Br. J. Am. Leg. Studies 8 (Special Issue) (2019), DOI: 10.2478/bjals-2019-0017 sciendo

The Environment, A Bipartisan Issue?: Partisanship Polarization and Climate Change Policies in the United States

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ABSTRACT

Responding to climate change presents significant challenges on both international and domestic fronts. The current U.S. federal government disclaims a connection between climate change, and human activity, and embraces an environmental program that includes withdrawal from the Paris Climate Change Agreement at international level and retrenchment from regulation domestically. This Article comments on the rollback of Obama-era environmental regulations now taking place at federal level and locates these policies in the context of the domestic polarization and partisanship that now characterizes U.S. politics. It notes that environmental regulation divides the Republican and Democratic Parties but that the response of individual party members may be more nuanced, particularly amongst younger voters. The Article comments on state level initiatives to counteract the effects of climate change that have gathered bipartisan support but are now subject to partisan actions by the federal government designed to limit their effectiveness. The Article concludes with the observation that as the combination of an aging demographic and alignment with a declining fossil fuel industry shrinks the GOP traditional constituency, it is to be hoped that far-sighted politicians from both parties will embrace credibility on this issue as a key component of enhancing their own as well as the planet's survival.

KEYWORDS

Environmental Partisanship, U.S. Withdrawal from the Paris Climate Change Agreement, State-level Bipartisan Initiatives, Environmental Federalism

CONTENTS

I. Introduction 484
II. The United States and the Challenge of Climate Change 485
III. Partisanship and Polarization in U.S. Politics 491
IV. Partisanship and the Environment 497
V. The Environment, the States and the Federal Government 499

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I. Introduction

Climate Change is a global problem that can no longer be ignored. A special report prepared by the Intergovernmental Panel on Climate Change (IPCC) warns that global temperatures are likely to reach 1.5°C above pre-industrial levels between 2030 and 2052 if they continue to increase at the current rate, that global warming is closely associated with human activity and that it poses significantly increased risks to health, livelihoods, food security, water supply, human security, and economic growth.[1] In the 2017/2018-year period the global surface temperature was the fourth highest since the introduction of instrumental measures at the Goddard Institute for Space Studies (GISS)[2] and +1.7°C warmer than the average temperatures for the time period 1880/1920, an appropriate base period for an estimate of 'pre-industrial temperature' in part because this was the earliest period with appropriate and substantial instrumental measurements and in part because unusually high volcanic activity off-set warming from human-made greenhouse gas activity.[3]

The results of a warming planet were felt the world over with higher than usual temperatures that led to record rainfalls, wildfires and, droughts. Thus, even if the target goal of 1.5°C of warming were achievable and achieved, leading climate scientists agree that climate change is transforming our planet in ways beyond their initial scientific estimates. Mitigation and adaptation require a global coordinated response[4] but this can pose significant challenges at the domestic level. For the United States, "with its love of big houses, big cars and blasting air conditioners,"[5] the challenges are particularly severe; the United States and China together account for approximately 45% of global greenhouse gas emissions. The federal legislation that put in place the Environmental Protection Agency (EPA) and gave it the legislative framework to enable it to do its job remains more or less in place but fifty years on, an updated response to the contemporary climate change challenge is thwarted by the polarization of partisan politics.

This Article considers current U.S. administration responses to environmental regulation from the perspective of political polarization. In Part One, we identify U.S. international climate change obligations and comment on the rollback of Obama-era environmental regulations now taking place at federal level. In Part Two, we locate these policies in the context of the growth of political polarization and partisanship that now characterizes U.S. politics. We note the recommendations of the American Political Science Association (APSA) published in 1950 to the effect that too little party differentiation and an absence of clear political identity are inimical to a two-party system democracy, but suggest that the results of

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1 Intergovernmental Panel on Climate Change, Global Warming of 1.5°C (2018), http://www.ipcc.ch/report/sr15/ (last visited Mar. 4, 2019).

2 James Hanson et al., *Global Temperature in 2018 and Beyond,* Earth Institute, Columbia University (Feb. 6, 2019), http://csas.ei.columbia.edu/2019/02/06/global-temperature-in-2018-and-beyond/. *See also,* James Hansen et al., *Global Surface Temperature Change*, 48 Reviews of Geophysics (2010).

3 *Id.*

4 *See, e.g.* World Meteorological Organisation, WMO Statement on the State of the Global Climate in 2018 (2019).

5 Justin Gills & Nadia Popovitch, *The U.S. Is the Biggest Carbon Polluter in History: It Just Walked Away from the Paris Climate Deal*, N.Y. Times (June 1, 2017).

implementation have not been as predicted; contemporary hyper-partisanship indicates that the pendulum has now swung too far the other way.

In Part Three, we note that environmental regulation now divides the Republican and Democratic Parties but comment on research that suggests that, at the level of individual party members, support for a more positive response to tackling climate change may cross party lines. To the extent that party affiliation and loyalty are now matters of personal identity, political agendas at the level of national politics can mask or conceal internal contradictions and inconsistencies and this, we suggest, is the case here.

In Part Four, we note that state level initiatives to counteract the effects of climate change have gathered bipartisan support but are subject to partisan attempts by the federal government to preempt their effectiveness. We note in particular the Trump Administration's attacks on California and the multi-state lawsuit initiated in response to the withdrawal of California's vehicle emissions waiver. We note that, although described as non-partisan, the states involved are predominantly Democrat or Democrat-leaning and consider the suggestion that these disputes are primarily about delineating the boundaries of state and federal government authority. We conclude with the observation that, indicators of healthy federalism or not, for a younger generation of voters, these are disputes that concern the existential issue of the age. If for that reason alone, all politicians sooner rather than later will have to respond.

II. The United States and the Challenge of Climate Change

The United Nations Framework Convention on Climate Change (UNFCCC) adopted on 9 May 1992 and opened for signature at the Earth Summit in Rio de Janeiro a month later, represented the first international treaty attempt to respond to the threat of climate change.[6] It entered into force on 21 March 1994 and today has 197 signatories, including the United States.[7] The UNFCCC called for stabilizing "greenhouse gas concentrations at a level that would prevent dangerous anthropogenic (human induced) interference with the climate system. ... within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened, and to enable economic development to proceed in a sustainable manner."[8] The Kyoto Protocol which entered into force on 16 February 2005 implemented this objective with a principle of common but differentiated responsibilities, putting the burden of reducing greenhouse gas emissions on the 37 industrialized countries with historic responsibility for high levels of atmospheric pollution and exempting more than 100 developing countries, including China and India.[9] For this reason

6 United Nations Framework Convention on Climate Change (adopted May 9, 1992, entered into force March 21, 1994) 1771 U.N.T.S. 107.

7 The UN Framework Convention on Climate Change was signed by President George H.W. Bush on behalf of the United States and subsequently ratified by the Senate.

8 UNFCC, *supra* note 6.

9 Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted Dec. 11, 1997, entered into force Feb. 16, 2005) 2303 U.N.T.S. 161.

the United States did not ratify the treaty and the Bush Administration withdrew in 2001.

By contrast, the Paris Climate Agreement which opened for signature on 22 April 2016 and entered into force on 4 November 2016, required nearly every country in the world to commit to lowering their greenhouse gas emissions with a universal accounting system for emissions, and a requirement for individual countries to monitor emissions, and create a plan for emissions reduction.[10] The effect "for the first time—[brought] all nations into a common cause to undertake ambitious efforts to combat climate change and adapt to its effects, with enhanced support to assist developing countries to do so."[11] As such, the Agreement represented "a new course in the global climate effort."[12]

The long-term goal is to substantially reduce the risks and effects of climate change by keeping the increase in global average temperature to below 2 °C above pre-industrial levels, and to pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels.[13] Greenhouse gas emissions (GGE) contribute to climate change by trapping heat and making the planet warmer.[14] Signatories to the Paris Climate Agreement agreed to reach "global peaking of greenhouse gas emissions as soon as possible" with 20/20/20 targets: 20% reduction of greenhouse gas emissions, 20% increase in the use of renewable sources of energy and 20% increase of energy efficiency (with a 20 % reduction of energy consumption). As of May 2019, 197 states and the European Union (EU) have signed the Agreement.[15] 185 states and the EU, representing more than 88% of global greenhouse gas emissions, have ratified or acceded to the Agreement, including three of the largest producers of greenhouse gas emissions: China, the United States and India.[16] The United States became a signatory to the Paris Agreement in April 2016 and accepted it by executive signature in September 2016, thereby obviating the need for ratification by Congress.[17] President Obama committed the United States to contributing US$3 billion to the Green Climate Fund, an initiative within the United Nations Framework on Climate Change that seeks to helps developing countries limit or reduce their greenhouse gas (GHG) emissions and adapt to climate change.[18]

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10 UN Framework Convention on Climate Change Conference of Parties, Twenty-First Session, *Adoption of the Paris Agreement* (12 Dec. 2015) UN Doc FCCC/CP/2015/L.9/Rev.1 [hereinafter referred to as 'Paris Agreement'].

11 https://unfccc.int/process-and-meetings/the-paris-agreement/what-is-the-paris-agreement.

12 *Id.*

13 http://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf.

14 EPA, *Sources of Greenhouse Gas Emission*, https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions (last visited Oct. 17, 2019).

15 Paris Agreement, United Nations Treaty Collection. 8 July 2016.Status as at: 09-07-2019 05:00:39 EDT, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en.

16 China: 30%; US: 15%; India: 7%; Russia 5%; Japan: 4%.

17 *See* Tanya Somander, *President Obama: The United States Formally Enters the Paris Agreement* (Sept. 3, 2016, 10.41 AM ET), https://obamawhitehouse.archives.gov/blog/2016/09/03/president-obama-united-states-formally-enters-paris-agreement.

18 Green Climate Fund, https://www.greenclimate.fund/who-we-are/about-the-fund (last accessed Oct. 20, 2019).

The United States and China together account for approximately 45% of global greenhouse gas emissions. The U.S.-China Joint Presidential Statement on Climate Change issued on March 31, 2016, confirmed that both countries would sign the Paris Agreement and signaled U.S. intentions to take a full leadership role in tackling the global problem of climate change.[19] On September 3, 2016, as the United States and China deposited with U.N. Secretary-General Ban Ki-Moon their respective joining documents, President Obama uttered these remarks:

> We have a saying in America—that you need to put your money where your mouth is. And when it comes to combating climate change, that's what we're doing, both the United States and China. We're leading by example. As the world's two largest economies and two largest emitters, our entrance into this agreement continues the momentum of Paris, and should give the rest of the world confidence—whether developed or developing countries—that a low-carbon future is where the world is heading.[20]

Early in his presidency, President Barack Obama had identified tackling climate change as a key priority. In his first address to the United Nations he pledged "a new day, a new era" to address a climate change challenge that was serious, urgent and growing: "Our generation's response to this challenge will be judged by history; for if we fail to meet it boldly, swiftly and together, we risk consigning future generations to an irreversible catastrophe."[21] His 2013 Climate Change Plan announced ambitious plans for curbing carbon pollution and agency support for local investment to help vulnerable communities on the domestic level. Internationally it committed to leading and expanding existing global climate change initiatives, including those with China, India and other major emitting countries and called for the end of U.S. government support for public financing of new coal-fired power plants overseas.[22]

However, following the mid-term elections which saw the House flipped and Senate Democratic numbers reduced, the domestic ambitions of Obama's second term fell victim to political partisanship. With the loss of its legislative majority, the Administration fell back on the power of the presidency to in effect bypass Congress.

Achievements of the second term, including fuel economy standards for light-duty vehicles (passenger cars and trucks),[23] restrictions on methane emissions and other pollutants, and updating energy efficiency standards for home appliances,[24]

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19 The White House, Office of the Press Secretary, *U.S.-China Joint Presidential Statement on Climate Change*, (March 31, 2016) https://obamawhitehouse.archives.gov/the-press-office/2016/03/31/us-china-joint-presidential-statement-climate-change.

20 President Obama, reported by Somander, *supra* note 17.

21 President Barack Obama at UN Climate Change Summit, Energy.Gov. https://www.energy.gov/videos/president-barack-obama-un-climate-change-summit.

22 The White House, Office of the Press Secretary, *Fact Sheet: President Obama's Climate Action Plan* (June 25, 2013).

23 *2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards*, 49 C.F.R. 523, 531, 533, 536, 537 49.

24 *See* Marianne Lavelle, *2016, Obama's Climate Legacy Marred by Triumphs and Lost Opportunities*, Inside Climate News, Dec. 26, 2016, https://insideclimatenews.org/news/23122016/obama-climate-change-legacy-trump-policies.

were effected in the main by executive orders and regulations, "the tools of the administrative presidency,"[25] leaving them vulnerable to reversal by an incoming regime.[26] The Clean Power Plan[27] unveiled August 23, 2015 was arguably the "most visible" of the Obama's climate initiatives.[28] The Plan sought to tackle carbon dioxide emissions from existing fossil fuel burning power plants, the largest source of climate pollution in the United States, by requiring a 32% reduction from 2005 levels by 2030. It was immediately challenged by a coalition of Attorneys-General from more than 24 Republican states, was stayed by the Supreme Court, pending a ruling by a lower federal court and has never come into effect. [29]

The 2016 election victory of Donald J. Trump as 45th President of the United States barely four months after U.S. accession to the Paris Agreement, signaled a change of pace in American leadership on climate change policy on both domestic and international fronts.[30] In the intervening period, there have been no significant U.S. initiatives to combat climate change. On the contrary, Obama's key domestic and international measures have been systematically attacked. [31] On June 1, 2017, President Trump announced his intention to withdraw the United States from the Paris Agreement, thereby signaling a step back from international leadership on environmental issues. On the domestic front, "[t]he Trump Administration's tumultuous presidency has brought a flurry of changes—both realized and anticipated—to U.S. environmental policy."[32]

President Trump's first actions on taking office included the appointment as head of the EPA of Scott Pruitt, a 'climate change denier' who has refused to acknowledge the connection between climate change and human activity and lost little time in initiating the roll-back of Obama era achievements and regulations that now characterizes this Administration.[33] Under the leadership of his successor

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25 David M. Konisky & Neal D. Woods, *Environmental Federalism and the Trump Presidency: A Preliminary Assessment*, 48 Publius 345, 356 (2018).

26 William F. Grover & Joseph G. Peschek, The Unsustainable Presidency: Clinton, Bush, Obama, and Beyond (2014).

27 Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, Final Rule , 40 C.F.R. 205 (Oct 23, 2015). *See* The White House, Office of the Press Secretary, *Fact Sheet: President Obama to Announce Historic Carbon Pollution Standards for Power Plants* (Aug. 03, 2013).

28 Joshua Linn et al., *The Supreme Court's Stay of the Clean Power Plan: Economic Assessment and Implications for the Future*, 46 Envtl. L. Rep. News & Analysis 10859 (2016).

29 West Virginia v. EPA, No. 15-1363 (D.C. Cir. Jan. 21, 2016); West Virginia v. EPA, No. 15A773 (U.S. Feb. 9, 2016).
See Paul Nolette, *The Dual Role of State Attorneys General in American Federalism: Conflict and Cooperation in an Era of Partisan Polarization*, 47 Publius 342 (2017).

30 *Id.*

31 Douglass F. Rohrman, *Senator Obama and the Environment*, 6 Frontiers in Ecology & Env't 450 (2008).

32 Michael Greshko et al., *A Running List of How President Trump Is Changing Environmental Policy*, National Geographic (May 3, 2019) https://www.nationalgeographic.com/news/2017/03/how-trump-is-changing-science-environment/.

33 *See* S. Suresh, *Climate Change Denial Is a War on Humanity*, Fair Observer (Feb.13, 2018), https://www.fairobserver.com/region/north_america/donald-trump-scott-pruitt-climate-change-epa-news-13421/.

Andrew Wheeler, a former coal industry representative and lobbyist,[34] the EPA has replaced the Clean Power Plan[35] and announced a replacement of the WOTUS (Waters of the United States) rule with the likely effect that polluters will no longer need a permit to discharge potentially harmful substances into many streams and wetlands.[36] Rules regarding fracking on public lands and coal leases on federal land have been repealed;[37] restrictions on automobile tailpipe[38] and methane emissions[39] are to be relaxed and against the advice of its own scientists and lawyers the EPA has failed to ban new uses of asbestos when "many developed countries ... including the United Kingdom, Japan, South Korea, France, Italy, Spain, Australia, Germany, the Netherlands and Finland" have already done so and Brazil has recently voted to do the same."[40] Pesticide safety rules have been rolled back or eliminated on the basis that the data supporting objections to the use of the pesticide was "not sufficiently valid, complete or reliable."[41]

The change of pace has happened primarily at federal level; at State level, by contrast, numerous actions have been implemented to counteract the effects of climate change and initiatives promoted for a more responsible use of natural

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34 Steven Mufson, *Scott Pruitt's Likely Successor Has Long Lobbying History on Issues Before the EPA,* Wash. Post (July 5, 2018).

35 On June 19, 2019, EPA issued the final Affordable Clean Energy rule (ACE) replacing the CPP with a rule that "restores rule of law, empowers states, and supports energy diversity." The ACE rule establishes emission guidelines for states to use when developing plans to limit carbon dioxide (CO_2) at their coal-fired electric generating units (EGUs). The EPA made the announcement on September 19, 2019.

36 The Administration is likely to base the new rule on Justice Scalia's dissent in *Rapanos v. United States*, 547 U.S. 715 (2006) limiting the definition of navigable waters within the jurisdiction of the Clean Water Act to "relatively permanent" waters and wetlands with a continuous surface connection to larger rivers and streams. *See* David Koniskey & Neal D. Woods, *Environmental Federalism and the Trump Presidency: A Preliminary Assessment*, 48 Publius 345, 348-50 (2019) (suggesting that the change "may lead to a loss of protection for in the region of two million miles of streams and 20 million acres of wetlands which is potentially significant since as many as one in three Americans get their drinking water from a source that may not qualify for EPA protection under Scalia's definition). *Id*. at 361.

37 Chelsea Harvey, *The Coming Battle Between Economists and the Trump Team over the True Cost of Climate Change*, Wash. Post (Dec. 22, 2016), https://www.washingtonpost.com/news/energy-environment/wp/2016/12/22/the-coming-battle-between-the-trump-team-and-economists-over-the-true-cost-of-climate-change/.

38 *See* EPA 40 CFR Parts 85 and 86 DOT, NHTSA, 49 CFR Parts 531 and 533 *The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program* (Sept. 27, 2019).

39 *See* EPA *Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Review*, 40 CFR 60 (Aug. 28, 2019).

40 Memorandum from Richard Mednick Region10 Office of Regional Counsel et al. to Robert Courtnage, National Program Chemicals Division ,Office of Pollution Prevention and Toxics *Comments on the Proposed Rule, Asbestos, Significant New Use Rule (RIN2070-AK45),FRL9978-76,EPA-HQ-OPPT-2018-00159*, (May 31, 2018), available at https://int.nyt.com/data/documenthelper/815-e-p-a-memos-on-asbestos/12c87a96be998db10048/optimized/full.pdf#page=1(last visited Oct.17, 2019.)

41 EPA Chlorpyrifos, 40 CFR 180 (July 18, 2019) (Final Order Denying Objections to March 2017 Petition Denial Order).

resources.[42] What is clear, however, is that environmental regulation is very much a partisan issue. President Trump, himself a climate change denier,[43] campaigned on a platform of deregulation so that, as from day one, as Larsen and Herndon put it, the CPP was a "dead reg walking". [44]

This has not always been the case; the current framework of environmental legislation was put in place under a Republican administration and in a spirit of general environmental concern. As his first official act President Richard Nixon signed the U.S. National Environmental Policy Act (NEPA) into law on January, 1970. The Clean Air Act of the same year received no opposition in the Senate and only one hostile vote in the House.[45] President Nixon's support at the signing ceremony was effusive:

> As we sign this bill in this room, we can look back and say, in the Roosevelt Room on the last day of 1970, we signed a historic piece of legislation that put us far down the road toward a goal that Theodore Roosevelt, 70 years ago, spoke eloquently about: a goal of clean air, clean water, and open spaces for the future generations of America.[46]

George H.W. Bush, as Republican candidate, campaigned on an environmental program and as President signed into law the Clean Air Act Amendments of 1990. The cap-and-trade system that it introduced to cut power plant pollution and reduce acid rain was described by the New York Times as a "model for updating in the 1990s the other 1970s-era statutes that form the foundation of the nation's environmental program."[47] By 2013 however, the Boston Globe was commenting on a change: "Republicans no longer seriously contest the environmental vote; instead, they have run from it. Largely as a result, national environmental policy-making has become one-sided, polarized, and stuck."[48] Environmentalism had become a partisan issue:

> Environmentalists exacerbated the Republican shift away from environmental issues by allying forcefully with the Democratic Party.

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42 Dana R. Fisher, Joseph Waggle & Philip Leifeld, *Where Does Political Polarization Come From? Locating Polarization Within the U.S. Climate Change Debate*, 57 American Behavioral Scientist 70–92 (2013).

43 *See* Chris Cillizza, *Donald Trump Buried a Climate Change Report Because "I Don't Believe It"*, CNN Politics, Updated 1557 GMT (2357 HKT) Nov. 27, 2018, https://edition.cnn.com/2018/11/26/politics/donald-trump-climate-change/index.html.

44 *Id.*

45 *Id.*

46 *See* Jaime Fuller*, Environmental Policy Is Partisan; It Wasn't Always*, Wash. Post (June 2, 2014 at 11:30 a.m. GMT+1) https://www.washingtonpost.com/news/the-fix/wp/2014/06/02/support-for-the-clean-air-act-has-changed-a-lot-since-1970/.

47 *See* Paul Sabin, *The Decline of Republican Environmentalism*, Boston Globe (Aug. 31, 2013, 12:00 AM), https://www.bostonglobe.com/opinion/2013/08/30/the-decline-republican-environmentalism/P6lEmA4exWFamGnkQLOQlL/story.html.
See also, Marshall Shepherd, *The Surprising Climate and Environmental Legacy of President George H.W. Bush*, Forbes, (Dec. 1 2018, 07:58 AM) https://www.forbes.com/sites/marshallshepherd/2018/12/01/the-surprising-climate-and-environmental-legacy-of-president-george-h-w-bush/#2fda7124589c.

48 Sabin, *supra* note 47.

> Environmental groups gave Bush little credit for his accomplishments. When they denounced Bush for his failings, and allowed Democrats to claim the environmental mantle exclusively for themselves, environmentalists helped to drive both parties to the extremes. The Democrats veered toward warning of environmental apocalypse, while Republicans went to the other pole, denying the threat of environmental problems.[49]

For President Obama the result was political deadlock: "Republican politicians mostly deny the threat of climate disruption and block legislative solutions, while President Obama tries to go it alone with a shaky patchwork of executive actions. A middle ground on environmental policy remains a mirage."[50] For President Trump, rejection of climate change science is largely in pursuit of a political agenda of deregulation that now characterizes Republican Party ideology. [51]

III. Partisanship and Polarization in U.S. Politics

President Barack Obama famously remarked that "[t]his country (the United States) is founded on compromise.[52] The horizontal division of powers that is built into U.S. constitutional arrangements "forces national leaders to seek cooperation from an array of independent actors, all with their own bases of political power and formal authority" [53] and requires "exceptional skill at negotiation and conciliation." Currently, however, as Professor Bullman-Pozen observes, the "rise of ideologically coherent, polarized parties means that partisanship matters more for the competition it generates than for the cooperation it inspires."[54] Partisanship and polarization give Americans political representatives "who struggle to cooperate across party lines at an unprecedented rate, resulting in high profile fiscal and policy battles, government shutdowns, and an inability to resolve problems or enact legislation that guides the nation's domestic and foreign policy."[55]

If political polarization, is now the defining feature of early 21st century politics,[56] partisanship in U.S. politics is hardly a new phenomenon. [57] George

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49 *Id.*

50 *Id.*

51 Brian Helmuth et al., *Trust, Tribalism and Tweets: Has Political Polarization Made Science a "Wedge Issue"?*, 3 Climate Change Responses (2016), http://climatechangeresponses.biomedcentral.com/articles/10.1186/s40665-016-0018-z (last visited Feb. 28, 2019).

52 Barack Obama, Press Conference, White House, (Dec. 3, 2010), available at https://www.youtube.com/watch?v=koZkFQ-_SK4.

53 Frances E. Lee, *How Party Polarization Affects Governance*, 18 Annual Review of Political Science 261, 262 (2015).

54 Jessica Bulman-Pozen, *Partisan Federalism*, 127 Harv. L. Rev. 1077, 1081 (2014).

55 Clio Andris et al., *The Rise of Partisanship and Super-Cooperators in the U.S. House of Representatives*, 10(4) PLoS ONE e0123507 (2015), https://doi.org/10.1371/journal.pone.0123507.

56 Carroll Doherty, *7 Things to Know About Polarization in America*, Opinion Today (June 12, 2014) http://opiniontoday.com/2014/06/12/7-things-to-know-about-polarization-in-america/

57 David W. Brady, Hahrie Han & Jeremy C. Pope, *Primary Elections and Candidate Ideology: Out of Step with the Primary Electorate?*, 32 Legislative Studies Quarterly 79–105 (2007).

Washington in his farewell address of 1796 warned against partisanship, condemning parties as: "[d]ivisive, disruptive, and the tools of demagogues seeking power.*"*[58] Washington feared that partisanship would lead to a "Spirit of Revenge" in which politicians would not govern for the good of people, but only to obtain and maintain their grip on power.[59] As a result, he warned Americans to guard against would-be despots who would use parties as "Potent engines ... to subvert the power of the people and to usurp for themselves the reins of government".[60] Despite this warning, as historians have noted, much, if not most, of U.S. political history has been characterized by high levels of partisanship with a post war interval of muted party conflict representing something of an exception.[61]

Partisanship in the sense of loyalty and polarization in the sense of division are not the same and the one does not necessarily imply the other. In contemporary U.S. politics however the position seems to be that they do. American parties, in general terms, have become progressively more programmatic, cohesive and, ideologically distinct.[62] An increase in party distinctiveness has been accompanied by a measurable rise in party conflict.[63] Van Houweling reports that an increasing proportion of Congressional votes—more than 90%—involves parties voting against the other. [64] And when party conflicts do occur, both Representatives and Senators exhibit more loyalty to their parties than they did in the past.[65] This tallies with the results of other studies of Congressional voting behavior to the effect that between the 1950s and the 1970s only 60% voted on party lines, but this figure rose to over 70% in the 1980s and continues to rise to today's levels. [66]

In 2018, the Washington Post identified a potential culprit: a "little-known report" that "keeps popping up in commentary on the state of American politics," and its authors blamed for contemporary political gridlock.[67] The report in question,

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58 Washington's Farewell Address 1796, http://avalon.law.yale.edu/18th_century/washing.asp.

59 *Id.*

60 *Id.*

61 *See* Brady et al., *supra* note 59. *See also* Joanne Freeman, Affairs of Honor: National Politics in the New Republic 269-72 (2001) (noting that Federalists and Jeffersonians-Republicans were polarized over tariffs, the national bank, and, more generally, federal versus state and citizen power in the 1790s. Similar battles were fought between the Whigs and the Democrats in the 1830s and 1840s and again in 1850s and then the 1890s as Democrats and Republicans split over slavery and then agrarian and currency issues).

62 Sean M. Theriault, *Party Polarization in the US Congress: Member Replacement and Member Adaptation*, 12 Party Politics 483–503 (2006).

63 Edward G. Carmines & Michael W. Wagner, *Political Issues and Party Alignments: Assessing the Issue Evolution Perspective*, 9 Annual Review of Political Science 67–81 (2006).

64 Robert Parks Van Houweling, An Evolving End Game: The Partisan Use of Conference Committees in the Post-Reform Congress 47 (2003).

65 *Id.*

66 Marcus E. Ethridge & Howard Handelman, Politics in a Changing World (7th ed. 2014); Eric A. Posner & E. Glen Weyl, *Voting Squared: Quadratic Voting in Democratic Politics*, 68 Vand. L. Rev. 441 (2015).

67 Mark Wickham-Jones, *This 1950 Political Science Report Keeps Popping up in the News. Here's the Story Behind It*, Wash. Post (July 24, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/07/24/this-1950-political-science-report-keeps-popping-up-in-the-news-heres-the-story-behind-it/.

Toward a More Responsible Two-Party System,[68] written in 1950 for the American Political Science Association (APSA) was the product of a four-year inquiry into how governmental processes designed "for an untried federal republic in an undeveloped corner of the eighteenth-century world" might best be adapted to meet contemporary needs. [69] Specifically the report was critical of what it saw as the major weakness of the 1950s political framework: the parties were too similar to each other and lacked the necessary structures to operate effectively at national level. Moreover they were too unwilling to engage in conflict. Clearer ideological distinctions and "meaningful national programs" were needed to provide voters with real political choices, and thereby ensure democratic accountability:

> The fundamental requirement of accountability is a two-party system in which the opposition acts as the critic of the party in power, developing, defining and presenting the policy alternatives which are necessary for a true choice in reaching public decisions. The opposition most conducive to responsible government is an organized party opposition.[70]

APSA was not the first to lament the absence of clear party identifications. Such complaints can be traced as far back as the 1830s when Alexis de Tocqueville complained: "What I call great political parties are those more attached to principles than to consequences, to generalities rather than to particular cases, to ideas rather than to personalities. America has had great parties; now they no longer exist".[71]

Fifty years later Viscount James Bryce, a Scot, wrote of the differences between "intelligent Republicans" and "intelligent Democrats":

> Neither party has, as a party, anything definite to say on these issues; neither party has any clean-cut principles, any distinctive tenets. Both have traditions. Both claim to have tendencies. Both have certainly war cries, organizations, interests enlisted in their support. But those interests are in the main the interests of getting or keeping the patronage of the government. Distinctive tenets and policies, points of political doctrine and points of political practice, have all but vanished. They have not been thrown away, but have been stripped away by time and the progress of events, fulfilling some policies, blotting out others. All has been lost, except office or the hope of it. [72]

APSA's fear was that, absent its recommended reforms, there was a danger that repeated "demonstrations of ineffectiveness" would lead to voter alienation and an

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68 APSA, *Toward a More Responsible Two-Party System: A Report of the Committee on Political Parties*, 44(3) Am Pol. Sci. Rev. (1950) (Johnson Reprint Corp. 1973).

69 Philip Levy, *Toward a More Responsible Two-Party System. A Report of the Committee on Political Parties of the American Political Science Association* 65 Harv. L. Rev. 536, 536 (1952).

70 APSA, *supra* note 68, at 1-2, 17-19.

71 Alexis de Tocqueville , Democracy in America 161 (1994)(1835).

72 2 Viscount James Bryce, The American Commonwealth, with an Introduction by Gary L. McDowell (Indianapolis: Liberty Fund, 1995) (1888), https://oll.libertyfund.org/titles/697#Bryce_0004-02_51.

"unbridgeable political cleavage" which would fragment the two-party system and destabilize American political life:

> *If the two parties do not develop alternative programs that can be executed, the voter's frustration and the mounting ambiguities of national policy might also set in motion more extreme tendencies to the political left and the political right*. This again, would represent a condition to which neither our political institutions nor our civic habits are adapted. *Once a deep political cleavage develops between opposing groups, each group naturally works to keep it deep.* [73]

Ironically from where we now stand, the report concluded that accentuation of party difference was the way this cleavage would be avoided:

> *Orientation of the American two-party system along the lines of meaningful program*s, far from producing an unhealthy cleavage dividing the electorate, *is* actually *a significant step toward avoiding the development of such a cleavage*. It is a way of keeping differences within bounds. It is a way of reinforcing the constitutional framework within which the voter may, without peril exercise his freedom of political choice.[74]

The changes in party organization and programmatic agendas that have since taken place have been documented by political historians and are beyond the present scope of this Article.[75] Professor Rohde has suggested that the assumption by the APSA committee was that by providing more ideological distinction among the parties, clarity and responsibility would follow suit.[76] Today, the results are all too plain. Parties have certainly become more distinctive but the results are not what APSA intended. With the benefit of hindsight, the exact opposite has occurred; clarity of ideology has hindered rather than promoted what the APSA committee hoped for namely, a "more reasonable discussion of public affairs."[77] As the Pew Research Center reported in 2014, Republicans and Democrats "are more divided along ideological lines—and partisan antipathy is deeper and more extensive—than at any point in the last two decades."[78] Polarization and partisan allegiance as features of U.S. political life are at an all-time high. They have produced what

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73 *Id*. at 95 (emphasis in the original).

74 *Id*. at 95-96 (emphasis in the original).

75 *See, e.g.,* Alan I. Abramowitz, The Disappearing Center (2010); John H. Aldrich, Why Parties? A Second Look 163-323 (2011); Geoffrey C. Layman et al., *Party Polarization in American Politics: Characteristics, Causes, and Consequences*, 9 Ann. Rev. Pol. Sci. 83 (2006); Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 Calif. L. Rev. 273 (2011).

76 David W. Rohde, Parties and Leaders in the Postreform House (1991).

77 Philip Levy, *supra* note 69.

78 *Political Polarization in the American Public: How Increasing Ideological Uniformity and Partisan Antipathy Affect Policy, Compromise and Everyday Life*, Pew Research Centre (June 12, 2014), https://www.people-press.org/2014/06/12/political-polarization-in-the-american-public/.

has been termed the most ideologically polarized Congress in modern history;[79] political gridlock has become an accepted feature of contemporary U.S. politics. [80]

While the causes of the current "hyper-partisanship"[81] are complex, it is undoubtedly the case that political factionalism at the national level is closely tied to and mirrors an intensification of ideological polarization at the level of the electorate.[82] It has been suggested that structural practices such as the district boundary gerrymander and the presidential primary can bear some responsibility. Low-turnout primaries, it is said, permit extremist positions to prevail over the center. [83] Gerrymandering of congressional districts by reference to party allegiance further limits the influence of moderate voters. [84] In this connection the recent decision of the U.S. Supreme Court in *Rucho*, which puts partisan gerrymandering

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79 *See* Sandra Zellmer, *Treading Water While Congress Ignores the Nation's Environment*, 88 Notre Dame L. Rev. 2323, 2370 (2014). *See also* Edward G. Carmines & Matthew Fowler*, The Temptation of Executive Authority: How Increased Polarization and the Decline in Legislative Capacity Have Contributed to the Expansion of Presidential Power*, 24 Ind. J. Global Legal Stud. 369, 370–71 (2017) (referring to the 114th Congress); Geoffrey C. Layman et al., *Party Polarization In American Politics: Characteristics, Causes, and Consequences*, 9 Annual Review of Political Science 83–110 (2006).

80 Clio Andris et al., *The Rise of Partisanship and Super-Cooperators in the U.S. House of Representatives*, 10(4) PLoS One e0123507 (2015), https://doi.org/10.1371/journal.pone.0123507; Sean M. Theriault, *Party Polarization in the US Congress: Member Replacement and Member Adaptation*, 12 Party Politics 483–503 (2006); John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 Yale L. J. 1663–1750 (2004).

81 Thomas E. Mann, *We Must Address Gerrymandering*, Time (Oct. 13, 2016), https://time.com/4527291/2016-election-gerrymandering/.

82 *See* Andris et al., *supra* note 80, at 1-2 (flagging up "the stratifying wealth distribution of Americans, boundary redistricting, activist activity at primary elections, changes in Congressional procedural rules political realignment in the American South, the shift from electing moderate members to electing partisan members, movement by existing members towards ideological poles; and an increasing political, pervasive media"), (citing Olympia J. Snowe, *The Effect of Modern Partisanship on Legislative Effectiveness in the 112th Congress*, 50 Harv J. Legis. 21 (2013));
Nolan McCarty et al., Polarized America: The Dance of Ideology and Unequal Riches (2006); Jamie L. Carson et al., *Redistricting and Party Polarization in the U.S. House of Representatives* 35Am. Pol. Res. 878 (2007); Steven J. Rosenstone & John Mark Hansen, Mobilization, Participation, and Democracy in America (1993); Sean M. Theriault, *Party Polarization in the US Congress: Member Replacement and Member Adaptation*, 12 Party Politics 483 (2006), Jason M. Roberts & Steven Smith, *Procedural Contexts, Party Strategy and Conditional Party Voting in the U.S. House of Representatives 1971–2000*, 47 Am. J. Pol. Sci. 305 (2003); Jeffrey A. Jenkins, *Examining the Bonding Effects of Party: A Comparative Analysis of Roll-Call Voting in the U.S. and Confederate Houses.* 43 Am. J. Pol. Sci. 1144 (1999).

83 Elaine C. Kamarck, *Increasing Turnout in Congressional Primaries*, Center for Effective Public Management at BROOKINGS (July 2014) https://www.brookings.edu/wp-content/uploads/2016/06/KamarckIncreasing-Turnout-in-Congressional-Primaries72614.pdf.

84 Fred Dews, *A Primer on Gerrymandering and Political Polarization* Brookings (July 6, 2017), https://www.brookings.edu/blog/brookings-now/2017/07/06/a-primer-on-gerrymandering-and-political-polarization/.

beyond the reach of the federal judiciary is unfortunate.[85] Historically, of course, as the Chief Justice remarked, the practice is not new[86] and is not confined to one party,—*Rucho* itself concerned both the Republican map in North Carolina and a Democratic map in Maryland.[87] The point should not however be overstated; what seems to be happening is what the Chief Justice called a "natural" gerrymander;[88] as Kamarck explains "in recent years Americans seem to have "sorted themselves" into like-minded communities."[89] Brookings researchers Galston and Mann agree:

> Because people increasingly prefer to live near others who share their cultural and political preferences, they are voting with their feet and sorting themselves geographically. … Many more states and counties are dominated by one-party supermajorities than in the past. Contrary to widespread belief, reducing the gerrymandering of congressional districts would make only a small dent in the problem. [90]

The effect, put succinctly is partisan concentration: "In recent years, red states have gotten redder, blue states bluer and the same holds for counties." [91]

Underlying this is the continuing rise of identity politics; as political theorists and psychologists confirm,[92] affiliation to a political party and the values that it promotes have become important indicators of personal and social identity with the result that politics now lends itself to be conducted in terms of tribes and tribalism rather than specific issues.[93] In the words of Professor Appiah "American politics ... is driven less by ideological commitments than by partisan identities—less by what

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85 Rucho v. Common Cause, 139 S. Ct. 2484 (2019): "Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply."(Roberts, C.J.).

86 *Id*. at 2494.

87 *See* Zack Beauchamp, *The Supreme Court, Gerrymandering and the Republican Turn Against Democracy*, Vox, (June 27, 2019, 2.30 pm EDT): "In 2010, Republican strategist Karl Rove wrote an op-ed in the Wall Street Journal advocating a significant Republican push to gerrymander legislative districts after that year's midterm elections. Rove's idea manifested as Project REDMAP, a dark-money campaign to support Republican candidates for state legislature and then help them redraw House districts after the 2010 census.".

88 *Rucho*, 139 S. Ct. 2484 , 2501 (Roberts, C.J., posing the hypothetical: "Should a court "reverse gerrymander" other parts of a State to counteract "natural" gerrymandering caused, for example, by the urban concentration of one party? If a districting plan protected half of the incumbents but redistricted the rest into head to head races, would that be constitutional? A court would have to rank the relative importance of those traditional criteria and weigh how much deviation from each to allow.").

89 Kamarck, *supra* note 83.

90 William A Galston & Thomas E. Mann, *Republicans Slide Right: The Parties Aren't Equally to Blame for Washington's Schism,* BROOKINGS (May 16, 2010) https://www.brookings.edu/opinions/republicans-slide-right-the-parties-arent-equally-to-blame-for-washingtons-schism/.

91 Dews, *supra* note 84.

92 *See, e.g*., Donald Green et al., Partisan Hearts and Minds (2002); Nancy L. Rosenblum, On the Side of the Angels (2008) (arguing that Party identification is an important part of social identification). .

93 Brian Helmuth et al., *Trust, Tribalism and Tweets: Has Political Polarization Made Science a "Wedge Issue"?*, 3 Climate Change Responses (2016), http://climatechangeresponses.biomedcentral.com/articles/10.1186/s40665-016-0018-z (last visited Feb. 28, 2019).

we think than by what we are. Identity precedes ideology."[94] Or—as the headline writer put it—"all politics is identity politics."[95] Yet, as Appiah also points out, "the collective identities they spawn" can be riddled with contradictions.[96] Nowhere is this more true than in relation to the environment.

IV. Partisanship and the Environment

In terms of demographic, research identifies a Republican core constituency that is predominantly white, attends church regularly, has a conservative mindset on social issues such as immigration, same-sex marriage and racially equality, and responds to anti- abortion and gun control cues. [97] Top priorities, according to a Pew Research Center report, are terrorism and the economy.[98] Democratic voters on the other hand are racially and ethnically diverse, are socially liberal, see their top policy priorities in terms of reducing health care costs, improving education, protecting the environment and securing Medicare and are universally opposed to President Donald Trump. [99] "None of these," states the report, "is among the five leading top priorities for Republicans and Republican-leaning independents (Medicare and health care costs rank sixth and seventh, respectively)."[100] On global climate change the partisan gap is particularly wide: "two-thirds of Democrats and Democratic leaners identify global climate change as a top priority, while just 21% of Republicans and Republican leaners say the same."[101]

Another report published seven months later concluded that the percentage of Americans who regard global climate change as a "major threat" to the well-being of the United States grew from 40% in 2013 to 57% in 2019 but the rise in concern is mainly on the part of Democrats; opinions among Republicans on this issue remain "largely unchanged".[102] In terms of voting behavior, a 2018 Pew

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94 Kwame Anthony Appiah, *People Don't Vote for What They Want; They Vote for Who They Are*, Wash Post, (Aug. 30, 2018) https://www.washingtonpost.com/outlook/people-dont-vote-for-want-they-want-they-vote-for-who-they-are/2018/08/30/fb5b7e44-abd7-11e8-8a0c-70b618c98d3c_story.html. *See also* Kwame Anthony Appiah, The Lies That Bind: Rethinking Identity (2018).

95 Appiah, *People Don't Vote, supra* note 24.

96 *Id.*

97 Michele F. Margolis, *How Politics Affects Religion: Partisanship, Socialization, and Religiosity in America*, 80 Journal of Politics 30–43 (2018).

98 Bradley Jones, *Republicans and Democrats Have Grown Further Apart on What the Nation's Top Priorities Should Be*, Pew Research Center (Feb. 5, 2019), https://www.pewresearch.org/fact-tank/2019/02/05/republicans-and-democrats-have-grown-further-apart-on-what-the-nations-top-priorities-should-be/.

99 J. Baxter Oliphant, *6 Facts About Democrats as the Party Holds Its Presidential Debates*, Pew Research Center, (June 26, 2019) https://www.pewresearch.org/fact-tank/2019/06/26/facts-about-democrats/.

100 Jones, *supra* note 98.

101 *Id.*

102 Brian Kennedy & Meg Heffaron, *U.S. Concern About Climate Change Is Rising but Mainly Among Democrats,* Pew Research Center (Aug. 28, 2019), https://www.pewresearch.org/fact-tank/2019/08/28/u-s-concern-about-climate-change-is-rising-but-mainly-among-democrats/.

survey found that for Democrats seeking party nomination, climate change is now "centre stage" with 82% of registered Democrats agreeing that environmental issues would be "very important" to their vote, an increase from 69% since 2016. Amongst registered Republicans the figure was 38%, roughly unchanged since 2008.[103] The Report concludes that the role of environmental issues in the general election "remains unclear."

Both constituencies are now easily and directly targetable via social media and can be, and are, mobilized by the respective party organizations in support of an identified party agenda. Party platforms however, come in packages of specific goals and priorities that do not necessarily mirror the priorities of the individuals who are prepared nevertheless to vote for them. As Pew researcher Drew DeSilver reminds us, both parties need to be seen in terms of coalitions united less by the specifics of party agendas but more by perceptions of common values and shared understandings.[104]

Thus in terms of party behavior, there is no doubt that the thirty years since the environmental legislation of the 1970s, have seen the partisan divide on environmental issues in Congress grow "exponentially more bitter and ideological."[105] Equally, research also supports the view that Republicans are more likely than Democrats to be skeptical of climate change science.[106] Nevertheless a Pew Research Center survey conducted in March/April 2018 rather surprisingly found that, after a year of Trump Administration change in climate and energy regulation policies, "pockets of partisan agreement" could be found:

> majorities of Americans said the federal government is doing too little to protect key aspects of the environment including water (69%), air quality (64%) and animals and their habitats (63%). And two-thirds of Americans (67%) said the government is doing too little to reduce the effects of climate change.[107]

Partisan agreement was closest in relation to increasing the use of renewables but furthest away over increasing fossil fuels through such methods as coal mining, hydraulic fracturing and offshore drilling for oil and natural gas.[108] However what was dividing the partisans most keenly was the issue of regulation. In terms of the population as a whole:

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103 *Id.*

104 Drew DeSilver, *A Closer Look at Who Identifies as Democrat and Republican*, Pew Research Center (July 1, 2014), https://www.pewresearch.org/fact-tank/2014/07/01/a-closer-look-at-who-identifies-as-democrat-and-republican/.

105 David W. Case, The Lost Generation: Environmental Regulatory Reform in the Era of Congressional Abdication, 25 Duke Envtl. L. & Pol'y F. 49, 60 (2014).

106 Brian Helmuth et al., *Trust, Tribalism and Tweets: Has Political Polarization Made Science a "Wedge Issue"?*, 3 Climate Change Responses (2016),

107 Pew Research Center, *Majorities See Government Attempts to Protect the Environment as Insufficient* (May 14, 2018) https://www.pewresearch.org/science/2018/05/14/majorities-see-government-efforts-to-protect-the-environment-as-insufficient/.

108 *Id.*

> On balance, most U.S. adults (56%) agree with the statement "Government regulations are necessary to encourage businesses and consumers to rely more on renewable energy sources." Meanwhile, 42% back the statement "The private marketplace will ensure that businesses and consumers rely more on renewable energy sources, even without government regulations."[109]

Broken down by party, however the partisan divide is revealed:

> Some 74% of Republicans and independents who lean Republican believe it is possible to cut regulations and protect the quality of air and water, compared with 35% of Democrats and Democratic leaners who say the same.[110]

The explanation, as Professor Case suggests, is an underlying ideological concern that has less to do with the environment but everything to do with regulation; what is currently in play is a pushback against the reach of the administrative state and an expansion of federal regulatory authority that has been described as "quasi-constitutional in scope."[111] From this perspective environmental regulation is a "political lightening rod […]" and the role of the EPA a symbol of "excessive and heavy handed regulation."[112]

V. The Environment, the States and the Federal Government.

"The history of the American administrative state" asserted then law professor Elena Kagan, is the history of competition among different entities for control of its policies[…]. We live today in an era of presidential administration."[113] President Obama's environmental initiatives by-passed Congress and were largely implemented using the tools of the administrative presidency, namely executive orders and agency rulemaking. The Trump Administration uses the same methods to reverse these initiatives, thereby contributing to what may be termed the "ebb and flow" of forty years of U.S. environmental policy, the underlying issues of which relate directly to the dynamics of federal-state relations. The twist in the saga is that the actions of the current administration are apparently less about federalism and more about political point-scoring and the personal animosity of

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109 *Id.*

110 *Id*.

111 Cary Coglianese, *Social Movements, Law, and Society: The Institutionalization of the Environment*, 150 U. Pa. L. Rev. 85, 97-98 (2001). *See* David W. Case, *The Lost Generation: Environmental Regulatory Reform in the Era of Congressional Abdication*, 25 Duke Envtl. L. & Pol'y F. 49 (2014).

112 Todd S. Aagaard, *Environmental Law Outside the Canon*, 89 Ind. L. J. 1239, 1257 (2014). *See* Daniel A. Farber, *Trump, EPA and the Anti-Regulatory State*, Regulatory Review, (Jan 24, 2018) https://www.theregreview.org/2018/01/24/farber-trump-epa-anti-regulatory-state/.

113 Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2246 (2001).

the President towards environmentally conscious states, specifically the state of California.

Experience under the Trump Administration, comments Professor Farber, suggests "industry capture or reflexive ideological opposition to regulation—or both."[114] The EPA may be a "central instrument of the modern regulatory state" but, as the Environmental Council of the States points out, cooperative federalism, in the sense of power-sharing between the 50 states of the union and the federal government, is built into the framework of U.S. environmental regulation.[115] The EPA sets standards at national level which are implemented at state level by state agencies with EPA authorization to carry out federal programs.[116] States can negotiate opt-outs, *i.e.* authorization to set their own standards which can be higher but not lower than the federal base line. This is a model that applies across most environmental statutes, including the Clean Air Act, the Clean Water Act, Safe Drinking Water Act, and the Resource Conservation and Recovery Act.[117] It presupposes a collaborative approach but where states and federal government share the same regulatory terrain but their political priorities diverge, states can and do argue that the federal government is exceeding its authority. Federal environmental regulation then becomes the battleground on which the divisive issue of the respective boundaries of state and federal authority can once again be played out.

President Obama's policy of environmental regulation with its emphasis on national rules and uniform standards, shifted the balance of authority back from the states to the federal government; President Trump's agenda reverses this, pulling back from federal regulation, and shifting responsibility back to the states.[118] From one perspective, this is broadly in line with a long-term pattern of U.S. environmental federalism whereby the federal role strengthens and diminishes in line with partisan political ideology. Republican President Ronald Reagan, for example, took office with an agenda aimed at freeing up businesses from the burden of excessive regulation.[119] From another perspective the current nature of intergovernmental relations appears to be shaped less by traditional divisions of political ideology and partisanship and more by a states pushback against an executive that in the words of the Environmental Council of the States, is damaging the "[c]onstructive, collaborative, and respectful engagement between state and federal governments [that] is an essential element in the protection of [the] nation's public health and environment."[120]

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114 Farber, *supra* note 112.

115 *See* Envtl. Council of the States (ECOS), *Co-operative Federalism 2.0: Achieving and Maintaining a Clean Environment and Protecting Public Health*, (July 2017) https://www.ecos.org/wp-content/uploads/2017/06/ECOS-Cooperative-Federalism-2.0-June-17-FINAL.pdf.

116 *See* Koniskey & Woods, *supra* note 36, at 348-50 (2019); Bulman-Pozen, *supra* note 54, at 1082–83 (2014); Neal D. Woods, *Primacy Implementation of Environmental Policy in the U.S. States*, 36 Publius 259 (2006); Patricia McGee Crotty, *The New Federalism Game: Primacy Implementation of Environmental Policy*, 17 Publius 53 (1987).

117 *See* Koniskey & Woods, *supra* note 36, at 348-49 (pointing out that the Endangered Species Act and the Superfund program are notable exceptions).

118 *Id*. at 354.

119 *See* Jefferson Decker*, Deregulation*, *Reagan-Style*, The Regulatory Review (Mar.13, 2019) https://www.theregreview.org/2019/03/13/decker-deregulation-reagan-style/.

120 ECOS, *supra* note 115.

The Environmental Council of the States is a non-profit, non-partisan association whose membership comprises all 50 states plus the District of Columbia and Puerto Rico.[121] It notes that the states have assumed more than 96% of the delegable authorities under federal law and is committed to a model of cooperative federalism which sees the states rather than the federal government as the primary implementers of environmental protection statutes.[122] In a recent letter sent to EPA Administrator Andrew Wheeler, ECOS expressed concern about EPA unilateral actions, lack of discussion and absence of advance consultation with the states that violate the principles of cooperative federalism and calls on the EPA "to return to the appropriate relationship with the states as coregulators under our nation's environmental protection system."[123] This "unusually bold move"[124] is not a complaint about partisanship—most of the group's current cabinet members are Republicans[125]—but about federalism; states "across the country from Kentucky to Alaska," California Environmental Agency Protection Agency Secretary, Jared Blumenfield, told Bloomberg Environment "are all alarmed at the tenor of the U.S. EPA."[126]

What seems to have provoked the ECOS response is what looks like a politically- motivated attack on "the nation's left-most state" that may be designed to energize the President's base[127] but as an example of federal overreach is having the effect of bringing the states together in a spirit of environmental solidarity. In the space of days, the Trump administration mounted three separate attacks against California. In reverse order, on 26 September, 2019 (the same day as the ECOS letter) EPA administrator Andrew Wheeler sent a letter to the Governor of California accusing the state of allowing untreated human waste matter to pollute its water and expressing concern "that California's implementation of federal environmental laws is failing to meet its obligations" under the federal Clean

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121 *Id*.

122 *Id*.

123 Letter from ECOS to Andrew Wheeler, Administrator, EPA (Sept. 26, 2019), https://www.ecos.org/wp-content/uploads/2019/09/ECOS-Sept-26-2019-Letter-to-Adminstrator-Wheeler.pdf.

124 *See* Stephen Lee, *States Demand Wheeler Explains EPA's Stance on Federalism* (*2*), Bloomberg Environment (Sept. 27, 2019, updated 10.03 PM), https://news.bloombergenvironment.com/environment-and-energy/states-demand-wheeler-explain-epas-stance-on-federalism (quoting California Environmental Protection Agency Secretary Jared Blumenfeld).

125 *Id*. (quoting "a career EPA water official who left the agency in 2017, [and] called the ECOS letter "a shocker" because most of the group's cabinet members are Republicans.).

126 *See* Lee, *supra* note 124 (quoting Blumenfeld).

127 Todd S. Purdum, *Trump's Attacks on California Are Shortsighted*, The Atlantic (Sept. 28, 2019),
https://www.theatlantic.com/politics/archive/2019/09/attacking-california-easy-trump-bait/598915/.
On October 23, 2019, the Trump Administration launched yet another attack on California, this time in the form of a lawsuit challenging the state's cap-and-trade agreement with Quebec for limiting carbon dioxide emissions. The lawsuit, filed in the U.S. district court for the Eastern District of California, argues the state has entered into an international agreement in contravention of the U.S. Constitution which bars state treaties or compacts with foreign powers. *See* United States of America v. State of California et al., Case 2:19-cv-02142-WBS-EFB (Oct. 23, 2019, E.D. Cal.).

Water Act and Safe Drinking Water Act.[128] The letter requested a written response within 30 days outlining in detail how California intends to address the concerns and violations and demonstrating that the state has "the adequate authority and capability to address these issues."[129]

Two days previously, Andrew Wheeler had sent another letter to the California Air Resources Board, complaining that California had the "worst air quality in the United States," had filed incomplete plans for fighting air pollution, and had "failed to carry out its most basic tasks" under the federal law.[130] The letter threatened sanctions, including cuts to federal highway funding, a substantial penalty for a state that receives more federal highway funding than any other state in the Union.[131]

Four days before that, on September 20, the EPA formally announced it was withdrawing California's waiver under the Clean Air Act to set its own vehicle emissions standards.[132] This move was not unexpected. The EPA and Department of Transportation (DOT) signaled this intention in the notice of proposed rulemaking (NPRM)—the Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks (SAFE Vehicles Rule)—in August 2018.[133] According to the agencies' press release the aim was to "give the American people greater access to safer, more affordable vehicles that are cleaner for the environment."[134] DOT secretary, Elaine L. Chao, claimed the federal action "meets President Trump's commitment to establish uniform fuel economy standards for vehicles across the United States, ensuring that no state has the authority to opt out of the nation's rules and no state has the right to impose its policies on the rest of the country."[135] Critics point up the inconsistency of requiring the state to take action to combat air pollution while removing its main mechanism for tackling the problem. They say the waiver which has been in operation since 2013, has enabled California and 13 other states to set standards above those of the national rule, including a zero-vehicle emission (ZEV) mandate[136] and has been the foundation

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128 Letter from Andrew R. Wheeler to Hon. Gavin C. Newsom (Sept. 26, 2019), https://src.bna.com/LIZ.

129 *Id*.

130 Letter from Andrew R. Wheeler to Ms. Mary D. Nichols, Chair, California Air Resources Board, (Sept 24, 2019), available at https://www.sacbee.com/news/politics-government/capitol-alert/article235397887.html (last visited Nov. 2, 2019).

131 According to the Department of Transportation, California is projected to receive more than $19 billion from the Federal Highway Administration between fiscal years 2016 and 2020. *See* U.S. Dept of Transportation, *Fixing America's Surface Transportation Act or "Fast Act,"* https://www.fhwa.dot.gov/fastact/funding.cfm (last visited Nov. 2, 2019).

132 Betsy Lillian, *Feds Officially Move to Withdraw California's Clean Air Act Waiver,* NGT News (Sept. 20. 2019) https://ngtnews.com/feds-officially-move-to-withdraw-californias-clean-air-act-waiver.

133 DOT & EPA, *Proposed California Waiver Withdrawal* (Aug. 2, 2018), https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P100V26M.pdf.

134 EPA, *U.S. EPA and DOT Propose Fuel Economy Standards for MY 2021-2026 Vehicles*, (Aug. 2, 2018) https://www.epa.gov/newsreleases/us-epa-and-dot-propose-fuel-economy-standards-my-2021-2026-vehicles.

135 Lillian, *supra* note 132.

136 https://ww2.arb.ca.gov/sites/default/files/2019-03/177-states.pdf.

for California to become an environmental leader in reducing greenhouse gas emissions and improving air quality.[137]

On September 20, California, 23 other states,[138] the District of Columbia, New York City, and Los Angeles filed a lawsuit in the federal district court for the District of Columbia. The states asserted that the preemption regulation exceeded the NHTSA's authority, that the regulation contravened the Energy Policy and Conservation Act of 1975 and the Clean Air Act, and that NHTSA failed to consider the regulation's environmental impacts as required by the National Environmental Policy Act. [139] The states have the support of nine nonprofit organizations that have filed a similar lawsuit.[140]

The states involved, are, broadly speaking, those signed up to ECOS which calls itself non-partisan but in terms of its membership is almost entirely Democrat or Democrat-leaning.[141] The same is true, again broadly speaking, of other "bipartisan" state climate change coalitions. Led by the Governors of California, Washington and New York, the same State Governors plus the Governor of Puerto Rico have come together to form the *United States Climate Alliance*, a "bipartisan" coalition with a commitment to uphold the objectives of the 2015 Paris Agreement within their borders, "by achieving the U.S. goal of reducing greenhouse gas (carbon dioxide equivalent) economy-wide emissions 26–28% from 2005 levels by 2025and meeting or exceeding the targets of the federal Clean Power Plan."[142] Representing 55 percent of the U.S. population and an $11.7 trillion economy "an economy larger than all countries but the United States and China" the Alliance is committed to a program of climate leadership at home and international engagement across borders. Above all it seeks to refute the argument that action on climate change and positive economic growth are not compatible:

> The climate and clean energy policies in Alliance states have attracted billions of dollars of new investment and helped create more than 1.7 million clean energy jobs, over half the U.S. total. Independent analysis highlighted in the Alliance's 2018 Annual Report shows that Alliance States are not only outpacing non-Alliance states in reducing their emissions, they are also growing their economies at a faster pace. Between 2005 and 2016, Alliance States reduced their emissions by 14 percent compared to the national average of 11 percent. In that same time period, the combined economic output of Alliance states grew by

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137 Anna M. Phillips, *Trump Plans to Revoke a Key California Environmental Power; State Officials Vow to Fight* L.A. Times (Sept. 17, 2019, 2.24 PM) https://www.latimes.com/environment/story/2019-09-17/trump-revokes-california-environmental-authority-auto-deal.

138 California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, Wisconsin.

139 California v. Chao, No.19-cv-02826 (D.D.C. Filed 09/20/ 2019).

140 Envtl. Defense Fund v. Chao, 19-cv-02907 (D.D.C. Filed 09/27/2019).

141 *See* California v. Chao, No.19-cv-02826 (D.D.C. Filed 09/20/ 2019).

142 http://www.usclimatealliance.org/. Members include: California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Puerto Rico, Rhode Island, Vermont, Virginia, Washington, Wisconsin.

> 16 percent while the rest of the country grew by only 14 percent. The Alliance is demonstrating that climate leadership and economic growth go hand-in-hand. [143]

From one perspective these alliances feed a narrative of "partisan federalism" that Professor Bulman-Pozen regards as the norm for the turn of the twenty-first century.[144] Partisan federalism, she argues, has been fueled by the transfer of power from the states to the federal government and the rise of ideologically cohesive, polarized parties: "[t]he states challenge the federal government, as doctrine and scholarship assume they will, because some number of them are governed by members of the political party out of power at the national level." but tension between the states and the federal government is both deeply rooted in the nation's history and critical to an understanding of contemporary American federalism. [145] Cross-state engagement of the kind outlined above, she suggests, represents "powerful evidence" of a process whereby states present "a vision of the national will different from that offered by the federal government" and thereby "participate in nationwide controversies on behalf of people both inside and outside their borders."[146]

From another perspective, a different narrative emerges. Faced with a situation of legislative gridlock, states and cities have put aside partisan differences and come together with businesses and civil society to form bipartisan coalitions with a shared commitment to reducing emissions within their communities. *America's Pledge*, an initiative spearheaded by former New York Mayor and U.N. Special Envoy Michael Bloomberg and California Governor Jerry Brown, recently published a report detailing how growing coalitions of states, cities, colleges, businesses, and other "real economy" actors are working together with climate change initiatives, despite the Trump Administration's announced intention to take the United States out of the Paris Agreement and commitment to reviving the coal industry.[147] As Paul Bodnar, managing director at the clean-energy-promoting Rocky Mountain Institute and a co-author of the report, told the Guardian newspaper:

> There have been—cities working together, states working together, businesses working together. What's changed in the last year and what's new is this cross-cutting perspective. When states pass laws that help cities' [emissions] strategies, or when states' renewable portfolio standards are designed to help businesses—that's really where we're seeing really interesting, high-impact results." [148]

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143 *See* http://www.usclimatealliance.org/: "The Alliance is engaging internationally to inspire others to make progress towards the goals of the Paris Agreement. Alliance States are working across borders to share best practices and further drive down emissions, including through regional initiatives, such as the North America Climate Leadership Dialogue."

144 Bulman-Pozen, *supra* note 54, at 1145.

145 *Id*. at 1145.

146 *Id.* at 1136, 1145.

147 *Fulfilling America's Pledge: How States, Cities and Businesses Are Leading the United States to a Low-Carbon Future*, Bloomberg Philanthropies (2018), https://www.bbhub.io/dotorg/sites/28/2018/09/Fulfilling-Americas-Pledge-2018.pdf.

148 *See* Liza Ramrayka, *US Activists Launch Climate Change Initiatives in Absence of Federal Leadership*, The Guardian (Sept. 12, 2018, 3:34 PM).

Other bipartisan initiatives include *We Are Still In*, a 'bottom-up network', that began in June with a "promise to world leaders that Americans would not retreat from the global pact to reduce emissions and stem the causes of climate change" and now includes over 3,500 representatives from all 50 states, spanning large and small businesses, mayors and governors, university presidents, faith leaders, tribal leaders, and cultural institutions coalition. [149] As of October 2019, 12 U.S. cities have joined *C40*, a global network of cities committed to the Paris Agreement and decreasing emissions.[150] Nine New England and Mid-Atlantic states have formed a *Regional Greenhouse Gas Initiative* (RGGI), "the first mandatory market-based program in the United States to "cap and reduce CO2 emissions from the power sector,"[151] while four-hundred U.S. mayors have joined together as "*Climate Mayors*," a bipartisan peer-to-peer network committed to joint action to demonstrate leadership on climate change.[152]

At Congressional level too there are indications that environmental concerns can cross the partisan divide. Both chambers of Congress have established bipartisan Climate Solutions Caucuses. The House Climate Solutions Caucus, chaired by Ted Deutch (D-FL-22) and Francis Rooney (R-FL-19). currently comprises 23 Republicans and 41 Democrats. The Senate Climate Change caucus is a very recent initiative announced by Senator Michael Braun (R-IN) and Senator Chris Coons (D-DE). They are currently its only members but have plans for equal numbers of Republicans and Democrats yet to be announced.[153]

In an interview for NBC News, Rep. Rooney welcomed the Senate initiative, but said that efforts to get more Republicans interested in climate change have been challenging.[154] Moreover the work of Niskanen Center researcher, Professor David Karol suggests that the profile of the GOP Climate Solutions Caucus is unlikely to be typical of the wider party. [155] Nevertheless these developments may be straws in the wind. As Professor Karol reminds us, there is a "generation gap in the GOP on environmental issues, especially on the subject of climate change" with 57% of Republican and Republican-leaning millennials believing there is "solid evidence" of climate change.[156] To quote Karol again:

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149 https://www.wearestillin.com/about, last visited Oct. 10, 2019.

150 Austin, Boston, Chicago, Houston, Los Angeles, New Orleans, New York, Philadelphia, Portland, San Francisco, Seattle, Washington, D.C. *See* https://www.c40.org/cities, last visited Oct. 10, 2019.

151 Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont. *See* https://perma.cc/5XEJ-QAPV, last visited Oct. 10, 2019.

152 *See* http://climatemayors.org/, last visited Oct. 10, 2019.

153 Julie Tsirkin, *Senators Launch Bipartisan Climate Change Initiative*, NBC News (Oct.23, 2019 5:11PM BST) , https://www.nbcnews.com/politics/congress/senators-launch-bipartisan-climate-change-initiative-n1070286.

154 *Id.*

155 David Karol, *Party Polarization on Environmental Issues*, Niskanen Center (May 2018), https://www.niskanencenter.org/wp-content/uploads/old_uploads/2018/05/Party-Polarization-on-Environmental-Issues.pdf.

156 *Id*. *See* Carroll Doherty et al., *The Generation Gap in American Politics*: *Wide and Growing Divides in Views of Racial Discrimination*, Pew Research Center 32 (March 1st, 2018), file:///C:/Users/Anne/Downloads/03-01-18-Generations-release2.pdf.

> [t]he role of present-day coalitions in determining politicians' preferences will only hold as long as political costs remain small. If political costs were to rise, then coalitional allies would likely follow Members of Congress to more pro-environmental positions. Anticipating such a shift, some Republicans may take forward positions on environmental issues to gather a reputation for issue leadership and distinguishing media attention.[157]

As the combination of an aging demographic and alignment with a declining fossil fuel industry shrinks the GOP traditional constituency it is to be hoped that, if only for their own political advantage, "far-sighted Republicans might see an advantage in building credibility on the issue."[158] At the present and from where we stand, the prospects for closing the partisan gap remain small and the horizon unclear. However, there is no doubt that environmental concern is now a defining, if not the defining issue of our age to which politicians of every persuasion will have to respond.

[157] Karol, *supra* note 155.
[158] *Id.*