscal flexibility afforded states through the block grant increases the opportunity to use federal funds to replace state funding in welfare-related programs."); MILDRED REIN, *DILEMMAS OF WELFARE POLICY* 145 (1982) (maintaining that the AFDC's "open-ended federal funding" created the incentive for states to spend more money on social services with federal rather than state funds).

³²⁵ 42 U.S.C. § 291c(e) (2006).

³²⁶ See H.R. 2454, 111th Cong., § 321 (2009) (providing emission allowances for electrical, natural gas, home-heating oil, and propane consumers).

³²⁷ See David A. Super, *Offering an Invisible Hand: The Rise of the Personal Choice Model for Rationing Public Benefits*, 113 *YALE L.J.* 815, 832-35 (2004) (exemplifying how required contacts with agencies may drive up the costs of applying for benefits, therefore discouraging some claimants from seeking those benefits in the first place); Super, *supra* note 287, at 434-38 (discussing the effects of administrative costs on those applying to government programs for benefits).

grams are politically easiest to cancel before anyone has begun receiving aid.

A low-income offset program for emissions regulation therefore should operate through a single agency, to avoid requiring duplicative applications and eligibility determinations.³²⁸ Ideally, it would rely as much as possible on determinations already being made by existing programs. The major federal-state entitlement programs' administrative spending is relatively modest. In recent years, the food-stamp program's administration has never reached 15% of overall program costs.³²⁹ Medicaid's administrative costs in 2007 were 5.2% of the total program's costs.³³⁰

3. How to Offset the Regressive Effects of Higher Energy Costs

Large components of the pending climate change legislation's response to its impact on low-income consumers fare badly on all of these criteria. Their attempt to assist consumers through subsidies to utility companies are unlikely to be well-targeted, are likely to undermine incentives to conserve (to the extent that they are allocated on the basis of usage rather than need), will require utility companies to develop bureaucracies duplicating those operating public means-tested programs, and will require enormous political capital to reform once the utility companies and middle-income consumers become accustomed to receiving these subsidies. A well-designed public program should be able to do much better.

No existing program for assisting low-income people provides a workable platform for offsetting carbon-emissions controls' impact on low-income people's budgets. Cash-assistance programs lack broad coverage and, in the case of the EITC, have horrific temporal target-

³²⁸ See Jon Michaels, *Deforming Welfare: How the Dominant Narratives of Devolution and Privatization Subverted Federal Welfare Reform*, 34 SETON HALL L. REV. 573, 660 (2004) (explaining how dividing responsibility through devolution can sabotage substantive goals).

³²⁹ Author's calculations are based on data provided by the U.S. Department of Agriculture's website, Food and Nutrition Serv., U.S. Dep't of Agric., Supplemental Nutrition Assistance Program Participation and Costs (2009), <http://www.fns.usda.gov/pd/SNAPsummary.htm>. In 2009, administration consumed 10.7 percent of the program's spending.

³³⁰ Author's calculations are based on data found in EARL DIRK HOFFMAN, JR. ET AL., DEP'T OF HEALTH & HUMAN SERVS., BRIEF SUMMARIES OF MEDICARE & MEDICAID: TITLE XVIII AND TITLE XIX OF THE SOCIAL SECURITY ACT 25 (2008), available at <http://www.cms.hhs.gov/MedicareMedicaidStatSupp/downloads/2008BriefSummaries.pdf>. This ratio is dramatically lower than that in the Food Stamp Program in part because Medicaid spends almost ten times as much on benefits: the cost of many administrative functions does not vary with the value of the benefits delivered.

ing. Housing-assistance programs form a crazy patchwork; short of the mammoth sums needed to convert Section 8 vouchers to a responsive entitlement, these programs either lack the coverage to reach most of those in need or, in the case of the food-stamp shelter deduction, provide aid in a form that likely would skew households' spending decisions and leave the households still badly exposed to most of the effects of higher energy prices. Well-fed homeless people should not be the objective.

Creating a new program is a possibility. The more antipoverty programs we establish, however, the more difficulty the public has in assessing what resources genuinely are available to low-income people.³³¹ With middle-class voters having demonstrated a strong tendency to overestimate these programs' extent in the case of uncertainty, further multiplication endangers the political future of all of these programs, new and old.³³²

A superior approach would be to consolidate the existing housing assistance programs to the greatest extent possible and then increase that program's funding. Much of the legal structure, administrative base, and funding for the consolidated program can be found in the food-stamp shelter deduction. Instead of reducing households' countable incomes in the amount by which their shelter costs exceed half of their incomes (net of work and child care expenses and other compelling costs), the program would give households electronic vouchers that could be spent on rent, mortgage or land contract payments, or utility bills. Households could apply through the same state offices that operate the Food Stamp Program, subject to the same rules, definitions, nonfinancial eligibility conditions, and procedures for establishing eligibility. Although all sides—claimants' advocates, state administrators, and conservative critics of the program—dislike aspects of these rules, as a whole the rules have broad legitimacy.

The same electronic benefit transfer (EBT) systems that manage electronic food-stamp benefits could maintain households' accounts. Utility companies and mortgage-servicing companies presumably could easily accept payments through such systems. Many landlords

³³¹ See Super, *supra* note 277, at 705 (noting that the presence of many programs can make it difficult for the public to make policy judgments about those programs).

³³² Recognizing the problems with each of these approaches, the Center on Budget and Policy Priorities proposes combining them: a new cash or near-cash benefit, an expansion of the EITC, and more funding for LIHEAP. GREENSTEIN ET AL., *supra* note 313, at 12-13. Although diversifying the low-income offset's portfolio of political and operational risks surely is superior to relying solely on any one of these methods, there is nothing inconsistent about all of these negative effects occurring simultaneously.

and land-contract vendors likely would find the prospect of more reliable payments ample motivation to develop the capacity to do so as well; for those that did not, with relatively modest effort states should be able to develop the capacity to issue checks to landlords and land-contract vendors based on the tenants' and vendees' swipes of their EBT cards.

The immediate effect of converting the food-stamp shelter deduction into a freestanding program would be to significantly increase benefits for the very poorest households. As is true in the tax system, the deduction mechanism regressively offers no benefit to those whose incomes are so low they have nothing against which to apply it. Thirty percent of food-stamp households lose some or all of their shelter deductions in this way.³³³ Thus, the proposal here to create a freestanding program is analogous to proposals to convert tax deductions into refundable credits: it would make the food-stamp shelter deduction "refundable" against the household's nonfood expenses.

For all eligible households, the housing subsidy that would result from only converting the food-stamp shelter deduction into a freestanding program would be quite modest. The existing deduction provides thirty additional cents of food stamps for every dollar by which shelter costs exceed half of a household's net income, subject to a cap of \$459 per month.³³⁴ The average household claiming the shelter deduction receives \$69 in additional monthly benefits, which offsets fifteen percent of the average food-stamp household's shelter costs.³³⁵ Moreover, if food-stamp eligibility rules applied, this subsidy would be limited to households with net incomes below the federal poverty income guidelines, which are currently \$1838 per month for a family of four.³³⁶

Partly as a result of its modest benefit levels, the resulting program's targeting and incentive structure would be quite appealing. It would provide the largest subsidies for the poorest households, yet it would only increase the effective marginal tax rate on earnings by

³³³ WOLKWITZ & TRIPPE, *supra* note 272, at 40 tbl.A-9.

³³⁴ Food & Nutrition Serv., U.S. Dep't of Agric., FY 2010 Allotments and Deduction Information, http://www.fns.usda.gov/snap/government/FY10_Allot_Deduct.htm (last visited Feb. 15, 2010).

³³⁵ Author's calculations based on WOLKWITZ & TRIPPE, *supra* note 272, at 32 tbl.A-2, 41 tbl.A-10.

³³⁶ Food & Nutrition Serv., U.S. Dep't of Agric., FY 2010 Income Eligibility Standards, http://www.fns.usda.gov/snap/government/FY10_Income_Standards.htm (last visited Feb. 15, 2010).

twelve percent.³³⁷ It also would require recipients to pay seventy percent of their marginal shelter costs, which would be a powerful incentive to conserve.

To cover the cost of providing shelter-cost assistance to the poorest households—those households too poor to fully benefit from the existing food-stamp shelter deduction—and to begin to deepen and possibly broaden the subsidy, funds from other programs could be merged into this program. The most obvious candidate is LIHEAP, which, as a block grant, has little content except its funding.

More contentious, but more important, would be incorporating some of the major HUD rental-assistance programs. Section 8 housing vouchers' purpose and function closely resemble the new program. Section 8 vouchers differ from similar programs largely in that they provide much deeper subsidies to tenants, supporting somewhat higher rent levels to landlords, and that they leverage these more generous rents to impose some housing quality standards on landlords. Whatever one's view of the general merits of housing-code enforcement,³³⁸ having the federal government direct PHAs to duplicate the work of local housing inspectors for a small fraction of rental units seems rather awkward. With so many low-income families hard-pressed by housing costs,³³⁹ providing such deep subsidies to a haphazardly chosen minority seems difficult to defend when the resources could benefit equally impoverished people receiving only the thinnest

³³⁷ Author's calculations based on food-stamp-benefit computation formula. The Food Stamp Program's earned income deduction leaves only eighty percent of earnings to be counted. Only half of those earnings are counted as available to pay for shelter costs. Of the resulting excess shelter costs, only thirty percent are reimbursed.

³³⁸ Compare, e.g., Bruce Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 YALE L.J. 1093, 1095 (1971) (arguing that government subsidies combined with stricter enforcement of housing codes may lead to higher-quality housing for low-income people without a corresponding increase in rent), and Duncan Kennedy, *The Effect of the Warranty of Habitability on Low Income Housing: "Milking" and Class Violence*, 15 FLA. ST. U. L. REV. 485, 485 (1987) (arguing, contrary to the popular view, that warranties of habitability can "benefit low income tenants at the expense of their landlords"), with Neil K. Komesar, *Return to Slumville: A Critique of the Ackerman Analysis of Housing Code Enforcement and the Poor*, 82 YALE L.J. 1175, 1188-91 (1973) (criticizing Ackerman's methodology and conclusions).

³³⁹ Stephen Malpezzi and Richard Green argue that unaffordability has replaced defective conditions as the chief malady in the low-income housing market. Stephen Malpezzi & Richard K. Green, *What Has Happened to the Bottom of the US Housing Market?*, 33 URB. STUD. 1807, 1807 (1996) ("Two central facts about the bottom of the [U.S.] housing market are easy to characterise: housing quality has improved dramatically for most low-income households, but they are paying much larger shares of their income for it.").

subsidies under the current system. In the particular context of climate change, the more market-reliant structure proposed here would provide better temporal and horizontal targeting to need as well as better incentives to conserve energy than the Section 8 utility-allowance system can.

Section 8 project-based subsidies could not be converted as quickly because they are committed by multiyear contracts. As those contracts expire, however, the considerable challenges this program has faced³⁴⁰ suggest that converting its resources to strengthen the new voucher program would be wise. Converting those resources directly into increased purchasing power for low-income families should produce results that are at least as positive.

On the other hand, terminating operating subsidies for public housing would cause an immediate, dramatic reduction in the low-cost housing stock and would waste those assets. Further, the weatherization program's mission is both distinct from and important to ongoing housing-cost assistance. The program seems best left as is.³⁴¹

Expanding this new voucher program, initially with funds from LIHEAP and Section 8 and then with the proceeds of carbon-emissions regulation, could take several paths. First, the fraction of subsidized costs could be increased above thirty percent. That would not expand eligibility and would provide the same percentage increase in benefits for all recipients. Any affordable increase would be likely both to retain strong incentives for conservation and to raise effective marginal tax rates only a few percentage points.

³⁴⁰ In particular, the program has been unable to capture the value of the de facto options it grants landlords. If the market value of the development has declined over the length of a contract, the landlord generally can count on the PHA to renew it. With tenants rendered largely insensitive to the amount of rents and HUD regulating permissible charges across metropolitan areas, the landlord need absorb relatively little of the decline in property value. On the other hand, if the value of the property has risen—perhaps with gentrification occurring closer—the landlord can decline to renew, evict the low-income tenants, and raise rents or convert to condominiums. As Congress has required PHAs to enter into shorter contracts to meet targets for lowering budget authority, this problem has worsened.

³⁴¹ In principle, folding the Low-Income Housing Tax Credit (LIHTC) into the new program would make roughly \$6 billion per year in additional funding available. See STAFF OF JOINT COMM. ON TAXATION, 110TH CONG., ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2007–2011, at 28 (Comm. Print 2007). Enhancing low-income families' power in the housing market likely would stimulate the creation—and upkeep—of affordable housing far more efficiently than having the government pick winners, as the LIHTC does. In practice, because that money goes directly to a relatively small, well-organized group of developers, collective action problems likely would doom any such attempt.

Second, the threshold above which the subsidy applies could be reduced below half of net income. It would reduce further the program's already-modest work disincentives and leave incentives to conserve largely unchanged. The resulting increase in benefits would accrue overwhelmingly to less-poor households (some of whom would newly qualify). It would also skew benefits toward those with more modest shelter costs, although less dramatically.³⁴²

Finally, income eligibility limits could be raised from those that apply to the Food Stamp Program. This would probably be largely symbolic: likely, relatively few of those individuals made eligible would apply. Because they would receive smaller benefits and because they have more alternatives, households at the higher reaches of the Food Stamp Program's income eligibility range consistently participate at low rates. Nonetheless, allowing potential recipients to make that decision for themselves is likely to result in better targeting than a rigid financial-eligibility limit.³⁴³

The housing-voucher program proposed here would not directly address the higher prices low-income families pay for transportation and for other goods and services. Because housing consumes such a large fraction of a low-income household's budget, however, reducing those costs would allow household members to spend more on other things.

Creating this program could give rise to jurisdictional problems in two respects. First, assuming that the new housing-subsidy program would fall under the banking committees' jurisdictions—as existing HUD programs have—it would transfer billions of dollars of mandatory and discretionary spending to those committees both from the agriculture committees and from the committees with jurisdiction over LIHEAP. Both as a matter of pride and because of the flexibility that comes from the ability to transfer funds between programs, committees tend to resist losses of jurisdiction over spending, especially in mandatory programs. The common solution is some sort of a swap: with many specialized financial institutions now serving the

³⁴² Dividing incremental funding evenly between the two kinds of changes—consideration of shelter costs that exceed less than half of household income *and* reimbursement of a higher fraction of those that do—would also have a regressive effect.

³⁴³ See Super, *supra* note 327, at 830-32 (describing how the administrative burdens of participation can target program benefits to those who will gain most from them).

agricultural and educational sectors, it seems possible such a trade could be worked out.³⁴⁴

Second, folding discretionary funding from LIHEAP and HUD rental-assistance programs into a mandatory housing-voucher program would move funds across an important barrier in the federal budget process. Discretionary spending is controlled with caps in the Congressional Budget Act³⁴⁵ and allocations in the annual budget resolution.³⁴⁶ Mandatory (“entitlement”) spending and revenues are controlled substantively with the pay-as-you-go requirement³⁴⁷ and procedurally through reconciliation legislation.³⁴⁸ Thus, in the ordinary course of events, the budget rules would not count elimination of a discretionary-spending program as producing any savings that could be applied to pay for more mandatory spending. This is because merely eliminating LIHEAP or some HUD programs would leave appropriators free to spend more on other discretionary programs under their discretionary caps and annual allocations. Here, too, the solution is a sort of swap: to reflect the programs’ transfer to the mandatory side of the ledger, OMB could lower the discretionary baseline and caps, which would likely induce the budget committees to do the same with their allocations.³⁴⁹ Such a transfer would have the effect of reducing appropriators’ jurisdiction, making it politically perilous. On the other hand, the climate change legislation as a whole is likely to be moving significant sums across the same divide but in the opposite direction: funding research and other prototypically discretionary activities through the new system’s revenues.

CONCLUSION

Climate change is no ordinary policy problem. Its regulation certainly is no ordinary policy initiative. No one should be surprised, therefore, that making principled choices about its substantive scope

³⁴⁴ Possibly complicating this bargaining is the fact that these antipoverty programs all have relatively low political profiles within these committees. Devising a commensurate trade of peripheral pieces of one committee’s jurisdiction for core elements of another’s could be challenging, especially because five trades across the two chambers would have to be negotiated simultaneously.

³⁴⁵ See 2 U.S.C. § 901(c) (2006) (setting discretionary spending limits). For now, Congress has allowed the multiyear caps that prevailed in the 1990s to expire.

³⁴⁶ *Id.* § 633(a)(1).

³⁴⁷ See *id.* § 902 (requiring sequestration of government spending when certain kinds of enacted direct spending or revenue legislation increase the deficit).

³⁴⁸ *Id.* § 641.

³⁴⁹ See *id.* § 901(b)(1)(A).

requires more than routine policy analysis. A purely political calculus will likely result in legislation that undervalues urgent human needs while providing environmentally counterproductive subsidies to existing polluters. On the other hand, a purely sentimental approach will also prove unavailing, wasting large sums on projects that, while appealing, are likely to receive adequate funding from elsewhere. Yet even if policymakers can resist these temptations, they nonetheless will face many more legitimately worthy and important claims than available funds can possibly satisfy. Policy-analysis tools designed to assess each proposal's cardinal merit, or at best compare a handful of similar approaches to a similar problem, offer little hope of sorting through this blizzard of policy proposals. No rational response is possible without effective, defensible principles for determining which ancillary claims ought to be joined with climate change legislation.

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

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

The cost of climate change reform cannot be shouldered by the weakest among us. Fortunately, it does not have to be.