

# “The Grass is Not Always Greener” Revisited: Climate Change Regulation Amid Political Polarization

Hari M. Osofsky<sup>†</sup> & Jacqueline Peel<sup>††</sup>

*In 2016, we co-authored a symposium article, The Grass is Not Always Greener: Congressional Dysfunction, Executive Action, and Climate Change in Comparative Perspective, 91 CHI.-KENT L. REV. 139 (2016), that compared the impact of polarization on the process of creating climate change law and policy in the United States and Australia. We found that while the United States relied heavily on administrative regulation because comprehensive climate change legislation could not pass Congress, Australia’s flip-flopping legislation did not offer a demonstrably superior solution. We did not at the time foresee the political changes that would take place in both countries over the five years that followed. The transitions from President Obama to President Trump to President Biden have involved dramatic shifts in regulatory policy at the same time as the same conservative Coalition government has until recently continued to hold power in Australia. This Article revisits our thesis, given these changes, that both forms of government face barriers to effective lawmaking when deep partisan divisions exist. We find that although the politics of particular periods may make one political system more stable in approach than the other, neither country has made consistent progress in addressing the problem of climate change. In addition, subnational governments and other key stakeholders have taken action in both countries when confronted with partisan barriers at the federal level. We conclude that the dramatic regulatory shifts in the United States and the limited regulatory action in Australia over the past five years only bolster the importance of advancing substantive and structural strategies that foster greater cooperation.*

---

<sup>†</sup> Dean, Myra and James Bradwell Professor of Law, and Professor of Environmental Policy and Culture (courtesy), Northwestern Pritzker School of Law.

<sup>††</sup> Professor, University of Melbourne, School of Law, Australia; Director, Melbourne Climate Futures. A special thanks to Melbourne Climate Futures Research Fellow, Rebekkah Markey-Towler, for her assistance with referencing for this Article. We are also grateful for the insightful suggestions of Professors Lisa Benjamin and David Spence.

“The Grass is Not Always Greener” Revisited

Introduction.....	816
I. Evolving Partisanship in the United States and Australia .....	818
A. United States .....	818
B. Australia .....	820
II. U.S. Regulatory Instability.....	822
A. U.S. System of Governance .....	823
B. Dramatically Shifting U.S. Climate Change Policy .....	824
1. Obama Administration.....	825
2. Trump Administration .....	827
3. Biden Administration.....	829
C. Climate Action by Subnational Governments and Corporations.....	832
III. Declining Australian Regulation.....	835
A. Australia’s Parliamentary System of Governance.....	836
B. Australian Climate Policy: Federal Intransigence .....	840
C. Multilevel Action and Subnational Experimentation .....	847
Concluding Reflections.....	853

## Introduction

In 2016, we co-authored an article for a symposium convened by the *Chicago-Kent Law Review* analyzing the complex barriers that partisanship poses to progress on climate change law and policy.<sup>1</sup> At the time, under the Obama Administration, there was no prospect of comprehensive climate change legislation passing Congress, and so the Administration's climate change strategy relied heavily on executive orders under existing environmental law. We compared this approach to that of Australia, where there was also deep polarization about climate change but the parliamentary form of government meant that passing legislation was possible.

We found that the “grass was not always greener” when dealing with climate change in parliamentary governance systems. While the U.S. experience under the Obama Administration had been one of congressional obfuscation and subsequent efforts by the federal executive to circumvent such barriers, the Australian experience of flip-flopping between progressive climate legislation under a liberal government and its rapid repeal by an incoming conservative government did not offer a demonstrably superior solution.<sup>2</sup>

We did not at the time foresee the political changes that would take place in both countries. Although we noted differences in how Republican and Democratic administrations approached climate change, the transitions from President Obama to President Trump to President Biden have involved far more dramatic shifts in regulatory policy. In Australia, the opposite situation has emerged, with the stagnation of climate policy positions as the same conservative Coalition government has continued to hold power until very recently, from 2013 to late May 2022, although under a succession of different leaders (Prime Ministers Abbott, Turnbull, and Morrison respectively).

Five years on, we revisit our thesis that parliamentary democracies are no more effective at dealing with complex policy issues, such as climate change, where deep partisan divisions exist. Although public attitudes are shifting<sup>3</sup> and both countries are again parties to the 2015 Paris Agreement,<sup>4</sup> high levels of political partisanship on issues of climate change persist in the United States and Australia, with important implications for progress on the clean energy transition. Moreover, while the Paris Agreement provides a common global framework for climate action, including temperature limits and a net-zero goal,<sup>5</sup>

---

1. Hari M. Osofsky & Jacqueline Peel, *The Grass is Not Always Greener: Congressional Dysfunction, Executive Action, and Climate Change in Comparative Perspective*, 91 CHI.-KENT L. REV. 139 (2016).

2. *Id.*

3. *See infra* Part II.

4. *See* Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104 [hereinafter Paris Agreement].

5. Article 2(1)(a) of the 2015 Paris Agreement calls on parties to hold global average temperature rises “to well below 2°C above pre-industrial levels” and to pursue efforts to contain temperature rises to no more than 1.5 degrees Celsius. *Id.* art. 2(1)(a). Article 4(1) of the Paris Agreement

it emphasizes the role of national policymaking in achieving these objectives through “nationally determined” and “self-differentiated” contributions.<sup>6</sup>

In this Article, we compare the U.S. approach to national climate policymaking with that of Australia over the last five years. Australia does not face the same level of legislative gridlock that confronts the U.S. Congress because the party that leads its House of Representatives selects the Prime Minister. However, despite the enactment of progressive federal climate change legislation in the mid-2010s,<sup>7</sup> the shift in power to a conservative government in 2013 resulted in the repeal of that legislation<sup>8</sup> and the entrenchment of lackluster federal climate policies that had positioned Australia as a “climate laggard” in international climate negotiations.<sup>9</sup> This new chapter in climate change regulation in both countries indicates that while the politics of particular periods may make one political system more stable in approach than the other, neither system has been able to make consistent progress in addressing the problem of climate change. The experience of both countries also involves actions by subnational governments and other key stakeholders when confronted with partisan barriers at the federal level.<sup>10</sup>

Part I of this Article briefly sketches the landscapes of public attitudes and partisan divides around climate change in the two countries, which shape regulatory efforts. Parts II and III then revisit our earlier examination of the respective experiences in the United States and Australia in attempting to make progress on climate action in a partisan environment, updating for the respective developments of the previous five years. These Parts compare the two countries’ systems of government and administrative law regimes that shape environmental governance, how each functions when the public and political parties are deeply divided on policy questions, and the ways in which these interactions have played out in the development of climate policy between 2016 and 2021, including through encouraging climate action by non-federal entities. Part IV concludes with our reflections on the difficulties faced under both systems and considers possibilities for a better way forward.

---

commits parties to a goal of reducing emissions “so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases [i.e. net zero emissions] in the second half of this century.” *Id.* art. 4(1).

6. See *id.* art. 4; see also Lavanya Rajamani, *Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics*, 65 INT’L & COMPAR. L. Q. 493 (2016).

7. *Clean Energy Act 2011* (Cth) (Austl.).

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

9. John Hewson, *Australia, The Climate Laggard, Could Lead the World: Over to You, PM*, SYDNEY MORNING HERALD (Dec. 16, 2020), <https://www.smh.com.au/environment/climate-change/australia-the-climate-laggard-could-lead-the-world-over-to-you-pm-20201216-p56nua.html> [https://perma.cc/PF6B-3A79].

10. See Hari M. Osofsky & Jacqueline Peel, *Energy Partisanship*, 65 EMORY L.J. 695, 702 (2016).

## I. Evolving Partisanship in the United States and Australia

This Part explores evolving patterns of partisanship. Over the five years since our original study, the United States and Australia have taken different paths. In the United States, polarization regarding climate change, including views on climate change science, has continued to increase over the course of the Trump Administration and beginning of the Biden Administration. During this same time period, there has been continued polarization in Australia, but with a trend towards a belief in the need for climate change action. However, as discussed in more depth in Part II, neither country has seen significant legislative action to address climate change. The primary difference is that while Australian regulation has aligned with legislative inaction, the U.S. regulatory regime has experienced dramatic swings as presidential administrations have transitioned.<sup>11</sup>

### A. United States

The United States remains deeply divided on issues of climate change, with polls showing that partisanship has remained relatively steady regarding the big picture of climate change but has worsened in specific ways in the years since our original article. A January 25, 2022 Pew Research Center Report found that significantly more people agree with Democrats (44%) than Republicans (22%) on climate change, and these numbers are nearly identical to those polled in 2016, with minor shifts in intensity of views.<sup>12</sup>

A March 2021 Gallup poll also found relatively steady views over time regarding whether climate change is caused by human activities (64%) and has begun to have effects (59%), but found that the gap between Republicans and Democrats had increased on other questions. For example, the percentage difference widened between Republicans and Democrats who believe that the effects of climate change have begun—from 13% in 2001 to 37% in 2016 to 53% in 2021. As of the 2021 poll, 82% of Democrats, 59% of Independents, and 29% of Republicans believe this.<sup>13</sup>

Partisan divergence has similarly increased regarding whether climate change will pose a serious threat to poll respondents or their way of life in their lifetime, from 16% in 2001 to 38% in 2016 to 56% in 2021. As of 2021, 67% Democrats, 43% of independents, and 11% of Republicans have this view.<sup>14</sup>

A December 2020 study of the Yale Program on Climate Change Communication and George Mason University Center for Climate Change

---

11. See *infra* Part II.

12. *Biden Starts Year Two with Diminished Public Support and a Daunting List of Challenges*, PEW RSCH. CTR. 19, 47 (Jan. 25, 2022), <https://www.pewresearch.org/politics/2022/01/25/biden-starts-year-two-with-diminished-public-support-and-a-daunting-list-of-challenges/> [https://perma.cc/4485-ZJ2X].

13. Lydia Saad, *Global Warming Attitudes Frozen Since 2016*, GALLUP (Apr. 5, 2021), <https://news.gallup.com/poll/343025/global-warming-attitudes-frozen-2016.aspx> [https://perma.cc/LE3F-489U].

14. *Id.*

Communication likewise found a growing gap in views on whether climate change should be a priority for the President and Congress. Between October 2015 and December 2020, the percentage of liberal Democrats holding this view increased by twelve and the percentage of moderate/conservative Democrats increased by seventeen. During the same time period, the percentage of conservative Republicans holding this view declined by seven and the percentage of liberal/moderate Republicans holding this view increased by two.<sup>15</sup>

Divides have also widened with respect to key energy policy issues relevant to climate change following the transition from President Trump to President Biden, according to a May 2021 Pew Center report.<sup>16</sup> For example, although most Republicans still support expanding wind and solar power, their support for wind has decreased by 13% and their support for solar has decreased by 11% since Trump left office.<sup>17</sup> Similarly, 10% more Republicans and Republican leaners now support expanding oil and natural gas hydraulic fracturing, and 6% more support both offshore oil and gas drilling and coal mining.<sup>18</sup>

However, the Pew Research Center report found important differences among Republicans based on their age. For example, 49% of Gen Z and 48% of Millennial Republicans and Republican leaners support prioritizing action to reduce the effects of climate change today even if there are fewer resources to deal with other important problems, as compared to 37% of Gen X and 26% of Baby Boomer and older Republicans and Republican leaners.<sup>19</sup> If these trends persist, these generational differences may potentially lessen the partisan divide over time.

U.S. elected officials reflect and reinforce this partisanship in their approaches to climate change. For example, according to a March 2021 Center for American Progress analysis, the number of climate deniers in Congress declined since January 2019—from 150 to 139—but still comprises 52% of House Republicans and 60% of Senate Republicans. In addition, among the sixty-nine new members of Congress, 33% are climate deniers (twenty of the new House Republicans and three of the new Republican senators).<sup>20</sup> Moreover, the Center’s May 2021 analysis found that while eighteen members of Congress who previously denied climate change science had changed their views, they

---

15. Anthony Leiserowitz, Edward Maibach, Seth Rosenthal, John Kotcher, Jennifer Carman, Xinran Wang, Matthew Goldberg, Karine Lacroix & Jennifer Marlon, *Climate Change in the American Mind*, YALE PROGRAM ON CLIMATE CHANGE COMM’N (Dec. 2020), <https://climatecommunication.yale.edu/publications/climate-change-in-the-american-mind-december-2020/> [https://perma.cc/FC82-89PJ].

16. Alec Tyson, Brian Kennedy & Cary Funk, *Gen Z, Millennials Stand Out for Climate Change Activism, Social Media Engagement with Issue*, PEW RSCH. CTR. 13 (May 2021), <https://www.pewresearch.org/science/2021/05/26/gen-z-millennials-stand-out-for-climate-change-activism-social-media-engagement-with-issue/> [https://perma.cc/5LJU-ZTKA].

17. *Id.*

18. *Id.*

19. *Id.* at 7.

20. Ari Drennan & Sally Hardin, *Climate Deniers in the 117th Congress*, CTR. FOR AM. PROGRESS (Mar. 30, 2021), <https://www.americanprogress.org/article/climate-deniers-117th-congress/> [https://perma.cc/US4X-9FLG].

were still opposing action on climate change with evolving rhetoric.<sup>21</sup> This partisanship on climate change occurs in the broader context of deep partisanship on many issues in Congress. For instance, the Center for American Progress also found significant overlap between members of Congress who were climate deniers and those who refused to certify the 2020 election.<sup>22</sup>

### B. Australia

Australians' appreciation of the impacts of climate change and the need for federal action to address the problem has continued to strengthen over the past five years. Attitudes have been shaped by devastating natural disasters with a strong climate change connection, such as the unprecedented 2019-2020 "Black Summer" bushfires,<sup>23</sup> unrelenting droughts, and extensive flooding in several states.<sup>24</sup>

Colvin and Jotzo's large nationally representative survey of Australian voters' climate attitudes published in 2021 found that over 80% of Australians surveyed viewed action to reduce Australia's emissions as important.<sup>25</sup> This figure included almost 70% of those identifying as conservative voters. However, while around three-quarters (73%) of progressive voters characterized Australian action to reduce emissions as "extremely important," only one-quarter (26%) of conservative voters held this view. The authors found that "[h]olding pro-climate action attitudes consistently correlates with voting for progressive political parties and having higher levels of education."<sup>26</sup> They further observed, like in the U.S. polling described above, "a strong age cohort divide, with younger people holding stronger pro-climate attitudes than older people," noting that this raised the question "whether we are seeing the emergence of a new generation expressing strong pro-climate action and progressive political attitudes that will persist over time."<sup>27</sup>

Colvin and Jotzo's findings are reinforced by another nationally representative online and telephone survey, the Climate Poll 2021 by the Lowy

---

21. Ari Drennan, *A Look at the Rhetorical Evolutions of Congress' Former Climate Deniers*, CTR. FOR AM. PROGRESS (May 7, 2021), <https://www.americanprogress.org/article/look-rhetorical-evolutions-congress-former-climate-deniers/> [<https://perma.cc/NG7H-UTMF>].

22. Drennan & Hardin, *supra* note 20.

23. See Ross Bradstock, Hamish Clarke, Luke Collins, Michael Clarke, Rachael Helene Nolan & Trent Penman, *A Staggering 1.8 Million Hectares Burned in 'High-severity' Fires During Australia's Black Summer*, CONVERSATION (Mar. 30, 2021), <https://theconversation.com/a-staggering-1-8-million-hectares-burned-in-high-severity-fires-during-australias-black-summer-157883> [<https://perma.cc/VK58-SZ7P>].

24. See James Purtill, *NSW, Queensland Floods on Track to Be Among Country's Worst-Ever Natural Disasters, Climate Council Says*, ABC NEWS (Mar. 10, 2022), [https://www.abc.net.au/news/science/2022-03-10/floods-nsw-queensland-climate-change-worst-ever-natural-disaster/100894956?utm\\_campaign=abc\\_news\\_web&utm\\_content=link&utm\\_medium=content\\_shared&utm\\_source=abc\\_news\\_web](https://www.abc.net.au/news/science/2022-03-10/floods-nsw-queensland-climate-change-worst-ever-natural-disaster/100894956?utm_campaign=abc_news_web&utm_content=link&utm_medium=content_shared&utm_source=abc_news_web) [<https://perma.cc/62NX-NY78>].

25. R.M. Colvin & Frank Jotzo, *Australian Voters' Attitudes to Climate Action and Their Social-Political Determinants*, 16 PLOS ONE, no. 3, Mar. 2021.

26. *Id.* at 1.

27. *Id.*

Institute.<sup>28</sup> Sixty percent of respondents in this survey agreed that “global warming is a serious and pressing problem . . . [and] we should begin taking steps now, even if this involves significant costs.”<sup>29</sup> This result was higher than that recorded in 2020, although still eight points below support in 2006 when Australian public attitudes favoring climate action were at an all-time high.<sup>30</sup>

When results are disaggregated by political affiliation, the Climate Poll 2021 contains patterns similar to those in the Colvin and Jotzo study, with progressive voters seeing climate change as a more serious and urgent problem to address than conservative voters.<sup>31</sup> Voters were also surveyed on their attitudes towards specific climate change policies, such as setting a net-zero emissions target for 2050, banning new coal mines from opening in Australia, and reducing Australian coal exports to other countries. Support was highest for policies such as providing subsidies for the development of renewable energy technologies (91% support) and setting a net-zero 2050 target (78% support).<sup>32</sup> Again, when the data is disaggregated by political affiliation, partisan differences emerge. For example, conservative voters were more supportive of using gas as part of Australia’s energy generation compared with the most progressive voters, and were less supportive of measures such as banning new coal mines or reducing coal exports.<sup>33</sup>

Despite this evidence of strong public support for climate action in Australia across political lines, albeit with some differences of emphasis, this had not translated into voting outcomes until the most recent election in late May 2022. The 2019 Australian federal election, dubbed “the climate election,”<sup>34</sup> returned to power the conservative Liberal-National Coalition government of Prime Minister Scott Morrison, notwithstanding its climate policy that preserves the status quo. Colvin and Jotzo’s study exploring this apparent paradox points to the sharp division between voters in the levels of importance they attached to emissions reduction policies, which diverged along lines of political party preference.<sup>35</sup> Although a large majority of the Australian population agreed that reducing greenhouse gas emissions is important, the climate issue only drove the voting preferences of a much smaller slice of the electorate.<sup>36</sup> The May 2022 election has potentially marked a shift in voter responses to climate change.

---

28. The poll was conducted by the Social Research Centre between April 12 and April 26, 2021, with a sample size of 3,286 Australian adults. See Natasha Kassam & Hannah Léser, *Climate Poll 2021*, LOWY INST. (May 26, 2021), <https://www.lowyinstitute.org/publications/climatepoll-2021> [https://perma.cc/BFY9-3ALW].

29. *Id.*

30. See *Australia and Climate Change*, LOWY INST., <https://www.lowyinstitute.org/issues/australia-climate-change> [https://perma.cc/Z6AC-94CT] (last visited Aug. 20, 2021).

31. Kassam & Léser, *supra* note 28.

32. *Id.*

33. *Id.*

34. Matt McDonald, *Election 2019: What Happened to the Climate Change Vote We Heard About?*, ABC NEWS (May 20, 2019), <https://www.abc.net.au/news/2019-05-20/what-happened-to-the-climate-change-vote/11128128> [https://perma.cc/89JE-X9CB].

35. Colvin & Jotzo, *supra* note 25.

36. *Id.*

While climate change did not feature as a major issue for debate during the election campaign, many seats in Parliament have now been won by Greens and mainly female independent candidates who ran on a climate platform.<sup>37</sup>

Partisan views on climate change tend to be more extreme in Australia among political elites than the general voting public—a divergence that is more pronounced than in the United States. In the ruling Liberal-National federal coalition, for example, several politicians (including the current Deputy Prime Minister, Barnaby Joyce) are well known for their strong opposition to progressive climate policies, such as a net-zero emissions target.<sup>38</sup> Positions on climate change in Australia have come to be associated with particular political identities reinforced by “political elites who set the tone, and influence the rank and file.”<sup>39</sup> Nevertheless, there are signs of change, particularly as younger generations reach voting age. For instance, Colvin and Jotzo conclude that “while cleavages in climate attitudes in Australia are set to continue, efforts to promote climate delay are bound to have a limited shelf life as a growing majority of voters accepts the need for climate action.”<sup>40</sup>

## II. U.S. Regulatory Instability

Although the approach to U.S. climate change regulation varies between Democratic and Republican presidential administrations, the swings from the Obama Administration to the Trump Administration to the Biden Administration have been particularly dramatic. This Part outlines key regulatory decisions in the Obama Administration, the shift to the Trump Administration, and the subsequent shift to the Biden Administration. In so doing, it explores the foundational role that administrative regulation has played in shaping policy. Unlike in Australia, the United States has broad federal environmental laws which courts have interpreted to allow for extensive administrative regulation relevant to climate change.<sup>41</sup> However, these regulations are subject to change during presidential transitions.

---

37. Smriti Mallapaty, *Australians Vote for Stronger Climate Action*, NATURE (May 23, 2022), <https://www.nature.com/articles/d41586-022-01445-0> [<https://perma.cc/VN6H-XZLT>].

38. Sarah Martin, *Barnaby Joyce Says Nationals Won't Commit to Net Zero Carbon Emissions Without Seeing 'Menu'*, GUARDIAN (July 18, 2021), <https://www.theguardian.com/australia-news/2021/jul/18/barnaby-joyce-says-nationals-wont-commit-to-net-zero-carbon-emissions-without-seeing-menu> [<https://perma.cc/YLC2-RY2J>]. Before the Glasgow COP26 conference, however, Joyce eventually brokered the support of Nationals members for a net-zero target based on promises of greater support for regions. See Sarah Martin & Katherine Murphy, *Nationals Agree to Net Zero Target By 2050 Despite Barnaby Joyce's Opposition*, GUARDIAN (Oct. 24, 2021), <https://www.theguardian.com/australia-news/2021/oct/24/nationals-agree-to-net-zero-target-by-2050-despite-barnaby-joyces-opposition> [<https://perma.cc/6SUB-UYCA>].

39. Bo Seo, *How Politicians Drive the Climate Wars*, AUSTL. FIN. REV. (Feb. 12, 2020), <https://www.afr.com/politics/federal/how-politicians-drive-the-climate-wars-20200206-p53yhn> [<https://perma.cc/6VJQ-WS9L>].

40. Colvin & Jotzo, *supra* note 25.

41. For example, the Supreme Court's approach to the Clean Air Act in *Massachusetts v. EPA*, the first U.S. Supreme Court case on climate change, provided the basis for the Obama Administration's climate change regulation. See *Massachusetts v. EPA*, 549 U.S. 497 (2007).

As described in depth below, the differences between the Trump Administration and the Democratic administrations that preceded and followed it involve all major areas of federal administrative regulation relevant to climate change. These include, among others, U.S. participation in international efforts to address climate change, carbon dioxide emissions from power plants and motor vehicles, methane emissions from fossil fuel production, offshore oil and gas, the transition to cleaner sources of energy, and climate change adaptation. Throughout this period, though, U.S. states and cities have had more stability in their approaches to climate change than the federal government, with pro-regulatory states and localities continuing to take additional action on climate change.<sup>42</sup>

#### A. U.S. System of Governance

The U.S. system of governance, with its checks and balances and separation of powers, shapes the crucial role of administrative regulation in its shifting climate change policy. Most significantly, Article II of the U.S. Constitution establishes an executive branch headed by a president who is elected by state-designated electors.<sup>43</sup> Unlike in the Australian parliamentary system described below, in which the executive emerges from the legislative branch, the President may differ politically from Congress. Although administrative regulation is grounded in statutes created by the legislative branch, sufficient discretion exists that administrative regulation under the same statutes can vary greatly, as demonstrated by the last several years of climate change regulation.<sup>44</sup>

As discussed in our original article, the Founders recognized the dangers of partisanship and viewed the U.S. republican form of government as a way of addressing them. *Federalist No. 10*, for instance, argues that the U.S. approach to governance helps to ameliorate the dangers of “mischiefs of faction.”<sup>45</sup>

Through the way in which it structures the three branches and their interactions, the Constitution creates the ability for them to check each other, which particularly matters at times when the country is deeply divided. For example, if different parties control the legislative and executive branches at a time when the legislative branch is closely divided, presidential vetoes may

---

42. See WE ARE STILL IN, <https://www.wearestillin.com/> [<https://perma.cc/ZZA6-84YF>] (last visited Oct. 2, 2021); Sam Ricketts, Rita Clifton, Lola Oduyeru & Bill Holland, *States Are Laying a Road Map for Climate Leadership*, CTR. FOR AM. PROGRESS (Apr. 30, 2020), <https://www.americanprogress.org/issues/green/reports/2020/04/30/484163/states-laying-road-map-climate-leadership/> [<https://perma.cc/HW66-WN87>].

43. U.S. CONST. art. II.

44. See *infra* Section II.B.

45. THE FEDERALIST NO. 10 (James Madison).

prevent legislation from moving forward.<sup>46</sup> Similarly, in the context of climate change, pro- and anti-regulatory litigation has pushed against executive action.<sup>47</sup>

The U.S. administrative state plays a crucial role in these interactions among the three branches in the context of climate change. Under U.S. administrative law, Congress promulgates laws that delegate authority to administrative agencies to implement them through regulation. In many of the crucial substantive areas relevant to climate change—most notably environmental and energy law—U.S. federal statutes create bases for administrative regulation. The agencies with statutory authority relevant to climate change include, among others, the Environmental Protection Agency (EPA), the National Highway Traffic Safety Administration (NHTSA), the Department of Transportation (DOT), the Department of Energy, the Federal Energy Regulatory Commission, the Nuclear Regulatory Commission, and the Department of the Interior.<sup>48</sup>

The U.S. Administrative Procedure Act governs the agencies' promulgation of regulations and judicial review of them. It plays an important role in structuring the pace and constraints of rulemaking as each administration develops new regulations and modifies the approach of the prior administration. It also establishes the scope of review and deferential judicial approach—agency actions are set aside if they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”<sup>49</sup>—that shapes the interaction between courts and administrative agencies in the context of climate change.<sup>50</sup> Much of the litigation over climate change in the United States involves enforcement and interpretation of statutes in administrative contexts.<sup>51</sup>

### *B. Dramatically Shifting U.S. Climate Change Policy*

In *The Grass Is Not Always Greener*, we trace the dynamics between Congress and the executive branch on climate change beginning in the late 1970s.<sup>52</sup> We argue that the difficulties of passing legislation and ratifying treaties created a situation in which administrative regulation based in broad U.S. environmental statutes played a crucial role in shaping U.S. climate change policy over time.<sup>53</sup> These statutes create significant agency authority to

---

46. *Presidential Vetoes*, HISTORY, ART & ARCHIVES: U.S. HOUSE OF REPRESENTATIVES, <http://history.house.gov/Institution/Presidential-Vetoes/Presidential-Vetoes/> [https://perma.cc/XA44-BGM4] (last visited July 29, 2015).

47. For an in-depth description of these dynamics, see JACQUELINE PEEL & HARI M. OSOFSKY, *CLIMATE CHANGE LITIGATION: REGULATORY PATHWAYS TO CLEANER ENERGY?* (2015).

48. See LINCOLN L. DAVIES, ALEXANDRA B. KLASS, HARI M. OSOFSKY, JOE TOMAIN & ELIZABETH WILSON, *ENERGY LAW AND POLICY* 28-42 (3d ed. forthcoming 2022).

49. 5 U.S.C. § 706(2).

50. 5 U.S.C. §§ 551-559.

51. PEEL & OSOFSKY, *supra* note 47; *Climate Change Litigation*, SABIN CTR. FOR CLIMATE CHANGE L., <https://climate.law.columbia.edu/content/climate-change-litigation> [https://perma.cc/DD2Y-NQDH] (last visited Apr. 22, 2022).

52. Osofsky & Peel, *supra* note 1, at 146-54.

53. *Id.*

promulgate relevant regulations. The extent of executive action to address climate change under these statutes has varied across presidential administrations. Litigation has at times challenged this administrative regulation—or the lack thereof. For example, the first U.S. Supreme Court case on climate change, *Massachusetts v. EPA*, emerged from the George W. Bush Administration’s refusal to regulate motor vehicle greenhouse gas emissions under the Clean Air Act.<sup>54</sup>

This Part’s analysis picks up where that article left off, in the middle of the Obama Administration. It finds that the pattern of limited congressional action paired with extensive administrative regulation has continued, but that the swings have become substantially more dramatic. This pattern has created high levels of regulatory uncertainty, which has not only delayed progress on reducing greenhouse gas emissions, but also resulted in governmental and business entities repeatedly pivoting in response to new regulations.

### 1. Obama Administration

As described in *The Grass Is Not Always Greener*, the Obama Administration developed a Climate Action Plan focused on mitigation, adaptation, and international action and took substantial steps to advance each of those pillars.<sup>55</sup> From its first week in office, the Obama Administration developed significant administrative regulation on climate change under the Clean Air Act, relying upon the U.S. Supreme Court decision in *Massachusetts v. EPA*.<sup>56</sup> The EPA made an Endangerment Finding regarding greenhouse gas emissions,<sup>57</sup> and then proceeded to develop regulations for motor vehicles and stationary sources, including power plants.<sup>58</sup> In the motor vehicles context, the Obama Administration took a joint agency approach that bridged the fragmentation of environmental and energy law and regulated both fuel economy and tailpipe emissions.<sup>59</sup> With respect to power plants and other stationary sources, the EPA took a series of steps under Section 111 of the Clean Air Act,

---

54. *Id.* at 150-51 (citing *Massachusetts v. EPA*, 549 U.S. 497 (2007)).

55. Exec. Off. of the President, *The President’s Climate Action Plan*, WHITE HOUSE (June 2013), <https://obamawhitehouse.archives.gov/sites/default/files/image/president27sclimateactionplan.pdf> [https://perma.cc/B53F-8HBL].

56. 549 U.S. 497. For an in-depth discussion of *Massachusetts v. EPA*, see Hari M. Osofsky, *Is Climate Change “International”?: Litigation’s Diagonal Regulatory Role*, 49 VA. J. INT’L L. 585 (2009).

57. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009) (to be codified at 40 C.F.R. ch. I).

58. See Hari M. Osofsky & Jacqueline Peel, *supra* note 10. For an overview of EPA’s current mitigation efforts, see *Climate Change Regulatory Initiatives*, EPA (Aug. 3, 2015), <https://www.epa.gov/climate-change/climate-change-regulatory-actions-and-initiatives> [https://perma.cc/2J9E-FFDX].

59. See Notice of Upcoming Joint Rulemaking to Establish Vehicle GHG Emissions and CAFE Standards, 74 Fed. Reg. 24,007 (May 22, 2009); Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324 (May 7, 2010) (to be codified at 40 C.F.R. pts. 85, 86, 600; 49 C.F.R. pts. 531, 533, 536, 538); Greenhouse Gas Emissions Standards and Fuel Efficiency Standards for Medium and Heavy-Duty Engines and Vehicles, 75 Fed. Reg. 81,952 (Dec. 29, 2010) (to be codified at 40 C.F.R. pts. 85, 86, 1036, 1037, 1065, 1066, 1068; 49 C.F.R. pts. 523, 534, 535).

including developing the Clean Power Plan.<sup>60</sup> These regulatory actions, and particularly the Clean Power Plan, were challenged through legislative efforts and litigation.<sup>61</sup> In addition, the EPA regulated methane emissions from oil and gas wells under its New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants.<sup>62</sup>

The Obama Administration also took substantial regulatory steps to advance climate adaptation. These efforts included the creation of an Interagency Climate Change Adaptation Taskforce and Council on Climate Preparedness and Resilience and a multi-level State, Local, and Tribal Leaders Task Force on Climate Preparedness and Resilience, as well as the development of presidential and federal agency climate change adaptation plans.<sup>63</sup>

In line with the third pillar of its Climate Action Plan,<sup>64</sup> the Obama Administration played an important leadership role in the successful negotiation of the Paris Agreement, serving as a member of the high ambition coalition.<sup>65</sup> In the leadup to the adoption of the Paris Agreement, the Obama Administration submitted its first Intended Nationally Determined Contribution in March 2015, committing “to reduce our emissions by 26-28% below 2005 levels by 2025, and to make best efforts to reduce by 28%.”<sup>66</sup> The United States formally joined the

60. See Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring, 75 Fed. Reg. 31,514 (June 3, 2010) (to be codified at 40 C.F.R. pts. 51, 52, 70, 71); Standards of Performance for Greenhouse Gas Emissions From New Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 1430 (Jan. 8, 2014); Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,510 (Oct. 23, 2015) (to be codified at 40 C.F.R. pts. 60, 70, 71, 98); *Fact Sheet: President Obama to Announce Historic Carbon Pollution Standards for Power Plants*, WHITE HOUSE (Aug 3, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/08/03/fact-sheet-president-obama-announce-historic-carbon-pollution-standards> [<https://perma.cc/DKG9-N6ZT>].

61. See, e.g., *Whitfield Unveils Ratepayer Protection Act to Address EPA’s Overreaching Power Plant Rule*, ENERGY & COMMERCE COMM. REPUBLICANS (Mar. 23, 2015), <https://republicans-energycommerce.house.gov/news/press-release/whitfield-unveils-ratepayer-protection-act-address-epa-s-overreaching/> [<https://perma.cc/5BRJ-8KU9>]; *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 332-33 (2014); Petition for Extraordinary Writ to the U.S. EPA, *In Re West Virginia et al.*, No. 15-1277 (D.C. Cir. Aug. 13, 2015).

62. Oil and Natural Gas Sector: New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants Reviews, 77 Fed. Reg. 49,490 (Aug. 16, 2012) (to be codified at 40 C.F.R. 60, 63); Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources, 81 Fed. Reg. 35,824 (June 3, 2016) (to be codified at 40 C.F.R. 60).

63. See Exec. Order No. 13,514, 74 Fed. Reg. 52,117 (Oct. 5, 2009); Exec. Order No. 13,653, 78 Fed. Reg. 66,819 (Nov. 1, 2013); Exec. Off. of the President, *supra* note 55 (discussing President Obama’s plan to fight climate change).

64. Exec. Off. of the President, *supra* note 55.

65. See Matt McGrath, *COP21: US Joins ‘High Ambition Coalition’ for Climate Deal*, BBC NEWS (Dec. 10, 2015), <https://www.bbc.com/news/science-environment-35057282> [<https://perma.cc/DP4Y-D8MS>]; HIGH AMBITION COAL., <https://www.highambitioncoalition.org/work> [<https://perma.cc/Q3HM-3QAU>] (last visited Sept 30, 2021).

66. *Fact Sheet: U.S. Reports Its 2025 Emissions Target to the UNFCCC*, WHITE HOUSE (Mar. 31, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/03/31/fact-sheet-us-reports-its-2025-emissions-target-unfccc> [<https://perma.cc/3VRS-PGBG>].

Paris Agreement on September 3, 2016, just weeks before the U.S. presidential election in which President Trump won.<sup>67</sup>

## 2. Trump Administration

It would be hard to overstate the extent to which the Trump Administration reversed the Obama Administration’s regulations on climate change. Columbia University’s Sabin Center for the Study of Climate Change Law’s Climate Deregulation Tracker details 176 administrative actions that the Trump Administration took.<sup>68</sup> These resulted in nearly 100 completed rule changes that impacted climate change regulation and other environmental protections.<sup>69</sup> Through President Trump’s final days in office in January 2021, his administration continued to finalize rules that constrain efforts to regulate climate change.<sup>70</sup> Although administrative law and other legal constraints—such as the process for withdrawing from the Paris Agreement—structured the approach that the Trump Administration took and constrained the pace of change somewhat,<sup>71</sup> a tremendous amount of regulatory change was possible over the course of those four years.

At an international level, President Trump followed through on his campaign promise to withdraw from the Paris Agreement. He announced the United States’ intended withdrawal on June 1, 2017,<sup>72</sup> submitted an official communication to the United Nations on August 4, 2017 regarding its intent,<sup>73</sup> and formally notified the United Nations on November 4, 2019 that it was withdrawing.<sup>74</sup> In response, 3,952 states, cities, counties, tribes, colleges and

---

67. Tanya Somanader, *President Obama: The United States Formally Enters the Paris Agreement*, WHITE HOUSE (Sept. 3, 2016), <https://obamawhitehouse.archives.gov/blog/2016/09/03/president-obama-united-states-formally-enters-paris-agreement> [https://perma.cc/26LQ-SYVB].

68. *Climate Deregulation Tracker*, SABIN CTR. FOR CLIMATE CHANGE L., <https://climate.law.columbia.edu/climate-deregulation-tracker> [https://perma.cc/38J4-KDL5] (last visited Oct. 2, 2021).

69. Nadja Popovich, Livia Albeck-Ripka & Kendra Pierre-Louis, *The Trump Administration Rolled Back More Than 100 Environmental Rules. Here’s the Full List.*, N.Y. TIMES (Jan. 20, 2021), <https://www.nytimes.com/interactive/2020/climate/trump-environment-rollbacks-list.html> [https://perma.cc/R9SQ-RX6F].

70. *Climate Deregulation Tracker*, *supra* note 68.

71. See, e.g., Cary Coglianese, Natasha Sarin & Stuart Shapiro, *Deregulatory Deceptions: Reviewing the Trump Administration’s Claims About Regulatory Reform*, PENN PROGRAM ON REGUL. REP. (2020), <https://www.law.upenn.edu/live/files/11017-coglianesesarinshapirotrumpderegulationreport11012> [https://perma.cc/AP5N-CP44] (arguing that the Trump Administration achieved less deregulation than it claimed).

72. Donald Trump, President of the United States, *Statement by President Trump on the Paris Climate Accord*, WHITE HOUSE (June 1, 2017), <https://trumpwhitehouse.archives.gov/briefings-statements/statement-president-trump-paris-climate-accord/> [https://perma.cc/92HN-PGWU].

73. See *Communication Regarding Intent to Withdraw From Paris Agreement*, U.S. DEP’T OF STATE (Aug. 4, 2017), <https://2017-2021.state.gov/communication-regarding-intent-to-withdraw-from-paris-agreement/index.html> [https://perma.cc/HKH2-HV3N].

74. See *Note to Correspondents: In Response to Questions About US Withdrawal from the Paris Agreement*, UNITED NATIONS: SECRETARY-GENERAL (Nov. 4, 2019), <https://www.un.org/sg/en/content/sg/note-correspondents/2019-11-04/note-correspondents-response-questions-about-us-withdrawal-the-paris-agreement> [https://perma.cc/63S5-LZXM]; Lisa Friedman, *Trump Serves Notice to Quit Paris Climate Agreement*, N.Y. TIMES (Feb. 19, 2021), <https://www.nytimes.com/2019/11/04/climate/trump-paris-agreement-climate.html> [https://perma.cc/MVG4-S8L2].

universities, healthcare organizations, businesses and investors, faith groups, and cultural organizations signed a “We Are Still In” pledge criticizing this decision and committing to continued action to meet Paris Agreement Goals.<sup>75</sup> The United States’ withdrawal took effect on November 4, 2020, the day after the next U.S. presidential election, but when results were not yet finalized.<sup>76</sup>

At the federal level, the Trump Administration rolled back all of the Obama Administration’s mitigation measures described above, including its motor vehicle, power plant, and methane regulations. In September 2019, the EPA and DOT revoked the waiver that enabled California and states following California’s approach to set higher standards for motor vehicle emissions,<sup>77</sup> and then in March 2020, the EPA and NHTSA finalized a rule that weakened the Obama Administration’s standards for motor vehicle greenhouse gas emissions and fuel efficiency for model years 2021-2026.<sup>78</sup> In June 2019, the EPA repealed the Clean Power Plan and issued the Affordable Clean Energy Rule, which substantially diminished the regulation of power plants,<sup>79</sup> and in January 2021, the EPA finalized regulation of stationary sources under the Clean Air Act Section 111 that only applied to sources that constitute at least 3% of U.S. greenhouse gas emissions.<sup>80</sup> In August 2020, the EPA rescinded the Obama Administration’s methane emissions regulations for oil and gas facilities.<sup>81</sup>

The Trump Administration also rolled back regulations requiring climate change adaptation planning. It revoked President Obama’s executive orders requiring agencies to include climate change adaptation in their planning in its

75. WE ARE STILL IN, *supra* note 42.

76. See Matt McGrath, *Climate Change: US Formally Withdraws from Paris Agreement*, BBC NEWS (Nov. 4, 2020), <https://www.bbc.com/news/science-environment-54797743> [<https://perma.cc/4X4J-SXSG>].

77. The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, 84 Fed. Reg. 51,310 (Sept. 19, 2019) (codified at 40 C.F.R. pts. 85, 86; 49 C.F.R. pts. 523, 531, 533).

78. The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, 85 Fed. Reg. 24,174 (Apr. 30, 2020) (codified at 40 CFR pts. 86, 600; 49 CFR Parts 531, 533, 536, 537).

79. *Affordable Clean Energy Rule*, EPA, <https://www.epa.gov/stationary-sources-air-pollution/affordable-clean-energy-rule> [<https://perma.cc/9UEV-GH76>] (last visited Oct. 2, 2021); Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32,520 (July 8, 2019) (codified at 40 C.F.R. pt. 60); Dena Adler, Jessica Wentz & Romany Webb, *Four Important Points about EPA’s Affordable Clean Energy Rule*, COLUMBIA L. SCH.: CLIMATE L. BLOG (June 20, 2019), <http://blogs.law.columbia.edu/climatechange/2019/06/20/four-important-points-about-epas-affordable-clean-energy-rule/> [<https://perma.cc/94VA-CZGZ>].

80. Pollutant-Specific Significant Contribution Finding for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, and Process for Determining Significance of Other New Source Performance Standards Source Categories, 86 Fed. Reg. 2,542 (Jan. 13, 2021) (to be codified at 40 C.F.R. pt. 60); see *EPA Issues Rule to Hamstring GHG Regulations*, SABIN CTR. FOR CLIMATE CHANGE L., <https://climate.law.columbia.edu/content/epa-issues-rule-hamstring-ghg-regulations-0> [<https://perma.cc/MQ8D-CPYM>] (last visited Oct. 2, 2021).

81. *EPA Issues Final Policy and Technical Amendments to the New Source Performance Standards for the Oil and Natural Gas Industry*, EPA, <https://www.epa.gov/controlling-air-pollution-oil-and-natural-gas-industry/epa-issues-final-policy-and-technical> [<https://perma.cc/3VB6-MWUX>] (last visited Oct. 2, 2021).

executive order on “Efficient Federal Operations.”<sup>82</sup> The Trump Administration also rescinded the executive order on “Preparing the United States for the Impacts of Climate Change” and replaced it with an executive order on “Promoting Energy Independence and Economic Growth.”<sup>83</sup>

In addition, through a series of regulations, the Trump Administration expanded offshore drilling and opened up national monuments to drilling, expedited approval of pipelines, eliminated federal government goals to reduce greenhouse gas emissions by forty percent over ten years, limited the scientific information the EPA could use, and decided not to renew the Climate Science Advisory Committee, among other actions.<sup>84</sup> Many of these regulations were challenged in court, and a number of them were struck down, which impacted the regulatory steps that were possible under the Biden Administration.<sup>85</sup>

### 3. Biden Administration

The transition from the Trump Administration to the Biden Administration has been equally dramatic. In its first months, the Biden Administration has made significant progress in reversing the Trump Administration’s reversals and promulgating new climate change regulations. As of June 1, 2022, the Sabin Center for the Study of Climate Change Law’s Climate Reregulation Tracker has noted 120 steps the Biden Administration has taken “to reinstate and expand federal climate mitigation and adaptation measures that were rolled back or eliminated in the preceding four years, as well as new policies to address previously unregulated areas of climate law.”<sup>86</sup>

On Inauguration Day, January 20, 2021, President Biden recommitted the United States to the Paris Agreement<sup>87</sup> and signed the executive order “Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis.”<sup>88</sup> That order stated the Biden Administration’s commitment

to listen to the science; to improve public health and protect our environment; to ensure access to clean air and water; to limit exposure to dangerous chemicals and pesticides; to hold polluters accountable, including those who disproportionately harm communities of color and low-income communities; to reduce greenhouse gas emissions; to bolster resilience to the impacts of climate change; to restore and expand our national treasures and monuments; and to prioritize both

---

82. R. ELIOT CRAFTON, LAURA B. COMAY, MARK K. DESANTIS, CAROL HARDY VINCENT, ANNA E. NORMAND & CHARLES V. STERN, CONG. RSCH. SERV., R46694, CLIMATE CHANGE ADAPTATION: DEPARTMENT OF THE INTERIOR 5-7 (2021), <https://sgp.fas.org/crs/misc/R46694.pdf> [<https://perma.cc/UTF4-CC26>].

83. *Id.*

84. *Climate Deregulation Tracker*, *supra* note 68.

85. *Id.*

86. *Climate Reregulation Tracker*, SABIN CTR. FOR CLIMATE CHANGE L., <https://climate.law.columbia.edu/content/climate-reregulation-tracker> [<https://perma.cc/63BN-KADN>] (last visited June 1, 2022).

87. *Paris Climate Agreement*, WHITE HOUSE (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/paris-climate-agreement/> [<https://perma.cc/5ZJU-YH26>].

88. Exec. Order No. 13,990, 86 Fed. Reg. 7037 (Jan. 25, 2021).

environmental justice and the creation of the well-paying union jobs necessary to deliver on these goals.<sup>89</sup>

The order specifically focused on reregulation, directing “all executive departments and agencies to immediately review and, as appropriate and consistent with applicable law, take action to address the promulgation of Federal regulations and other actions during the last 4 years that conflict with these important national objectives, and to immediately commence work to confront the climate crisis.”<sup>90</sup>

It also revoked, suspended, and directed review of numerous specific Trump Administration regulations.<sup>91</sup> President Biden’s first day reversals included rescinding the Keystone XL Pipeline permit, establishing a sixty-day moratorium on fossil fuel leasing and permitting on federal land and in federal waters, reinstating protections for national monuments, and reversing executive orders that weakened requirements that governmental operations reduce greenhouse gas emissions, fast-tracked environmental reviews and approvals of oil and gas pipelines, circumvented environmental review during the pandemic, and promoted offshore drilling in protected areas and domestic use of fossil fuels.<sup>92</sup>

President Biden has continued to advance climate change science, mitigation, and adaptation in the months since. By the end of January 2021, he also reestablished the President’s Council of Advisors on Science and Technology, created a White House Environmental Justice Advisory Council, signed a memo on governmental scientific integrity and evidence-based policymaking, and launched government-wide climate change action. Reregulation and new regulation have continued apace.<sup>93</sup> The Biden Administration’s steps on mitigation have included regulating motor vehicle greenhouse gas emissions, allowing California the ability to exceed federal standards, and signing a congressional resolution to repeal the rollback of methane regulation.<sup>94</sup> After the D.C. Circuit vacated the Trump Administration’s Affordable Clean Energy rule,<sup>95</sup> the Biden Administration indicated that it would not try to return to the Clean Power Plan approach.<sup>96</sup> In April 2021, the Biden Administration committed to a new greenhouse gas emissions reduction target of 50% to 52% reduction from 2005 levels by 2030, along with the goal of

---

89. *Id.* at 7037.

90. *Id.*

91. *Id.*

92. *Climate Reregulation Tracker*, *supra* note 86.

93. *Id.*

94. *Id.*

95. *Am. Lung Ass’n v. EPA*, 985 F.3d 914 (D.C. Cir. 2021), *cert. granted*, 142 S. Ct. 418 (2021).

96. Memorandum from Joseph Goffman, Acting Asst. Adm’r, EPA, to Reg’l Adm’rs Regions I-X, EPA, Status of Affordable Clean Energy Rule and Clean Power Plan (Feb. 12, 2021), [https://www.epa.gov/sites/default/files/2021-02/documents/ace\\_letter\\_021121.doc\\_signed.pdf](https://www.epa.gov/sites/default/files/2021-02/documents/ace_letter_021121.doc_signed.pdf) [<https://perma.cc/UP8M-TQL6>].

reaching 100% carbon pollution-free electricity by 2035.<sup>97</sup> The Biden Administration has also integrated a focus on environmental justice and energy justice throughout its approach to environmental regulation, including with respect to climate change.<sup>98</sup>

The actions taken on the first day President Biden was in office and since reinforce how comprehensively administrative regulation on climate change has flip-flopped between recent administrations. This represents a major shift from administrations prior to that of President Trump. While, as described in *The Grass Is Not Always Greener*, earlier presidential transitions between parties represented changes in climate change policy,<sup>99</sup> the scope of the immediate regulatory reversals of both the Trump and Biden Administrations are far more sweeping.<sup>100</sup> These two sets of changes are likely a function of how drastically the Trump Administration changed climate change policy, as a substantial portion of the Biden Administration’s initial actions have focused on undoing the prior administration’s reversals.

Even over a year into the Biden Administration, courts continue to engage with administrative decisions made by the Trump Administration. For example, in January 2022, the U.S. District Court for the District of Columbia invalidated an 80.8 million acre oil and gas lease sale, the largest in U.S. history, in the Gulf of Mexico. It held that “[the Bureau of Ocean Energy Management (BOEM)] and the Department of the Interior acted arbitrarily and capriciously in excluding foreign consumption from their greenhouse gas emissions calculation” under the National Environmental Policy Act (NEPA).<sup>101</sup>

This case is a particularly interesting example of the interaction between the administrative state and shifting climate change regulation. BOEM moved forward with a lease sale under an administrative approach to environmental analysis and lease sales established by the Trump Administration, despite the fact that the Biden Administration opposed it. The agency was forced to do so due to a federal court in Louisiana enjoining the Biden Administration’s moratorium on lease sales.<sup>102</sup> Interior spokeswoman Melissa Schwartz stated that the Biden Administration was “compelled to proceed with Lease Sale 257 based on the previous administration’s environmental analysis and its decision to

---

97. *Fact Sheet: President Biden Sets 2030 Greenhouse Gas Pollution Reduction Target Aimed at Creating Good-Paying Union Jobs and Securing U.S. Leadership on Clean Energy Technologies*, WHITE HOUSE (Apr. 22, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/22/fact-sheet-president-biden-sets-2030-greenhouse-gas-pollution-reduction-target-aimed-at-creating-good-paying-union-jobs-and-securing-u-s-leadership-on-clean-energy-technologies/> [https://perma.cc/HR3G-JZMV].

98. *See* Exec. Order No. 13,985, 80 Fed. Reg. 7009 (Jan. 5, 2021); Exec. Order No. 14,008, 86 Fed. Reg. 7619 (Jan. 27, 2021); Shalanda Young, Brenda Mallory & Gina McCarthy, *The Path to Achieving Justice40*, WHITE HOUSE (July 20, 2021), <https://www.whitehouse.gov/omb/briefing-room/2021/07/20/the-path-to-achieving-justice40/> [https://perma.cc/Y2N2-25D7].

99. Osofsky & Peel, *supra* note 1.

100. *Climate Reregulation Tracker*, *supra* note 86.

101. *Friends of Earth v. Haaland*, No. 21-cv-02317 (RC), 2022 WL 254526, at \*25 (D.D.C. Jan. 27, 2022).

102. *Louisiana v. Biden*, 543 F. Supp. 3d 388 (W.D. La. 2021).

approve the lease sale,” is “reviewing the [c]ourt’s decision concerning deficiencies in that record,” and has appealed the decision on the moratorium to “address serious deficiencies in the federal oil and gas program” in the context of climate change.<sup>103</sup>

This interplay between the two administrations’ administrative decisions and the courts reinforces that while a new administration can ultimately cause major shifts in policy, the structure of administrative law can limit the pace of change. As this pair of decisions reinforces, courts play an important role in determining how rapidly a new administration’s drastic shift in approach can move forward.

As explored in our prior scholarship, litigation tends to be more pro-regulatory when presidential administrations take limited action to address climate change and more antiregulatory during administrations, like those of President Obama and President Biden, which are advancing ambitious efforts to address climate change. For example, on February 28, 2022, the Supreme Court heard oral argument in *West Virginia v. EPA*, a case challenging the extent of Congress’s authorization under 42 U.S.C. § 7411(d) of the Clean Air Act for the EPA to issue rules regulating greenhouse gas emissions from the power sector.<sup>104</sup> The outcome of this case has significant implications for the Biden Administration’s efforts to address climate change through action by administrative agencies.

### C. Climate Action by Subnational Governments and Corporations

Throughout this period of dramatic federal policy shifts, pro-regulatory state and local governments and many businesses have been more consistent in their commitments to action on climate change and progress towards those goals. This Section explores the impact of these efforts while at the same time acknowledging that (1) not all subnational governments want to ambitiously regulate climate change, and (2) these efforts could not fully replace a lack of federal action during that period.<sup>105</sup>

---

103. Melissa Schwartz (@MSchwartz3), TWITTER (Jan. 27, 2022, 11:43 PM), <https://twitter.com/MSchwartz3/status/1486922870580289538> [<https://perma.cc/L3RL-E38Q>]; Anna Phillips & Maxine Joselow, *Judge Throws Out Massive Gulf of Mexico Oil and Gas Lease Sale*, WASH. POST (Jan 28, 2022, 7:23 AM), <https://www.washingtonpost.com/climate-environment/2022/01/27/biden-gulf-of-mexico-lease-sale/> [<https://perma.cc/32RY-4DUH>].

104. Oral Argument, *West Virginia v. EPA*, No. 20-1530 (Feb. 28, 2022), [https://www.supremecourt.gov/oral\\_arguments/audio/2021/20-1530](https://www.supremecourt.gov/oral_arguments/audio/2021/20-1530) [<https://perma.cc/T6ZS-RXPG>].

105. For example, subnational governments have been on both sides of major climate change litigation. For an analysis of these dynamics in the context of *Massachusetts v. EPA*, see Hari M Osofsky, *The Geography of Climate Change Litigation Part II: Narratives of Massachusetts v. EPA*, 8 CHI. J. INT’L L. 573 (2008). For an analysis of federalism in the context of conflictual dynamics, including interactions between states and the federal government in the context of the Clean Air Act, see Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1276-78 (2009). For a discussion of horizontal federalism dynamics, see Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 MICH. L. REV. 57 (2014); Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493 (2008); and Noah D. Hall, *Toward a New Horizontal Federalism: Interstate Water Management in the Great Lakes Region*, 77 U. COLO. L. REV. 405 (2006).

The efforts by pro-regulatory subnational governments and businesses have been substantial. For example, the broad set of entities that committed to “We Are Still In” under the Trump Administration have broadened their collaboration in an “America Is All In” coalition that is “working to cut U.S. emissions in half by 2030 [from 2005] levels and reach net-zero emissions by 2050, while guarding against the impacts of climate disruption.”<sup>106</sup> The coalition’s statement highlights some of the regulatory gains at subnational levels during the Trump Administration: “Today, one in three Americans live in a jurisdiction committed to 100% clean electricity. 16 states have passed or committed to pass regulations and legislation that would phase down the use of hydrofluorocarbons, a potent greenhouse gas. And in three years, the U.S. electric vehicle market has doubled.”<sup>107</sup> The coalition’s *Blueprint 2030* report details the actions needed at multiple levels of government and by public and private stakeholders.<sup>108</sup>

This activity by the “American Is All In” coalition occurs in the broader context of longstanding networks of cities, states, and businesses focused on addressing climate change. These networks have collaborated to advance local, state, national, and international action on climate change.<sup>109</sup> Although an in-depth look at the work of each of these networks during the past five years is beyond the scope of this Article, an examination of the international and U.S. networks of cities and some of their commitments illustrates the extensive collaborations occurring in the United States and internationally which have continued throughout this period.

Cities have collaborated on climate change internationally for more than three decades. Key international networks of cities have included ICLEI, which was established by 200 local governments from forty-three countries at the first World Congress of Local Governments for a Sustainable Future in 1990;<sup>110</sup> the World Mayors Council on Climate Change, which was launched just after the Kyoto Protocol came into force in 2005 and ended in 2015;<sup>111</sup> and the C40 Cities

---

106. *About, AMERICA IS ALL IN*, <https://www.americaisallin.com/about/> [https://perma.cc/424Q-R5NU] (last visited Oct. 3, 2021).

107. *Who’s In, AMERICA IS ALL IN*, <https://www.americaisallin.com/whos-in/> [https://perma.cc/NP25-2BST] (last visited Oct. 3, 2021).

108. *Blueprint 2030, AMERICA IS ALL IN*, <https://www.americaisallin.com/blueprint-2030/> [https://perma.cc/Y5N8-HV9U] (last visited Oct. 3, 2021).

109. For an in-depth exploration of the role of these networks, see Hari M. Osofsky, *Subnational Actors & International Environmental Law*, in OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW (Lavanya Rajamani & Jacqueline Peel eds., 2021); Hari M. Osofsky, *Rethinking the Geography of Local Climate Action: Multi-Level Network Participation in Metropolitan Regions*, 2015 UTAH L. REV. 173; Hari M. Osofsky, *Suburban Climate Change Efforts: Possibilities for Small and Nimble Cities Participating in State, Regional, National, and International Networks*, 22 CORNELL J.L. & PUB. POL’Y 35 (2012); and Hari M. Osofsky & Janet Koven Levit, *The Scale of Networks: Local Climate Change Coalitions*, 8 CHI. J. INT’L L. 409 (2008).

110. Kale Roberts, *Three Decades of Global Sustainability: ICLEI at 30 Enters Next ‘Decade of Local Action’*, ICLEI (Sept. 4, 2020), <http://icleiusa.org/iclei-at-30/> [https://perma.cc/9KCM-J7C4].

111. Cynthia Rosenzweig, William Solecki, Stephen A. Hammer & Shagun Mehrotra, *Cities Lead the Way in Climate-Change Action*, 467 NATURE 909, 910 (2010); *World Mayors Council on Climate Change (WMCCC)*, UN ENV’T PROGRAMME (Aug. 27, 2019), [https://climateinitiativesplatform.org/index.php/World\\_Mayors\\_Council\\_on\\_Climate\\_Change\\_\(WMCCC\)](https://climateinitiativesplatform.org/index.php/World_Mayors_Council_on_Climate_Change_(WMCCC)) [https://perma.cc/76WL-TC4Q].

Climate Leadership Group, which has expanded from eighteen participating cities in 2005 to nearly 100 participating cities today.<sup>112</sup> A number of efforts by networks of cities, including the Compact of Mayors and the European Union’s Covenant of Mayors, came together in 2016 to establish the Global Covenant of Mayors for Climate and Energy,<sup>113</sup> “the largest global alliance for city climate leadership, built upon the commitment of over 10,000 cities and local governments.”<sup>114</sup> These international networks and their member cities make commitments in line with goals of international climate agreements that they maintain even as their countries’ national policies evolve. For example, C40’s Deadline 2020 Initiative and more recently its 2021-2024 Leadership Standards involve cities making commitments in line with the Paris Agreement’s 1.5°C goal.<sup>115</sup>

U.S. networks of local governments have also been collaborating for nearly two decades. The Mayors Agreement was established in 2005 when the United States failed to join the Kyoto Protocol and cities pledged to meet what its commitments would have been—reducing emissions to seven percent below 1990 levels by 2012—and to advocate for larger-scale commitments.<sup>116</sup> 1066 cities have joined the agreement, and after the U.S. Conference of Mayors endorsed it, the U.S. Conference of Mayors Climate Protection Center was launched.<sup>117</sup> Climate Mayors, a bipartisan network that includes more than 470 mayors,<sup>118</sup> issued a statement committing to U.S. Paris Agreement goals when President Trump announced the United States’ withdrawal.<sup>119</sup> Cities also have been collaborating at regional and local levels in the United States.<sup>120</sup>

While these actions by subnational and private actors do not solve the problem of rapidly shifting federal regulation and did not fully counter the regulatory rollbacks of the Trump Administration, they ensured that efforts to

---

112. *About C40*, C40 CITIES, <https://www.c40.org/about-c40/> [https://perma.cc/F974-4THV] (last visited Mar. 3, 2022).

113. See Nicole Ortung, *Why Cities are Forming a Global Alliance to Fight Climate Change*, CHRISTIAN SCI. MONITOR (June 24, 2016), <https://www.csmonitor.com/Environment/2016/0624/Why-cities-are-forming-a-global-alliance-to-curb-climate-change> [https://perma.cc/R7GK-KCFH].

114. *About Us*, GLOB. COVENANT OF MAYORS FOR CLIMATE & ENERGY, <https://www.globalcovenantofmayors.org/about/> [https://perma.cc/F6XL-XCTB] (last visited Feb. 1, 2020).

115. *About C40*, C40 CITIES, <https://www.c40.org/about> [https://perma.cc/V22L-T6Z5] (last visited Feb. 10, 2022); *Statement by the C40 Cities Steering Committee on the Organisation’s New Leadership Standards*, C40 CITIES (Jan. 6, 2021), <https://www.c40.org/news/statement-by-the-c40-cities-steering-committee/> [https://perma.cc/PZ6Y-3JXQ].

116. Mayors Climate Prot. Ctr., *About the Mayors Climate Protection Center*, U.S. CONF. OF MAYORS, <http://www.usmayors.org/climateprotection/about.htm> [http://perma.cc/5ZZC-98KL] (last visited Oct. 21, 2014).

117. *Mayors Climate Protection Center*, U.S. CONF. OF MAYORS, <https://www.usmayors.org/mayors-climate-protection-center/> [https://perma.cc/4VCC-8FXE] (last visited Feb. 10, 2022).

118. *Who We Are*, CLIMATE MAYORS, <http://climatemayors.org/> [https://perma.cc/R3QK-DZS3].

119. *468 US Climate Mayors Commit to Adopt, Honor and Uphold Paris Climate Agreement Goals*, CLIMATE MAYORS (Nov. 27, 2019), <http://climatemayors.org/actions/paris-climate-agreement/> [https://perma.cc/8ZC6-QF2F].

120. For a more in-depth discussion of these networks, see *supra* note 111 and accompanying discussion.

address climate change continued against a backdrop of federal regulatory change.<sup>121</sup> These collaborations reinforce the multi-level nature of action to address climate change; while nation-state actions in line with international agreements are critical to making progress, other key actors and their commitments also play an important role.

### III. Declining Australian Regulation

Australia is also divided along partisan lines when it comes to issues of clean energy and climate change, particularly among the political elites who determine party policy positions. However, in Australia, a different system of government has seen divergence from U.S. policy outcomes on these issues over time. Australia’s parliamentary system of government aligns the federal legislature with the executive, allowing for action (or persistent inaction) by the party that wins the most seats in the lower house of parliament. This reduces the potential for legislative gridlock but has paved the way for dramatic flip-flops on climate policy across different administrations. Moreover, Australia’s federal system of environmental regulation allows limited opportunities for review of executive action, restricting the capacity of non-governmental actors to hold the federal government to account or to push for stronger action via the administrative law regime.

Over the past decade, Australia has at times been an international climate leader, such as when it ratified the Kyoto Protocol in 2007<sup>122</sup> and when it legislated to introduce a national price on carbon in 2011.<sup>123</sup> This has been followed, however, by a repeal of the carbon pricing legislation and a dramatic shift in the opposite policy direction when the current conservative federal government came to power in 2013. This shift has encouraged a flourishing of climate action and ambition at multiple sites of governance beyond the national government.

This Part briefly reviews the Australian parliamentary system of government as a backdrop for understanding the pattern of legislative shifts on climate change. It also details the system of federal environmental regulation and administrative law, which, unlike in the United States, provides limited capacity for judicial review of regulatory action. Although the different structure of government in Australia has avoided the kind of congressional gridlock seen in the United States, a partisan environment, coupled with limited opportunities for substantive review of federal executive action, has resulted in inconsistent

---

121. The Clean Energy States Alliance, for example, has reported on the twenty-one states with 100% clean energy goals. *100% Clean Energy Collaborative—Table of 100% Clean Energy States*, CLEAN ENERGY STATES ALL., <https://www.cesa.org/projects/100-clean-energy-collaborative/guide/table-of-100-clean-energy-states/> [https://perma.cc/2ERD-8GFG] (last visited June 1, 2022).

122. *Bali Summit Applauds Rudd for Kyoto Move*, ABC NEWS (Dec. 3, 2007), <http://www.abc.net.au/news/2007-12-04/bali-summit-applauds-rudd-for-kyoto-move/976302> [https://perma.cc/42ER-B3CK].

123. *Clean Energy Act 2011* (Cth) (Austl.).

policies and embedded inadequate action, all while the conservative party continued until very recently to maintain a majority in the federal parliament.

For those in the United States who pine for the greater legislative efficiency of a parliamentary system, Australia's experience on federal climate policy provides a cautionary tale. However, both the U.S. and Australian experiences point to the potential for these fragmented, federal systems of governance to allow more ambitious policymaking to emerge in other parts of the polity, even where roadblocks are encountered at the national level.

#### *A. Australia's Parliamentary System of Governance*

Australia's system of government may seem very familiar to U.S. eyes. The country has a federal Constitution, closely modeled on the U.S. Constitution, which divides powers between the federal government and the six states. The Australian Constitution also separates power at the federal level between the legislature, executive, and judiciary.<sup>124</sup> The federal legislature consists of two houses known as the House of Representatives and the Senate.<sup>125</sup> Members of the House of Representatives and Senate (collectively known as the Australian Parliament) usually belong to one of two party groupings: the Australian Labor Party (with a center-left focus)<sup>126</sup> or the Coalition of the Liberal Party and the National Party (both with a conservative focus).<sup>127</sup> A growing number of Members in the Australian Parliament represent other smaller parties, such as the Australian Greens, or are independent members.<sup>128</sup>

To become legislation, federal laws need to pass each house of the Australian Parliament. Legislation then receives "royal assent" from the Head of Government, who is nominally the Queen of England, but who exercises her powers in this regard through the appointed, largely ceremonial Governor-

---

124. *Australian Constitution* s 51. The six states in the Commonwealth of Australia are New South Wales, Victoria, Queensland, South Australia, Western Australia and Tasmania. There are also two self-governing mainland territories: the Northern Territory and the Australian Capital Territory.

125. The Senate consists of seventy-six senators, twelve from each of the six states and two from each of the mainland territories. The House of Representatives, sometimes called "the People's House" is currently made up of 151 members who each represent an electorate. The party or parties who hold the majority of seats in the House form a government. *See About Parliament*, PARLIAMENT OF AUSTRALIA, [https://www.aph.gov.au/About\\_Parliament](https://www.aph.gov.au/About_Parliament) [https://perma.cc/HYD2-8Q62] (last visited Aug. 20, 2021).

126. *What We Stand For: Labor's Policies*, AUSTRALIAN LAB. PARTY, <https://www.alp.org.au/policies> [https://perma.cc/S2CU-Y2KP] (last visited Aug. 20, 2021). The Labor party has strong links to the union movement.

127. *See Our Beliefs*, LIBERAL PARTY, <https://www.liberal.org.au/our-beliefs> [https://perma.cc/YY3M-6VFF] (last visited Aug. 20, 2021); *What We Stand For*, NAT'L PARTY, <https://nationals.org.au/about/what-we-stand-for/> [https://perma.cc/5Y5R-KR59] (last visited Aug. 20, 2021).

128. Prior to the May 2022 election, there were nine Greens senators and one Greens member of the lower house. Independents and minor parties make up a further five members of the Senate and six members of the House of Representatives. The most recent May 2022 election has seen the Greens and Independents pick up more seats in Parliament. *See Senate Composition*, PARLIAMENT OF AUSTRALIA, [https://www.aph.gov.au/Senators\\_and\\_Members/Senators/Senate\\_composition](https://www.aph.gov.au/Senators_and_Members/Senators/Senate_composition) [https://perma.cc/4HDC-4HQ2] (last visited June 1, 2022); *Senators and Members*, PARLIAMENT OF AUSTRALIA, [https://www.aph.gov.au/Senators\\_and\\_Members](https://www.aph.gov.au/Senators_and_Members) [https://perma.cc/GYS5-CWJ4] (last visited June 1, 2022).

General.<sup>129</sup> This royal assent rarely, if ever, serves a veto function over legislation, distinguishing the Australian system from the U.S. system with its executive veto.

This system shares many structural features with the United States but with an important difference. Like many western countries, Australia’s system of government operates as a parliamentary democracy and not as a strict separation-of-powers system.<sup>130</sup> The political party that wins the most seats in the House of Representatives is able to form a government and nominate its leader as Prime Minister.<sup>131</sup> The executive government, therefore, effectively controls the legislature, at least in the lower house, and generally is able to pursue its legislative agenda efficiently.<sup>132</sup> On occasion, blockage of legislation through the actions of opposition or minor party senators may slow down progress on particular legislative proposals. However, the Constitution provides mechanisms to break a deadlock if there is ongoing opposition in the Senate to legislation passed by the House of Representatives.<sup>133</sup> Often, there is also strong political pressure for the upper house to pass government legislation or to reach a compromise, especially when the government has been elected with a mandate to pass or repeal certain laws.<sup>134</sup>

While this system seems, *prima facie*, to compare favorably with the gridlock and legislative inaction often seen in the United States, it can equally promote quick reversal of legislative gains when another party comes to power. The problem may then become one of policy inconsistency as legislation radically changes course with successive administrations. This phenomenon is particularly likely where the major parties have strongly differing, partisan views on particular policy issues that influence prevailing public attitudes. However, as the past five years reveal, the Australian system—with its more unified executive and legislative branches—can also result in a stable, intransigent policy position from a party that many in the country oppose, particularly where the same party continues to control the Australian parliament over a long period.

---

129. See ROBIN CREYKE, DAVID HAMER, PATRICK O’MARA, BELINDA SMITH & TRISTAN TAYLOR, *LAYING DOWN THE LAW* 295 (2020).

130. *Id.* at 55-56.

131. *Id.* at 56.

132. It is possible in the Australian system for the Senate to be controlled by a different party from that of the government or for independent senators and senators from other minor parties to make up the “balance of power” in the Senate. To secure a majority of votes in the Senate where there is a partisan (Labor/Coalition) divide, the Coalition government has to secure votes from the Greens or other independent and minor party senators to pass legislation. Following the 2019 election, however, the Senate crossbench became substantially smaller, with the incumbent Coalition government only four seats short of a majority. See *Parliamentary Statistics*, PARLIAMENTARY EDUC. OFF., <https://peo.gov.au/understand-our-parliament/how-parliament-works/parliament-at-work/parliamentary-statistics/> [https://perma.cc/ACD3-LJCY] (last visited Aug. 23, 2021).

133. *Australian Constitution* s 57.

134. This was arguably the case with the *Clean Energy Act 2011* (Cth) (Austl.), enacted following the Abbott government’s election win on a platform of “axing the carbon tax.” See Lenore Taylor, *Australia Kills Off Carbon Tax*, *GUARDIAN* (July 17, 2014), <https://www.theguardian.com/environment/2014/jul/17/australia-kills-off-carbon-tax> [https://perma.cc/8F6D-P98Q].

This situation is exacerbated in Australia by narrow environmental regulation at the federal level, coupled with limited provisions for administrative review. Australia, like the United States, has no specific legislative power relating to the environment articulated in its Constitution.<sup>135</sup> Legislation pertaining to the environment and environmental issues, such as climate change, has therefore been founded on other constitutional powers, such as those relating to trade and commerce, regulation of corporations, and domestic implementation of international treaty obligations under the external affairs power.<sup>136</sup> In theory, these constitutional powers give the federal parliament a broad basis on which to construct federal environmental laws.<sup>137</sup> However, because Australian states have traditionally enjoyed extensive control over natural resources and have concurrent powers with the federal legislature in this area,<sup>138</sup> attempts at comprehensive federal environmental regulation have frequently been resisted and have resulted in several disputes going all the way to Australia's apex court, the High Court.<sup>139</sup>

What has emerged in the aftermath of these federal-state struggles is weak federal environmental legislation, embodied by the federal Environment Protection and Biodiversity Conservation Act (EPBC Act).<sup>140</sup> Unlike federal environmental statutes in the United States, this legislation does not create substantive regulatory standards for different environmental resources, such as air or water. Instead, the EPBC Act, like NEPA in the United States, sets up a system of environmental impact assessment for projects that are likely to significantly impact designated "matters of national environmental significance."<sup>141</sup> These matters are very tightly defined by the EPBC Act and do not include greenhouse gases or climate change.<sup>142</sup> This has limited the opportunity for external actors, such as environmental groups, to bring challenges to administrative decisionmaking by the federal government for projects with significant climate implications, such as coal mines.<sup>143</sup>

---

135. *Australian Constitution* s 51 (setting out Commonwealth legislative heads of power with no inclusion of a general "environment" provision).

136. *Id.* S 51(i)(xx)(xxix).

137. James Crawford, *The Constitution and the Environment*, 13 SYDNEY L. REV. 11, 13 (1992) ("[T]he Commonwealth Constitution was enacted with a formidable list of federal powers, a list which, given certain basic principles of interpretation, was likely to confer substantial federal authority with respect to environmental management.").

138. GERRY BATES, ENVIRONMENTAL LAW IN AUSTRALIA ch. 3 (10th ed. 2019) (discussing shared powers between the Commonwealth and States).

139. *E.g.*, *Commonwealth v Tasmania (Tasmanian Dams Case)* (1983) 158 CLR 1 (Austl.); *see* Jacqueline Peel & Lee Godden, *Australian Environmental Management: A 'Dams' Story*, 28 UNSW L.J. 668 (discussing this case).

140. *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (Austl.).

141. *Id.*

142. This gap has been the subject of extensive criticism, including in government reviews of the Act. *See, e.g.*, ALLAN HAWKE, REPORT OF THE INDEPENDENT REVIEW OF THE ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION ACT 1999, at 21-22 (2009); GRAEME SAMUEL, INDEPENDENT REVIEW OF THE EPBC ACT – FINAL REPORT, at vii (2020).

143. Chris McGrath, *Flying Foxes, Dams and Whales: Using Federal Environmental Laws in the Public Interest*, 25 ENV'T PLAN. L.J. 324, 331-34 (discussing obstacles to bringing public interest environmental litigation).

More recently, in the case of *Sharma v. Minister for the Environment*, a group of children successfully sued the federal environmental minister, with the federal court finding—at first instance—that the minister had a common law duty of care that ran alongside her administrative powers under the EPBC Act, which had to be exercised to safeguard Australian children from the physical dangers of climate harms.<sup>144</sup> If this ruling had stood on appeal, this duty could have placed quite significant limitations on the federal minister’s approval powers under the EPBC Act.<sup>145</sup> However, the minister successfully appealed the first instance decision to the full federal court and there has been no further appeal to the High Court.<sup>146</sup>

Australia’s federal administrative law regime also offers only limited grounds for review of federal administrative decisionmaking. Australia’s equivalent to the APA—the Administrative Decisions (Judicial Review) Act (ADJR Act)—applies to administrative decisions under federal laws or by federal authorities, and allows a person “aggrieved” by such decisions to seek judicial review by the Federal Court.<sup>147</sup> The test for standing under the ADJR Act has generally been limited to applicants who can demonstrate a “special interest” in the decision, which provides limited opportunities for environmental groups to bring citizen suits to address diffuse climate harms.<sup>148</sup> The EPBC Act broadens the category of “aggrieved” persons for the purpose of judicial review of decisions made under that legislation, allowing for suits by environmental groups.<sup>149</sup> However, given the restricted scope of the EPBC Act when it comes to regulation of projects with climate implications, as well as the fact that most decisions on climate are taken under unreviewable policies rather than under federal enactments, the federal administrative law regime in Australia offers very limited opportunities for scrutiny of executive government action relevant to climate change.

This has placed climate issues in Australia firmly in the domain of politics, rather than reviewable regulatory decisionmaking. As seen in Part II, partisanship on climate change is an established feature of Australian climate

---

144. *Sharma v Minister for the Environment* [2021] FCA 560 (Austl.).

145. See Jacqueline Peel & Rebekkah Markey-Towler, *A Duty to Care: The Case of Sharma v Minister for the Environment* [2021] FCA 560, 33 J. ENV’T L. 727, 734 (2021) (discussing implications of the decision).

146. Kieran Pender, *In the Sharma Case, Australia’s Federal Court Must Not Avert its Eyes from the Climate Crisis*, GUARDIAN (Oct. 21, 2021), <https://www.theguardian.com/commentisfree/2021/oct/21/in-the-sharma-case-australias-federal-court-must-not-avert-its-eyes-from-the-climate-crisis> [<https://perma.cc/Z72M-7HR8>]; Jacqueline Peel & Rebekkah Markey-Towler, *Today’s Disappointing Federal Court Decision Undoes 20 Years of Climate Litigation Progress in Australia*, THE CONVERSATION (Mar. 15, 2022), <https://theconversation.com/todays-disappointing-federal-court-decision-undoes-20-years-of-climate-litigation-progress-in-australia-179291> [<https://perma.cc/5GP7-CCW8>].

147. *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5 (Austl.).

148. See PETER CANE, LEIGHTON McDONALD & KRISTEN RUNDLE, *PRINCIPLES OF ADMINISTRATIVE LAW* 216-21 (3d ed. 2018) (discussing the special interest approach to standing in environmental litigation); LEE GODDEN, JACQUELINE PEEL & JAN McDONALD, *ENVIRONMENTAL LAW* 151-56 (2018) (discussing standing for NGOs).

149. *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 487 (Austl.).

politics just as it is in the United States. Indeed, the issue has become so contentious at the national level that it has given rise to the so-called “climate wars.”<sup>150</sup> In these policy and political battles, leaders from both parties, including several prime ministers, have lost their positions due to partisan differences over climate change.<sup>151</sup>

### *B. Australian Climate Policy: Federal Intransigence*

Over the last five years (2016-2021), Australia’s federal climate policy has moved from an era of legislative flip-flopping<sup>152</sup> to entrenched inaction. This may now change with the election of the new Labor Prime Minister Anthony Albanese in May 2022. The previously long-standing conservative federal government had pursued increasingly less ambitious climate policy proposals over time at the national level. Internationally, the Australian government had been increasingly viewed as an obstacle to efforts by more progressive governments, including the Biden Administration, to advancing global climate ambition.<sup>153</sup> Australia’s federal administrative law regime has little capacity to influence these dynamics given that most changes are enacted in policy rather than actions under legislation.

The focus of Australia’s federal climate policy under the conservative federal government had been on “technology not taxes” as was often emphasized by Prime Minister Scott Morrison<sup>154</sup> and as set out in the “Australian way” net-zero plan the government released prior to the 2021 United Nations Climate Change Conference (COP26).<sup>155</sup> The carbon pricing scheme introduced by Labor Prime Minister Julia Gilliard in 2011<sup>156</sup>—commonly referred to as Australia’s carbon tax—was repealed by the government of Coalition Prime Minister Tony Abbott in 2014<sup>157</sup> and has not been replaced with any similar

150. See Kate Crowley, *Climate Wars, Carbon Taxes and Toppled Leaders: The 30-Year History of Australia’s Climate Response*, In *Brief*, CONVERSATION (Oct. 15, 2021), <https://theconversation.com/climate-wars-carbon-taxes-and-toppled-leaders-the-30-year-history-of-australias-climate-response-in-brief-169545> [<https://perma.cc/CG43-A3DN>].

151. See Annabel Crabb, *Australia’s Recent Climate Change Policy: A Brief History of Seven Killings*, ABC NEWS (Aug. 23, 2018), <https://www.abc.net.au/news/2018-08-23/climate-change-policy-a-brief-history-of-seven-killings/10152616> [<https://perma.cc/3Z7Q-MH7U>].

152. See Osofsky & Peel, *supra* note 1.

153. See Anthony Galloway & David Crowe, *US and UK Keep Pressure on Australia but Taylor Says ‘Look at the Scoreboard’*, AGE (Aug. 20, 2021), <https://www.theage.com.au/politics/federal/look-at-the-scoreboard-angus-taylor-hits-back-at-us-over-climate-call-20210820-p58kf6.html> [<https://perma.cc/FU48-EDN8>].

154. *Video: PM Defends His ‘Technology Not Taxes’ Approach to Cutting Emissions*, ABC NEWS (Apr. 23, 2021), <https://www.abc.net.au/news/2021-04-23/pm-defends-his-technology-not-taxes-approach-to-emissions/13315616> [<https://perma.cc/V8D9-89JD>].

155. AUSTRALIA’S LONG-TERM EMISSIONS REDUCTION PLAN: A WHOLE-OF-ECONOMY PLAN TO ACHIEVE NET ZERO EMISSIONS BY 2050, AUSTRALIAN GOV’T (2021), <https://www.industry.gov.au/sites/default/files/October%202021/document/australias-long-term-emissions-reduction-plan.pdf> [<https://perma.cc/8AMG-CGMT>].

156. *Clean Energy Act 2011* (Cth) (Austl.). For a discussion of the design and early experience with the carbon pricing mechanism, see Jacqueline Peel, *The Australian Carbon Pricing Mechanism: Promise and Pitfalls on the Pathway to a Clean Energy Future*, 15 MINN. J.L. SCI. & TECH. 429 (2014).

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

legislation since. Instead, consistent with the “technology not taxes” mantra, the Morrison government supported funding for new and emerging low-emissions technologies, including hydrogen, soil carbon sequestration, and carbon capture and storage (CCS).<sup>158</sup>

Other elements of Australia’s federal climate policy include the so-called “Climate Solutions Package,” which is focused on paying farmers and other offset producers for carbon abatement actions in the land sector;<sup>159</sup> a Renewable Energy Target, although the target itself was decreased under the ruling conservative government;<sup>160</sup> and a national greenhouse and energy reporting scheme that encompasses a “Safeguard Mechanism” penalizing companies whose greenhouse gas emissions exceed generous baselines. Critically though, Australia has no emissions reduction targets enshrined in legislation at the federal level and no legislative mechanisms for driving climate action or ensuring accountability for the achievement of policy commitments. In contrast to other countries with such legislation (such as New Zealand<sup>161</sup> and the United Kingdom<sup>162</sup>), the lack of a legislative basis for Australia’s emissions reduction targets has limited the scope for judicial review of their adequacy.<sup>163</sup> As highlighted earlier, litigants in Australia have explored alternative common law pathways in tort to seek to induce federal climate action in accordance with a duty of care. These cases, however, are either at early stages or have been subject to appeal.<sup>164</sup>

---

158. Media Release, The Hon. Angus Taylor MP, Minister Indus., Energy and Emissions Reduction, Morrison Government supporting the next generation of low emissions technologies (July 23, 2021), <https://www.minister.industry.gov.au/ministers/taylor/media-releases/morrison-government-supporting-next-generation-low-emissions-technologies> [https://perma.cc/QVT3-J3QW]; AUSTRALIAN GOV’T, AUSTRALIA’S 2030 EMISSIONS REDUCTION TARGET 143 (2015), <https://www.environment.gov.au/system/files/resources/f52d7587-8103-49a3-aeb6-651885fa6095/files/summary-australias-2030-emissions-reduction-target.pdf> [https://perma.cc/PZ35-QUA8].

159. This policy repackages the Abbott-era “Direct action plan.” The *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) (Austl.) established a \$2.55 billion emissions reduction fund, an incentive pool for companies to voluntarily find ways to reduce their carbon footprint. Projects are funded through a reverse auction system, with the aim of purchasing emissions abatement at the lowest cost.

160. The *Renewable Energy (Electricity) Act 2000* (Cth) (Austl.) has undergone several amendments since it was first passed. But in 2015 the Government reduced the legislated target for large scale renewables energy allocation to 33,000GWh by 2020 from its original figure of 41,000GWh with the *Renewable Energy (Electricity) Amendment Act 2015* (Cth) (Austl.).

161. See, e.g., *Thomson v. Minister for Climate Change Issues* [2017] NZHC 733 (N.Z.); Climate Change Response (Zero Carbon) Amendment Act 2019 (N.Z.).

162. See, e.g., Climate Change Act 2008, c. 27 (U.K.); *R (Plan B Earth) v Prime Minister & Others* [2021] EWHC (Admin) 3469.

163. Though litigants have explored a range of avenues to hold the Federal government to account through the courts. See Jacqueline Peel, Hari Osofsky & Anita Foerster, *Shaping the ‘Next Generation’ of Climate Change Litigation in Australia*, 41 MELBOURNE U.L. REV. 793, 804 (2017) (discussing “next generation” climate change litigation); Tim Baxter, *Urgenda-Style Climate Litigation Has Promise in Australia*, 32 AUSTRALIAN ENV’T REV. 70 (2017) (arguing the Federal government’s emissions reduction targets could be in breach of a duty of care).

164. See, e.g., Notice of Appeal, *Minister for the Environment v Sharma*, VID389/2021, Full Court of the Federal Court (July 16, 2021) (Austl.), <https://www.fedcourt.gov.au/services/access-to-files-and-transcripts/online-files/minister-for-the-environment-v-sharma/vid-389-of-2021-filed-documents/Notice-of-Appeal-20210716.pdf> [https://perma.cc/8VC6-WY99]; see also *About the Case*, AUSTR.

In addition, the independent advisory body set up to help provide accountability regarding federal climate policy, like the Climate Change Authority, has been weakened through political appointments.<sup>165</sup> These steps followed the Authority's release, prior to the Paris Conference, of its Final Report on Australia's Future Emissions Reduction Targets, which recommended a 2025 emissions reduction target for Australia of 30% below 2000 levels and further reductions by 2030 of 40% to 60% below 2000 levels.<sup>166</sup> The Climate Change Authority's recommendations were not followed when the Australian government later submitted as the country's intended Nationally Determined Contribution (NDC) to the Paris Agreement negotiations an "economy-wide target to reduce greenhouse gas emissions by 26 to 28 percent below 2005 levels by 2030."<sup>167</sup>

Australia's NDC target is ranked as "highly insufficient" by tracking organizations, such as Climate Action Tracker,<sup>168</sup> and has been assessed by the Climate Change Performance Index as demonstrating "very low" performance (in the bottom ten of countries ranked, slipping four places in the most recent assessment).<sup>169</sup> A United Nations report assessing progress on the Sustainable Development Goals (SDGs) ranked Australia last on action in response to climate change among the 170 U.N. members analyzed.<sup>170</sup> Despite these assessments, and the passage of more than five years during which there have

---

CLIMATE CASE, [https://www.australianclimatecase.org.au/about\\_the\\_case](https://www.australianclimatecase.org.au/about_the_case) [https://perma.cc/6CZG-32RG] (last visited Nov. 17, 2021) (discussing *Sharma v Ministers for the Environment* [2021] FCA 560 (Austl.)).

165. The Climate Change Authority was originally set up to provide independent scientific advice, like the UK's advisory body (the Climate Change Committee). It was slated for abolition as part of the carbon tax repeal but spared in a deal between the Coalition and Clive Palmer. Nevertheless, following the resignation of Bernie Fraser, who was a critic of government policy, it has been weakened through the appointment of a former energy executive. See Daniel Hurst, *Bernie Fraser Quits as Chairman of Climate Change Authority*, *GUARDIAN* (Sept. 8, 2015), <https://www.theguardian.com/environment/2015/sep/08/bernie-fraser-quits-as-chairman-of-climate-change-authority> [https://perma.cc/BUS5-FS6F]; Jodie Stephens, *The Government Has Appointed a Former Energy Executive to Lead the Climate Change Authority*, *SBS NEWS* (Apr. 9, 2021), <https://www.sbs.com.au/news/the-government-has-appointed-a-former-energy-executive-to-lead-the-climate-change-authority> [https://perma.cc/WHB2-GWTH].

166. Climate Change Auth., *Final Report on Australia's Future Emissions Reduction Targets*, AUSTRALIAN GOV'T. (July 2, 2015), <https://www.climatechangeauthority.gov.au/sites/default/files/2020-07/Final-report-Australias-future-emissions-reduction-targets.pdf> [https://perma.cc/KHA3-9N6Q].

167. See AUSTRALIA'S INTENDED NATIONALLY DETERMINED CONTRIBUTION TO A NEW CLIMATE CHANGE AGREEMENT (Aug. 2015), <https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Australia%20First/Australias%20Intended%20Nationally%20Determined%20Contribution%20to%20a%20new%20Climate%20Change%20Agreement%20-%20August%202015.pdf> [https://perma.cc/C2Q2-XMJ2].

168. *Australia*, CLIMATE ACTION TRACKER (Sept. 15, 2021), <https://climateactiontracker.org/countries/australia/> [https://perma.cc/MLR6-5K5R].

169. *Australia*, CLIMATE CHANGE PERFORMANCE INDEX (CCPI), <https://ccpi.org/country/aus/> [https://perma.cc/4P2S-JWW8] (last visited Nov. 17, 2021).

170. Sammy Westfall, *Australia Ranks Last on Climate Action in U.N. Report*, *WASH. POST* (July 2, 2021), <https://www.washingtonpost.com/world/2021/07/02/australia-climate-action-un-sustainable-development/> [https://perma.cc/68ZQ-DP65].

been considerable international climate policy shifts, Australia has maintained the 2030 emissions reduction target set in its original NDC.<sup>171</sup>

The conservative federal government in Australia had resisted calls for policy change in this regard, arguing that it is plans and not targets that matter.<sup>172</sup> For example, Australia’s 2030 target was not altered by the federal government in the lead up to COP26, although it committed to a net-zero emissions target by 2050.<sup>173</sup> Since the conclusion of the COP26 negotiations and the call in the Glasgow Climate Pact for countries to strengthen their 2030 targets by 2022,<sup>174</sup> the conservative Morrison government had continued to state that it will maintain its original 2030 commitment.<sup>175</sup>

It is possible that the conservative Australian government’s adoption of a 2050 net-zero target marked the beginning of the end to the country’s “climate wars” and paved the way for more effective federal action on climate change.<sup>176</sup> Plans for such action, however, had not fared well in the partisan political environment of the Australian parliament since the repeal of carbon pricing legislation. In June 2017, under the leadership of then-Prime Minister Malcolm Turnbull, a long-awaited report from Chief Scientist Alan Finkel on Australia’s National Electricity Market was released recommending adoption of a Clean Energy Target.<sup>177</sup> This Target was intended to mandate that energy retailers provide a certain amount of their electricity from “low-emissions” generators (producing emissions below a threshold level of carbon dioxide per megawatt).<sup>178</sup> However, this proposal did not secure broad support within the

---

171. See AUSTRALIA: FIRST NDC, <https://www4.unfccc.int/sites/ndcstaging/Pages/Party.aspx?party=AUS&prototype=1> [https://perma.cc/ER59-8AGR] (last visited Aug. 23, 2021).

172. See Jake Evans, ‘No Blank Cheque’ on Net Zero Carbon Emissions Target, *Prime Minister Says, as Global ‘Code Red’ Issued*, ABC NEWS (Aug. 10, 2021), <https://www.abc.net.au/news/2021-08-10/ipcc-scott-morrison-climate-change-net-zero-2050/100364476> [https://perma.cc/Q7JQ-2H4N].

173. See Scott Morrison, *The Australian Way*, PRIME MINISTER OF AUSTRALIA (Oct. 26, 2021), <https://www.pm.gov.au/media/australian-way> [https://perma.cc/98LU-ZMUS].

174. U.N. Framework Convention on Climate Change, Glasgow Climate Pact, ¶¶ 28-29, FCCC/PA/CMA/2021/L.16 (Nov. 13, 2021).

175. Amy Remeikis, *Greg Hunt Won’t Say if Australia Will Update 2030 Emissions Target as Required, Instead Quoting Shakespeare*, GUARDIAN (Nov. 14, 2021), <https://www.theguardian.com/australia-news/2021/nov/14/greg-hunt-refuses-to-say-if-morrison-government-will-update-2030-emissions-target-as-required-under-cop26-deal> [https://perma.cc/U7S9-MTCU].

176. See, e.g., Frank Jotzo, *COP26: The Glasgow Climate Summit Demonstrates an Appetite for Change Australia Simply Can’t Ignore*, CONVERSATION (Nov. 15, 2021), <https://theconversation.com/cop26-the-glasgow-climate-summit-demonstrates-an-appetite-for-change-australia-simply-cant-ignore-171810> [https://perma.cc/Y7AN-DNDV]; *Despite its faults, Glasgow Climate Summit Offers Hope*, AGE (Nov. 14, 2021), <https://www.theage.com.au/national/despite-its-faults-glasgow-climate-summit-offers-hope-20211114-p598so.html> [https://perma.cc/2H8M-ES4A]; Sarah Martin, *Barnaby Joyce Says Nationals Did Not Sign Cop26 Pact and Australia is ‘Happy with Targets’*, GUARDIAN (Nov. 15, 2021), <https://www.theguardian.com/environment/2021/nov/15/scott-morrison-rules-out-more-ambitious-2030-emissions-target-despite-cop26-pact> [https://perma.cc/X5KP-LB42].

177. Alan Finkel, *Independent Review Into the Future Security of the National Electricity Market: Blueprint for the Future*, DEP’T ENV’T & ENERGY (AUSTRALIA) (2017), <https://www.energy.gov.au/sites/default/files/independent-review-future-nem-blueprint-for-the-future-2017.pdf> [https://perma.cc/C93R-ZS79].

178. See Madeleine De Gabriele, Michael Hopkin & Wes Mountain, *The Finkel Review at a Glance*, CONVERSATION (June 9, 2017), <https://theconversation.com/the-finkel-review-at-a-glance-79177>

Coalition party room. In October 2017, Prime Minister Malcolm Turnbull tried again, proposing the “National Energy Guarantee.”<sup>179</sup> This policy, negotiated with state governments, focused on ensuring a reliable electricity supply but also sought to cut the national electricity sector’s greenhouse gas emissions by 26% by 2030.

By August 2018, the National Energy Guarantee had gone the way of many other federal climate policies throughout Australia’s history. As *The Guardian* described it at the time: “The Turnbull government’s position on the national energy guarantee has flipped and flopped with remarkable tempo, even by the lowly standards of modern parliament . . . .”<sup>180</sup>

Once again, Australia was left with no emissions reduction target in regulation or legislation.<sup>181</sup> A leadership spill followed shortly thereafter, where Malcolm Turnbull was displaced in favor of Scott Morrison,<sup>182</sup> whose previous actions as Treasurer had included bringing a lump of coal into the federal parliament to demonstrate his support for Australian coal producers and exporters.<sup>183</sup>

Prime Minister Scott Morrison and his government did not subsequently attempt to introduce comprehensive climate legislation or even specific regulation for the electricity sector. Rather their “Australian Way” policy embraced the lack of a regulatory mandate for action, emphasizing the role of technological investment and innovation to steer Australia towards net-zero emissions by 2050.<sup>184</sup> Leading into the May 2019 national election—hopefully framed as the “climate election” by some commentators<sup>185</sup>—the Coalition government outlined its approach to action on climate change in its “Climate

[<https://perma.cc/BU3Q-S599>]; Penelope Crossley, *The National Energy Guarantee: Where Next for Clean Energy?*, 33 AUSTRALIAN ENV’T REV. 187, 189 (2019).

179. Madeleine De Gabriele, Michael Hopkin & Wes Mountain, *Infographic: The National Energy Guarantee at a Glance*, CONVERSATION (Oct. 17, 2017), <https://theconversation.com/infographic-the-national-energy-guarantee-at-a-glance-85832> [<https://perma.cc/D6FH-9UCK>].

180. Christopher Knaus, *The Liberal Party is Self-Destructing Over Energy. Here’s What You Need to Know*, GUARDIAN (Aug. 20, 2018), <https://www.theguardian.com/australia-news/2018/aug/20/liberal-party-self-destructing-national-energy-guarantee-malcolm-turnbull-what-you-need-to-know> [<https://perma.cc/Q3GT-CPXH>].

181. See Marc Hudson, *The Too Hard Basket: A Short History of Australia’s Aborted Climate Policies*, CONVERSATION (Aug. 20, 2018), <https://theconversation.com/the-too-hard-basket-a-short-history-of-australias-aborted-climate-policies-101812> [<https://perma.cc/Z4MZ-EBAE>].

182. See Louise Yaxley, *Scott Morrison Wins Leadership Spill; Malcolm Turnbull Takes Parting Shot at Abbott and Dutton in Final Speech*, ABC NEWS (Aug. 24, 2018), <https://www.abc.net.au/news/2018-08-24/scott-morrison-wins-liberal-leadership/10160168> [<https://perma.cc/Q66L-Y22W>].

183. See Katharine Murphy, *Scott Morrison Brings Coal to Question Time: What Fresh Idiocy is This?*, GUARDIAN (Feb. 9, 2017), <https://www.theguardian.com/australia-news/2017/feb/09/scott-morrison-brings-coal-to-question-time-what-fresh-idiocy-is-this> [<https://perma.cc/BX7B-3TVL>].

184. See AUSTRALIAN GOV’T, *supra* note 158, at 14 (setting out Australia’s whole-of-economy long-term emissions reduction plan).

185. Damien Cave, *It was Supposed to be Australia’s Climate Change Election. What Happened?*, N.Y. TIMES (May 19, 2019), <https://www.nytimes.com/2019/05/19/world/australia/election-climate-change.html> [<https://perma.cc/94KA-7YGN>].

Solutions Package.”<sup>186</sup> This package continued the status quo of voluntary measures introduced under previous conservative administrations. It promised a AUD3.5 billion investment, including for the “Climate Solutions Fund” (which invests in carbon abatement projects, mostly in the land sector), as well as support for new energy efficiency measures for homes, businesses and community organizations, a national strategy for electric vehicles (which has finally been released but with no subsidies to incentivize uptake),<sup>187</sup> and further investment and support for pumped hydropower projects.

Since its surprise re-election in 2019, the Coalition government of Prime Minister Scott Morrison had continued to issue broad policy statements on clean technology investment<sup>188</sup> but initiated no new actions to reduce emissions or introduce a net-zero emissions target. The “Black Summer” bushfires during December 2019 through February 2020 strengthened public concern about climate change but resulted in no discernible change in federal climate policy.<sup>189</sup>

In mid-2020, the federal government instead issued a discussion paper on its “Technology Investment Roadmap” designed to bring public investment into new and emerging low emissions technologies.<sup>190</sup> The First Low Emissions Technology Statement followed in September 2020,<sup>191</sup> with an intention that these statements be produced annually. These statements identify priority low emissions technologies and set economic stretch goals for each, tracking their progress over time.<sup>192</sup> Economic stretch goals are “ambitious but realistic goals to bring priority low emissions technologies to cost parity with existing high emissions technologies.”<sup>193</sup> As stated in Australia’s resubmitted NDC, the

---

186. *Climate Solutions Package*, AUSTRALIAN GOV’T (2019), <https://www.environment.gov.au/system/files/resources/bb29bc9f-8b96-4b10-84a0-46b7d36d5b8e/files/climate-solutions-package.pdf> [<https://perma.cc/WX7N-9PLX>].

187. See *Future Fuels and Vehicles Strategy: Powering Choice 9*, DEP’T INDUS., SCI., ENERGY & RES. (AUSTL.) (Nov. 2021), <https://www.industry.gov.au/sites/default/files/November%202021/document/future-fuels-and-vehicles-strategy.pdf> [<https://perma.cc/77VM-L6RZ>] (setting out priority initiatives); Henry Belot, *Government Commits to Expanding Electric Vehicle Charging Stations but no Subsidies to Increase Uptake*, ABC NEWS (Nov. 8, 2021), <https://www.abc.net.au/news/2021-11-08/electric-vehicle-charging-stations-no-subsidies-government-plan/100604122> [<https://perma.cc/RQG4-AK85>].

188. See, e.g., COAG Energy Council Hydrogen Working Grp., *Australia’s National Hydrogen Strategy*, AUSTRALIAN GOV’T (2019), <https://www.industry.gov.au/sites/default/files/2019-11/australias-national-hydrogen-strategy.pdf> [<https://perma.cc/U6RA-QVX3>].

189. See *Climate Wars*, FOUR CORNERS (May 18, 2020), <https://www.abc.net.au/4corners/climate-wars/12254562> [<https://perma.cc/V23L-S9ZX>].

190. Dep’t Indus., Sci., Energy & Res., *Technology Investment Roadmap Discussion Paper: A Framework to Accelerate Low Emissions Technologies*, AUSTRALIAN GOV’T (2020), [https://storage.googleapis.com/converlens-au-industry/industry/p/prj1a47c947e19c97e172db4/public\\_assets/technology-investment-roadmap-discussion-paper.pdf](https://storage.googleapis.com/converlens-au-industry/industry/p/prj1a47c947e19c97e172db4/public_assets/technology-investment-roadmap-discussion-paper.pdf) [<https://perma.cc/GLL8-QSFJ>].

191. Dep’t Indus., Sci., Energy & Res., *First Low Emissions Technology Statement – 2020*, AUSTRALIAN GOV’T (2020), <https://www.industry.gov.au/sites/default/files/September%202020/document/first-low-emissions-technology-statement-2020.pdf> [<https://perma.cc/S3CA-6A3L>].

192. The second statement was released in 2021. Dep’t of Indus., Sci., Energy & Res., *Low Emissions Technology Statement 2021*, AUSTRALIAN GOV’T 8 (Nov. 2021), <https://www.industry.gov.au/sites/default/files/November%202021/document/low-emissions-technology-statement-2021.pdf> [<https://perma.cc/T6QU-R5VN>].

193. *Id.* at 11.

government “will invest at least \$20 billion in low emissions technologies by 2030, to drive over \$80 billion of total public and private investment over the decade.”<sup>194</sup> This money has largely flowed to as-yet unproven emissions reduction technologies, like commercial-scale CCS or green hydrogen, rather than currently available technologies, such as renewable energy and energy storage. This domestic policy has been supplemented by a series of bilateral clean energy technology “partnerships” with countries such as Singapore, Japan, the United Kingdom, and Germany.<sup>195</sup> In addition, the government’s economic recovery strategy for coming out of the COVID-19 crisis lends support for a “gas-fired recovery,”<sup>196</sup> which is at odds with increasing divestment from oil and gas assets in the private sector, including by large Australian companies such as BHP Billiton.<sup>197</sup>

In comparison with the dramatic shifts in national climate policy that have characterized the past five years in the United States, Australia’s climate policies have, until recently, remained fixed in an unambitious position. This did not change while the Coalition government remained in control of the federal parliament, reinforcing the role that executive and legislative alignment can play not just in causing policy flip-flops between administrations, but also in entrenching policy when a coalition maintains power. While there was some movement in the direction of greater ambition—such as the Prime Minister’s signal that Australia would not seek to use “carry over credits” from the Kyoto Protocol to meet its Paris Agreement commitments,<sup>198</sup> and of a net-zero emissions target by 2050 in advance of COP26 in Glasgow<sup>199</sup>—these were small

---

194. Dep’t of Indus., Sci., Energy & Res., *Australia’s Nationally Determined Contribution: Communication 2021*, AUSTRALIAN GOV’T 7 (2021), <https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Australia%20First/Australia%20Nationally%20Determined%20Contribution%20Update%20October%202021%20WEB.pdf> [<https://perma.cc/98C7-ZF6U>].

195. See Media Release, The Hon. Angus Taylor MP, Minister Indus., Energy and Emissions Reduction (Austl.), *Australia-UK Partnership to Drive Low Emissions Solutions* (July 29, 2021), <https://www.minister.industry.gov.au/ministers/taylor/media-releases/australia-uk-partnership-drive-low-emissions-solutions> [<https://perma.cc/PM3M-PGEX>]; Dep’t Indus., Sci., Energy & Res., *International Co-operation on High Tech and Hydrogen*, AUSTRALIAN GOV’T (June 15, 2021), <https://www.energy.gov.au/news-media/news/international-co-operation-high-tech-and-hydrogen> [<https://perma.cc/9QUV-FMBK>].

196. Media Release, Prime Minister Scott Morrison (Austl.), *Gas-fired Recovery* (Sept. 15, 2020), <https://www.pm.gov.au/media/gas-fired-recovery> [<https://perma.cc/EKN9-6W8L>].

197. See John Quiggin, *BHP’s Offloading of Oil and Gas Assets Shows the Global Market has Turned on Fossil Fuels*, CONVERSATION (Aug. 18, 2021), <https://theconversation.com/bhps-offloading-of-oil-and-gas-assets-shows-the-global-market-has-turned-on-fossil-fuels-166336> [<https://perma.cc/PX2G-N924>].

198. See Melissa Clarke, *Scott Morrison flags Shift on Kyoto Climate Change Carry-over Credits*, ABC NEWS (Nov. 20, 2020), <https://www.abc.net.au/news/2020-11-20/government-morrison-carry-over-credits-kyoto-climate-change/12904084> [<https://perma.cc/GPP3-CZEU>].

199. See John Quiggin, *The Nationals Finally Agree to a 2050 Net-Zero Target, but the Real Decisions on Australia’s Emissions are Happening Elsewhere*, CONVERSATION (Oct. 24, 2021), <https://theconversation.com/the-nationals-finally-agree-to-a-2050-net-zero-target-but-the-real-decisions-on-australias-emissions-are-happening-elsewhere-170451> [<https://perma.cc/M97Q-WM4K>].

steps in comparison to the significant changes in climate action and ambition increasingly pursued by other developed and developing countries.<sup>200</sup>

As Australian emerges from another federal election at the end of May 2022, there is hope that climate policy and the nation's 2030 emission reduction commitments may now change. The incoming Labor government has committed to reducing emissions by 43% below 2005 levels by 2030.<sup>201</sup> Prime Minister Albanese has vowed to “end the climate wars” that have contributed to policy intractability in Australia over the past decade.<sup>202</sup> There has also been a strong uptick in the number of seats in parliament held by Greens and Independent members who ran on strong climate tickets.<sup>203</sup> Nevertheless, cautious optimism may be warranted in light of the past pattern of flip-flopping, with limited capacity offered by the administrative law regime to either promote or constrain executive action on climate change.

### *C. Multilevel Action and Subnational Experimentation*

If there is a silver lining to the intransigence of federal climate policy in Australia over the past five years, it is the space this has opened for policy experimentation, innovation, and action at other levels of governance and in other forums where climate partisanship seems to have less sway. This has included action by sub-national entities such as state and territory governments, local governments, and cities, by companies and business organizations, by investors and the financial sector, and by civil society including indigenous peoples' organizations and environmental groups.

---

200. For example, the UK is pledging to reduce emissions by 68% by 2030 and 78% by 2035, based on 1990 levels. *See* Climate Change Act 2008 c. 27 (UK). The European Union's recent European Climate Law commits the bloc to cuts of at least 55% by 2030, reaching climate neutrality by 2050 and negative emissions thereafter. *See* Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999, 2020 O.J. (L 243). President Biden has outlined his Administration's commitment to reduce U.S. emissions by 50-52% by 2030, compared to 2005 levels. *See* Press Release, White House, Fact Sheet: President Biden Sets 2030 Greenhouse Gas Pollution Reduction Target Aimed at Creating Good-Paying Union Jobs and Securing US Leadership on Clean Energy Technologies (Apr. 22, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/22/fact-sheet-president-biden-sets-2030-greenhouse-gas-pollution-reduction-target-aimed-at-creating-good-paying-union-jobs-and-securing-u-s-leadership-on-clean-energy-technologies/> [https://perma.cc/Q5NN-2ECT]. For further discussion of Australia's commitments relative to that of other countries, see, for example, Robyn Eckersley, 'The Australian Way': How Morrison Trashed Brand Australia at COP26, CONVERSATION (Nov. 12, 2021), <https://theconversation.com/the-australian-way-how-morrison-trashed-brand-australia-at-cop26-171670> [https://perma.cc/TV3P-E7SL].

201. *Powering Australia*, LABOR, <https://www.alp.org.au/policies/powering-australia> [https://perma.cc/BE9N-RBQ4] (last visited June 1, 2022).

202. Jay Savage, *Australian Election: Anthony Albanese Signals Climate Policy Change*, BBC NEWS (May 23, 2022), <https://www.bbc.com/news/world-australia-61539426> [https://perma.cc/2X4G-Y7LX].

203. *See id.*

Significant action on climate mitigation and adaptation has been undertaken by Australian subnational governments at the state and territory level.<sup>204</sup> As indicated in Table 1 below, all have put in place net-zero emissions targets, and several have interim emissions reduction targets that are on par with national targets adopted by the Biden Administration in the United States. Several states are investing heavily in renewable energy infrastructure<sup>205</sup> and have passed dedicated climate legislation, which includes provisions for regularly reviewing and updating targets and plans for action.<sup>206</sup> The state Environmental Protection Authority in New South Wales (NSW) was sued by a climate group to compel further adoption of climate regulation under the state's environmental legislation (paralleling the *Massachusetts v. EPA* case in the United States). This claim was upheld by the courts<sup>207</sup> and not appealed by the NSW government,<sup>208</sup> which has since introduced more ambitious emissions reduction targets.<sup>209</sup> Similar litigation is underway in another major state, Victoria, concerning the mandate for greenhouse gas regulation under the state's environmental protection legislation.<sup>210</sup>

This pattern of more ambitious action outside of the federal government sphere has been followed by Australian cities<sup>211</sup> and in the boardrooms of many

204. Peter Christoff & Robyn Eckersley, *Convergent Evolution: Framework Climate Legislation in Australia*, 21 CLIMATE POL'Y. 1190 (2021) (discussing framework climate legislation at the sub-national level in Australia); *State and Territory Climate Action: Leading Policies and Programs*, CLIMATEWORKS AUSTRALIA 6-7 (Oct. 2021), [https://www.climateworksaustralia.org/wp-content/uploads/2021/10/CWA\\_State-and-territory-climate-action\\_October-2021.pdf](https://www.climateworksaustralia.org/wp-content/uploads/2021/10/CWA_State-and-territory-climate-action_October-2021.pdf) [<https://perma.cc/2EZ9-E7W3>] (discussing targets at the sub-national level).

205. States and territories have set legislated and policy renewable energy targets (Table 1). For example, New South Wales has plans to become a “renewable energy superpower,” attracting more than \$37 billion in clean energy investment by the end of the decade. See Michael Mazengarb, *NSW Plans to Transition Biggest Coal State into Renewable Energy Superpower*, RENEWECONOMY (Sept. 29, 2021), <https://reneweconomy.com.au/nsw-aims-to-cut-emissions-in-half-by-2030-with-37-billion-clean-energy-surge/> [<https://perma.cc/AJ3P-NE22>].

206. For example, Victoria's climate legislation requires interim emissions reduction targets to be set every five years, as well as mitigation and adaptation strategies and plans. See *Climate Change Act 2017* (Vic) ss 10, 29-30, 34-35 (Austl.).

207. *Bushfire Survivors for Climate Action Incorporated v Environment Protection Authority* [2021] NSWLEC 92 (Austl.).

208. See *Bushfire Survivors Secure Landmark Change after NSW Minister Declines to Appeal Court Win*, ENV'T DEF. OFF. (Sept. 10, 2021), <https://www.edo.org.au/2021/09/10/bushfire-survivors-secure-landmark-change-after-nsw-minister-declines-to-appeal-court-win/> [<https://perma.cc/Y2C2-8LR3>].

209. See Media Release, NSW Government, NSW Set to Halve Emissions By 2030 (Sept. 29, 2021), <https://www.nsw.gov.au/media-releases/nsw-set-to-halve-emissions-by-2030#:~:text=NSW%20is%20set%20to%20attract.Zero%3A%20Stage%201%20Implementation%20Update> [<https://perma.cc/TXT5-9EQ3>].

210. Env't Just. Austl., Originating Motion for Judicial Review, Submission, *Env't Vict. v EPA*, S ECI 2021 03415 (Sept. 20, 2021) (Austl.).

211. See, e.g., *Climate Change Mitigation Strategy to 2050*, CITY OF MELBOURNE (Dec. 2018), <https://hdp-au-prod-app-com-participate-files.s3.ap-southeast-2.amazonaws.com/7215/6514/7295/climate-change-mitigation-strategy-2050.pdf> [<https://perma.cc/T99J-TAD4>]; *Council Plan 2021-2025*, CITY OF MELBOURNE 27-28 (2021), <https://www.melbourne.vic.gov.au/SiteCollectionDocuments/council-plan-2021-25.pdf> [<https://perma.cc/A3UK-ZPKU>]; *Darebin Climate Emergency Plan 2017-2022*, DAREBIN CITY COUNCIL (2017), <https://www.darebin.vic.gov.au/-/media/cityofdarebin/Files/Darebin-Living/CaringfortheEnvironment/EnergyandClimate/ClimateChange/DarebinClimateEmergencyPlan2017-2022.aspx> [<https://perma.cc/6PXU-SZFW>].

Australian businesses.<sup>212</sup> Australian cities and local governments have been active participants in sub-national networks such as C40 and the Global Covenant of Mayors.<sup>213</sup> Local governments and cities in progressive areas of the country have also embraced strategies such as declaring a climate emergency,<sup>214</sup> backed up with strong emissions reduction commitments and actions.<sup>215</sup>

Large Australian businesses, especially those in carbon-exposed industry sectors like resource extraction and energy, have also emerged as significant players in the clean energy transition.<sup>216</sup> Major multinational resource companies, like BHP and Fortescue, are among the many companies to have adopted net-zero targets and emissions reduction plans, including for their supply chain emissions.<sup>217</sup> Large energy asset owners have sought to close coal-fired power assets, and several multinational companies have divested their thermal coal mine assets. These shifts have been driven not by federal regulation—which is widely acknowledged to be lagging significantly behind business community action<sup>218</sup>—but rather by investor and shareholder activism. In recent years, Australia has seen an acceleration of investor activism and a growing number of

---

212. See Brett McDonnell, Hari M. Osofsky, Jacqueline Peel & Anita Foerster, *Green Boardrooms?*, 53 CONN. L. REV. 335, 339 (2021).

213. C40 CITIES, <https://www.c40.org/> [<https://perma.cc/Q5HL-UAYT>] (last visited Nov. 17, 2021); GLOB. COVENANT OF MAYORS FOR CLIMATE & ENERGY <https://www.globalcovenantofmayors.org/> [<https://perma.cc/EDA5-3V3U>] (last visited Nov. 17, 2021).

214. Darebin City Council, for example, was the first in the world to declare a climate emergency. See *Climate Emergency Declaration*, CITY OF DAREBIN, <https://www.darebin.vic.gov.au/Waste-and-environment/Sustainability/Energy-and-climate/Climate-emergency-declaration> [<https://perma.cc/B6NX-SJJF>] (last visited Mar. 11, 2022).

215. For example, Victorian Greenhouse Alliances (spanning most of Victoria) are partnerships of local governments working together on climate change, energy, and sustainability. A recent collaboration saw the forming of the Victorian Energy Collaboration (VECO), the largest renewable energy buyers group in Australia. See Rob Law, Scott McKenry, Fran Macdonald, David Meiklejohn, Dominique La Fontaine, Bronwyn Chapman & Ian Southall, *Local Governments Working Together on Climate Change*, VICTORIAN GREENHOUSE ALLS., [http://www.victoriangreenhousealliances.org/uploads/5/4/8/6/54860255/greenhouse\\_alliance\\_discussion\\_paper.pdf](http://www.victoriangreenhousealliances.org/uploads/5/4/8/6/54860255/greenhouse_alliance_discussion_paper.pdf) [<https://perma.cc/856D-4F2W>] (last visited Nov. 17, 2021).

216. See generally JACQUELINE PEEL, HARI OSOFSKY, BRETT MCDONNELL, ANITA FOERSTER & REBEKKAH MARKEY-TOWLER, *CORPORATE ENERGY TRANSITION: LEGAL TOOLS FOR SHIFTING COMPANIES TOWARDS CLEAN ENERGY PRACTICES* (2020) (discussing the role of corporate law tools in the clean energy transition).

217. BHP has set a long-term goal to achieve net-zero operational emissions by 2050, as well as interim value chain (scope 3) emissions, while Fortescue has committed to achieving net-zero emissions by 2040 across its entire global value chain (scope 3 emissions). See *Climate Transition Action Plan 2021*, BHP 8 (2021), [https://www.bhp.com/-/media/documents/investors/annual-reports/2021/210914\\_bhpclimatetransitionactionplan2021.pdf](https://www.bhp.com/-/media/documents/investors/annual-reports/2021/210914_bhpclimatetransitionactionplan2021.pdf) [<https://perma.cc/HR6B-8FT5>]; Release, Fortescue Metals Group Ltd, Fortescue Announces Target to Achieve Net Zero Scope 3 Emissions (Oct. 5, 2021), [https://www.fmg.com.au/docs/default-source/announcements/target-to-achieve-net-zero-scope-3-emissions.pdf?sfvrsn=195d0b1f\\_4](https://www.fmg.com.au/docs/default-source/announcements/target-to-achieve-net-zero-scope-3-emissions.pdf?sfvrsn=195d0b1f_4) [<https://perma.cc/NAC9-JNKG>].

218. For example, the Business Council of Australia, alongside other Australian Climate Roundtable members, has called for greater policy approaches to drive the successful transition to net-zero emissions. See Media Release, Bus. Council of Austl., Australian Climate Roundtable Statement: Australians Working Together for a Successful Transition to Net Zero Emissions (Nov. 8, 2021), [https://www.bca.com.au/joint\\_statement\\_australian\\_climate\\_roundtable\\_working\\_together\\_to\\_transition](https://www.bca.com.au/joint_statement_australian_climate_roundtable_working_together_to_transition) [<https://perma.cc/JE6J-TUVP>].

shareholder resolutions brought to the boards of energy sector companies.<sup>219</sup> The investor-led “Say on Climate” initiative is an example of this push, which calls for companies to commit to (at minimum) annual disclosure of emissions, plans to reduce their emissions, and an annual vote for shareholders on the company’s climate action plan at the annual general meeting.<sup>220</sup> Some of Australia’s largest energy companies—Rio, BHP, Santos, Woodside, Oil Search, AGL, Origin, and South32—have committed to providing their shareholders with this vote.<sup>221</sup> Large institutional investors are also playing a leading role in driving corporate behavioral change through their company engagement and voting on resolutions, such as U.S.-based asset manager BlackRock.<sup>222</sup>

A further factor driving climate action in Australia has been innovative climate litigation, such as the *Sharma* case discussed earlier.<sup>223</sup> This litigation increasingly seeks direct accountability from the federal government and big polluters for climate inaction, employing novel theories based in torts, human rights, and corporate law, rather than more traditional administrative review mechanisms.<sup>224</sup>

While the emergence of significant climate action and regulation beyond the federal realm in Australia has undoubtedly been driven by structural and political barriers to optimal national policy regimes, it also helps to chart a viable path for progress on climate change. An analysis by Climate Analytics demonstrates, for example, that sub-national action in Australia has put the country on track for a 35% emissions reduction from 2005 levels, exceeding the national target under Australia’s Paris NDC.<sup>225</sup> If effective federal action on

219. See Jacqueline Peel, Ben Neville & Rebekkah Markey-Towler, *Four Seismic Climate Wins Show Big Oil, Gas and Coal are running out of Places to Hide*, CONVERSATION (May 31, 2021), <https://theconversation.com/four-seismic-climate-wins-show-big-oil-gas-and-coal-are-running-out-of-places-to-hide-161741> [https://perma.cc/R6MA-HKUU]; Ian Ramsay & Lloyd Freeburn, *Australian Companies are Facing More Climate-focused ESG Resolutions Than Ever Before, and They Are Paying Quiet Dividends*, CONVERSATION (Nov. 8, 2021), <https://theconversation.com/australian-companies-are-facing-more-climate-focused-esg-resolutions-than-ever-before-and-they-are-paying-quiet-dividends-170466> [https://perma.cc/CT5Y-KXY7].

220. SAY ON CLIMATE, <https://www.sayonclimate.org/> [https://perma.cc/LX9L-256K] (last visited Nov. 17, 2021).

221. *Say on Climate*, ACCR, <https://www.accr.org.au/topics/say-on-climate/> [https://perma.cc/55UB-G4HA] (last visited Nov. 18, 2021).

222. BlackRock has signalled that it will publish the proportion of its assets under management currently aligned with net-zero and an interim net zero 2030 policy covering a proportion of their assets. BlackRock publishes their record of company engagement on climate risk and voting on shareholder proposals, including spotlighting engagement in Australia. *BlackRock Investment Stewardship: A Look into the 2020-2021 Proxy Voting Year*, BLACKROCK 8, 13-16 (2021), <https://www.blackrock.com/corporate/literature/publication/2021-voting-spotlight-full-report.pdf> [https://perma.cc/43A3-BNK9]; *Investment Stewardship Annual Report: January 1 – December 31, 2020*, BLACKROCK 86-89 (2021), <https://www.blackrock.com/corporate/literature/publication/blk-annual-stewardship-report-2020-calendar-year.pdf> [https://perma.cc/7B9E-ARNE].

223. *Sharma v Minister for the Environment* [2021] FCA 560 (Austl.).

224. See Peel, Osofsky & Foerster, *supra* note 163 (discussing the innovative ‘next generation’ of climate litigation).

225. Bill Hare, Anna Chapman, Victor Maxwell, Cindy Baxter & Nandini Das, *Australia’s 2030 Emissions: States Lead the Way*, CLIMATE ANALYTICS 6-7 (2021), [https://climateanalytics.org/media/australia\\_s\\_2030\\_emissions.pdf](https://climateanalytics.org/media/australia_s_2030_emissions.pdf) [https://perma.cc/8AMY-UHDZ] (finding that emissions reductions will likely have little or nothing to do with the federal government and are likely from states).

“The Grass is Not Always Greener” Revisited

climate change were added to this mix—for instance, through stronger emissions reduction targets, regulatory interventions such as carbon pricing or fuel emissions standards, or national institutions to support coal phase-out<sup>226</sup>—it could accelerate the country’s progress on bringing down emissions and pave the way for a more coordinated, orderly clean energy transition.

Table 1: State and Territory Climate Action in Australia

State/Territory	Framework Climate Change Legislation	Long Term Targets/Goals	Interim Targets/Goals	Renewable Targets
Qld	No	Policy net-zero emissions by 2050 <sup>227</sup>	Policy interim target of at least 30% below 2005 levels by 2030 <sup>228</sup>	Policy powering Qld with 50% renewable energy by 2030 <sup>229</sup>
NSW	No	Policy net-zero emissions by 2050 <sup>230</sup>	Policy interim target of 50% below 2005 levels by 2030 <sup>231</sup>	No (but plans) <sup>232</sup>
WA	No	Policy net-zero emissions by 2050 <sup>233</sup>	No	No

226. See, e.g., *Scaling Up Climate Action: Key Opportunities for Transitioning to a ZERO EMISSIONS Society – Australia*, CLIMATE ACTION TRACKER 1-28 (Nov. 2020), [https://climateactiontracker.org/documents/806/CAT\\_2020-11-10\\_ScalingUp\\_AUSTRALIA\\_FullReport.pdf](https://climateactiontracker.org/documents/806/CAT_2020-11-10_ScalingUp_AUSTRALIA_FullReport.pdf) [<https://perma.cc/A5TJ-SAVX>] (finding Australia needs to accelerate climate action across all sectors and ratchet up its 2030 target to put the country on track for net-zero emissions by 2050); Matt Grudnoff, *The Carbon Pricing Mechanism under the Gillard Government*, AUSTRALIAN INSTITUTE 1 (Aug. 2020), <https://australianinstitute.org.au/wp-content/uploads/2020/12/Carbon-price-10-years-on-web.pdf> [<https://perma.cc/B8TE-UG7D>] (finding the former carbon pricing mechanism drove down emissions); Climate Change Auth., *Light Vehicle Emissions Standards for Australia: Research Report*, AUSTRALIAN GOV’T 12 (2014), <https://www.climatechangeauthority.gov.au/sites/default/files/2020-06/Light%20Vehicle%20Report/Lightvehiclesreport.pdf> [<https://perma.cc/6S3B-FLJN>] (discussing emissions standards for vehicles); John Wiseman & Linda Wollersheim, *Building Prosperous, Just and Resilient Zero-Carbon Regions: Learning from Australian and International Experience*, MELBOURNE CLIMATE FUTURES 6 (Oct. 2021), [https://law.unimelb.edu.au/\\_data/assets/pdf\\_file/0009/3934404/Wiseman-and-Wollersheim,-2021\\_MC\\_F-Discussion-Paper\\_final.pdf](https://law.unimelb.edu.au/_data/assets/pdf_file/0009/3934404/Wiseman-and-Wollersheim,-2021_MC_F-Discussion-Paper_final.pdf) [<https://perma.cc/4ZJN-JB26>] (discussing policy priorities for creating just and resilient zero-carbon regions).

227. Dep’t Env’t & Heritage Prot., *Pathways to a Clean Growth Economy: Queensland Climate Transition Strategy*, QUEENSLAND GOV’T (2017), [https://www.qld.gov.au/\\_data/assets/pdf\\_file/0026/67283/qld-climate-transition-strategy.pdf](https://www.qld.gov.au/_data/assets/pdf_file/0026/67283/qld-climate-transition-strategy.pdf) [<https://perma.cc/CPG4-X37L>].

228. *Id.*

229. *Id.*

230. Dep’t Planning, Indus. & Env’t, *Net Zero Plan Stage 1: 2020-2030*, NEW SOUTH WALES GOV’T (2020), <https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Climate-change/net-zero-plan-2020-2030-200057.pdf> [<https://perma.cc/U2Q5-9M4E>].

231. *Id.*

232. NSW Gov’t, *Electricity Infrastructure Roadmap*, NEW SOUTH WALES GOV’T, <https://www.energy.nsw.gov.au/government-and-regulation/electricity-infrastructure-roadmap> [<https://perma.cc/JY5K-X736>] (last visited Mar. 11, 2022).

233. Dep’t Water & Env’t Regul., *Western Australian Climate Policy*, GOV’T WESTERN AUSTRALIA (Nov. 2020), [https://www.wa.gov.au/system/files/2020-12/Western\\_Australian\\_Climate\\_Policy.pdf](https://www.wa.gov.au/system/files/2020-12/Western_Australian_Climate_Policy.pdf) [<https://perma.cc/Q4W4-8VSC>].

<b>Vic</b>	Yes <sup>234</sup>	Legislated target net-zero emissions by 2050 <sup>235</sup>	Legislated target of 28-33% below 2005 levels by 2025 and a 45-50% reduction by 2030 <sup>236</sup>	Legislated renewable energy targets: 25% electricity from renewables by 2020, 40% electricity from renewables by 2025, and 50% electricity from renewables by 2030 <sup>237</sup>
<b>SA</b>	Yes <sup>238</sup>	Legislated target at least 60% to an amount that is equal to or less than 40% of 1990 levels by 2050 <sup>239</sup>  Policy net-zero emissions by 2050 <sup>240</sup>	Policy interim goal of 50% reduction on 2005 emissions levels by 2030 <sup>241</sup>	Legislated renewable energy targets for 2014 <sup>242</sup>  Policy ambition of 100% net renewable energy generation by 2030 <sup>243</sup>
<b>NT</b>	No	Policy net-zero emissions by 2050 <sup>244</sup>	No	Policy 50% renewable energy target by 2030 <sup>245</sup>
<b>ACT</b>	Yes <sup>246</sup>	Legislated target net-zero emissions by 2050 <sup>247</sup>	Legislated target 40% less than 1990 emissions by 30 June	Legislated renewable energy target: use of renewable electricity at 100%

234. *Climate Change Act 2017* (Vic) (Austl.).

235. Dep't Env't, Land, Water & Plan., *Victoria's Climate Change Strategy*, VICTORIA STATE GOV'T (May 2021), [https://www.climatechange.vic.gov.au/\\_data/assets/pdf\\_file/0026/521297/Victorian-Climate-Change-Strategy.pdf](https://www.climatechange.vic.gov.au/_data/assets/pdf_file/0026/521297/Victorian-Climate-Change-Strategy.pdf) [<https://perma.cc/U5NE-LQB2>].

236. *Id.*

237. *Renewable Energy (Jobs and Investment) Act 2017* (Vic) (Austl.).

238. *Climate Change and Greenhouse Emissions Reduction Act 2007* (SA) (Austl.).

239. *Id.*

240. Dep't Env't & Water, *Climate Action Plan 2021-2025*, GOV'T S. AUSTR. (2020), <https://cdn.environment.sa.gov.au/environment/docs/climate-change-action-plan-2021-2025.pdf> [<https://perma.cc/G2CH-22WW>].

241. *Id.*

242. *Climate Change and Greenhouse Emissions Reduction Act 2007* (SA) (Austl.).

243. Dep't Env't & Water, *supra* note 240.

244. Dep't Env't & Nat. Res., *Northern Territory Climate Change Response: Towards 2050*, NORTHERN TERRITORY GOV'T (July 2020), [https://depws.nt.gov.au/\\_data/assets/pdf\\_file/0005/904775/northern-territory-climate-change-response-towards-2050.pdf](https://depws.nt.gov.au/_data/assets/pdf_file/0005/904775/northern-territory-climate-change-response-towards-2050.pdf) [<https://perma.cc/G63J-CW5T>].

245. Alan Langworthy, Greg Bourne, Lyndon Frearson, Katherine Howard, Amanda McKenzie & Owen Peake, *Roadmap to Renewables*, NORTHERN TERRITORY GOV'T (Sept. 2017), [https://territoryrenewableenergy.nt.gov.au/\\_data/assets/pdf\\_file/0010/1056781/roadmap-to-renewables-report.pdf](https://territoryrenewableenergy.nt.gov.au/_data/assets/pdf_file/0010/1056781/roadmap-to-renewables-report.pdf) [<https://perma.cc/UU2V-G25Z>].

246. *Climate Change and Greenhouse Gas Reduction Act 2010* (ACT) (Austl.).

247. *Id.*

“The Grass is Not Always Greener” Revisited

			2020 <sup>248</sup> and interim targets for 2025 (50-60% less than 1990 emissions by 30 June 2025), 2030 (65-75% less than 1990 emissions by 30 June 2030) and 2040 (90-95% less than 1990 emissions by 30 June 2040) <sup>249</sup>	on and from 1 January 2020 <sup>250</sup>
<b>Tas</b>	Yes <sup>251</sup>	Legislated target at least 60% below 1990 levels by 2050 <sup>252</sup>  Already reached net-zero emissions <sup>253</sup>	Already reached net-zero emissions <sup>254</sup>	Legislated new renewable energy targets to reach 200% of current electricity needs by 2040 <sup>255</sup>

Concluding Reflections

The comparative regulatory pathways of the United States and Australia look significantly different than they did five years ago. The regulatory swings, based in administrative regulation, have been far more dramatic in the United States than in Australia, and Australia has followed a path of limited ambition on climate change under its conservative federal government. With a new Labor government in Australia, though, another potentially significant regulatory shift appears likely there as well.

However, despite evolving patterns of regulatory dynamics over time in both countries, the core conclusion of *The Grass is Always Greener* has not changed:

[C]ongressional dysfunction is not the heart of the problem. Partisanship plays just as poisonous a role in other systems of government, as demonstrated by this essay’s comparative analysis. In any democratic system in which people and their representatives are deeply politically divided, one side will likely resort to going

248. *Id.*

249. *Climate Change and Greenhouse Gas Reduction (Interim Targets) Determination 2018 (ACT)* (Austl.).

250. *Climate Change and Greenhouse Gas Reduction Act 2010 (ACT)* (Austl.).

251. *Climate Change (State Action) Act 2008 (Tas)* (Austl.).

252. *Id.*

253. Tasmania Climate Change Off., *Tasmanian Greenhouse Gas Emissions Report*, TASMANIA GOV’T (2021), [https://recfit.tas.gov.au/\\_\\_data/assets/pdf\\_file/0004/313852/Tasmanian\\_Greenhouse\\_Gas\\_Emissions\\_Report\\_2021.pdf](https://recfit.tas.gov.au/__data/assets/pdf_file/0004/313852/Tasmanian_Greenhouse_Gas_Emissions_Report_2021.pdf) [<https://perma.cc/S7NV-VA5W>].

254. *Id.*

255. *Energy Co-ordination and Planning Act 1995 (Tas)* (Austl.).

around the other to achieve progress. But this phenomenon across systems underscores the importance of finding ways to tamp down the conflict and focus on common ground. Our work on partisanship suggests that this is possible to a greater extent than the tenor of political dialogue in both countries suggests, and at least as crucial to making progress as bold executive and legislative action by one party or coalition.<sup>256</sup>

In particular, our 2016 article *Energy Partisanship* argues that substantive and structural reframing can help create greater bipartisan cooperation. The substantive reframing that has been most effective has involved economic development or disaster resilience with variation in whether climate change is mentioned directly. In addition, as the actions by subnational governments and businesses over the past five years reinforce, structural reframing that scales down to state and local levels and focuses more directly on incentives for corporate action can be effective.<sup>257</sup>

The dramatic regulatory shifts in the United States and the limited regulatory action in Australia under the prior conservative federal government over the past five years bolster the importance of finding these pathways to greater cooperation. While we are realistic that in a deeply divided polity, major action by the party that obtains power may be needed, more stable progress will only be achieved if we are more effective in bridging the divides in both countries. We look forward to continuing the work on where substantive and structural reframing strategies can make a difference.

---

256. Osofsky & Peel, *supra* note 1, at 170.

257. Osofsky & Peel, *supra* note 10.