

# The Carbon Tax Vote You've Never Heard of and What It Portends

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## ABSTRACT

Many aspects of carbon taxes have been studied in the academic literature. This paper focuses on an area that has received insufficient attention by examining some of the specific institutional challenges a carbon tax proposal would face in Congress. A relatively unknown recent debate in the House of Representatives over a resolution to denounce the concept of carbon taxes provides a window into these challenges, demonstrating the arguments and tactics that can impede solution-oriented action to address climate change. Developing a policy that responds to these arguments is likely to add complexity to a carbon tax proposal, to increase the number of congressional committees involved in consideration of the proposal, and to create additional demand for the revenue that a proposed carbon tax would generate. Moreover, opponents of a policy can exploit these complicating factors and the lengthy time needed in Congress to consider legislation, so they can preemptively attack emerging concepts and proposals. The paper concludes by arguing that enacting a carbon tax at the federal level, with the policy elements that are often

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contemplated, will require a great deal of agreement or complaisance among lawmakers. Understanding this challenge well in advance of the opportunity for congressional consideration of a carbon tax will best prepare carbon tax advocates for a successful outcome.

#### TABLE OF CONTENTS

I.	INTRODUCTION .....	168
II.	HOUSE CONCURRENT RESOLUTION 89 .....	172
III.	PREEMPTIVE VOTES, A DECADE APART .....	178
A.	Taxing Carbon .....	178
B.	The Kyoto Protocol.....	185
IV.	THE LONG ROAD TO BUILDING AGREEMENT ON CLIMATE POLICY .....	186
A.	Federal Cap-and-Trade Legislation.....	187
B.	Anti-Carbon Tax Efforts .....	194
V.	THE POWER OF THE MAJORITY AND SUPERMAJORITY .....	199
A.	Policy Views of Committee Chairs.....	203
B.	Committee Venue .....	206
C.	Rules Committee.....	209
VI.	WHY THE RHETORIC MATTERS.....	215
A.	Procedural Complication .....	219
B.	Complying With PAYGO and Mandatory Spending Requirements .....	221
C.	Offsets in Revenue Estimates .....	224
D.	The Origination Clause .....	226
VII.	CONCLUSION .....	228

#### I. INTRODUCTION

Scholars, policy experts, and economic modelers have examined extensively the selection, design, and implementation of carbon taxes. Scholars have studied how an effective carbon

tax could be designed<sup>1</sup> and why a carbon tax may be preferable to other policy alternatives.<sup>2</sup> Policy experts have written about the potential uses for the revenue a carbon tax generates<sup>3</sup> and how to build in assurances for environmental performance.<sup>4</sup> The literature has sought to assist policymakers by suggesting how to factor in political opportunity costs into the development of a climate mitigation policy.<sup>5</sup> Even during periods where progress on climate change seems threatened, scholars have held out hope that a carbon tax could be a way forward.<sup>6</sup>

In a parallel set of literature, scholars have examined Congress' internal processes and the impediments they cause for lawmaking. William Eskridge has described a "vetogates" model for thinking of those procedural gates that can block legislation within Congress.<sup>7</sup> Eskridge describes how Article I, Sections 5 and 7 of the Constitution, create nine vetogates which can stop proposed legislation. This paper examines many of the vetogates

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<sup>1</sup> Gilbert E. Metcalf & David Weisbach, *The Design of a Carbon Tax*, 33 HARV. ENVTL. L. REV. 499, 517 (2009).

<sup>2</sup> Reuven S. Avi-Yonah & David M. Uhlmann, *Combating Global Climate Change: Why a Carbon Tax is a Better Response to Global Warming Than Cap and Trade*, 28 STAN. ENVTL. L.J. 3, 40–46 (2009). Roberta Mann, *The Case for the Carbon Tax: How to Overcome Politics and Find Our Green Destiny*, 39 ELR 10118 (2009).

<sup>3</sup> See generally DONALD B. MARRON & ADELE C. MORRIS, URBAN INST. & BROOKINGS INST., TAX POLICY CENTER, HOW TO USE CARBON TAX REVENUES (Feb. 2016), <https://www.brookings.edu/wp-content/uploads/2016/07/howtousecarbontaxrevenue marronmorris.pdf> [<https://perma.cc/4RLS-JD9D>].

<sup>4</sup> See Joseph E. Aldy, et al., *Resolving the Inherent Uncertainty of Carbon Taxes: Introduction*, 41 HARV. ENVTL. L. REV. F. 1, 1–3 (2017); see Brian C. Murray, William A. Pizer, & Christina Reichert, *Increasing Emissions Certainty Under a Carbon Tax*, 41 HARV. ENVTL. L. REV. F. 14, 14–15 (2017); see Joseph E. Aldy, *Designing and Updating a U.S. Carbon Tax in an Uncertain World*, 41 HARV. ENVTL. L. REV. F. 28, 28–30 (2017); see Marc Hafstead et al., *Adding Quantity Certainty to a Carbon Tax Through a Tax Adjustment Mechanism for Policy Pre-Commitment*, 41 HARV. ENVTL. L. REV. F. 41, 41–42 (2017).

<sup>5</sup> Jonathan M. Gilligan & Michael P. Vandenbergh, *Accounting for Political Feasibility in Climate Instrument Choice*, 32 VA. ENVTL. L.J. 1, 26 (2014).

<sup>6</sup> Shi-Ling Hsu, *Carbon Tax Rising*, TRENDS (ABA Section of Env't, Energy, and Res., Chicago, Ill.) Mar./Apr. 2017, at 1,2, [https://www.americanbar.org/content/dam/aba/publications/trends/2017/ABA\\_TR\\_v048n04\\_issue.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/trends/2017/ABA_TR_v048n04_issue.authcheckdam.pdf).

<sup>7</sup> William N. Eskridge, Jr., *Vetogates, Chevron, Preemption*, 83 NOTRE DAME L. REV. 1441 (2008).

Eskridge identifies in the context of a carbon tax, such as the power of Committee chairs and the power of the House Rules Committee. This Article also identifies other obstacles such as the effect of budgetary processes on a proposed carbon tax.

There are multiple ways Congress could contemplate the enactment of a carbon tax. First, Congress could craft a freestanding bill that is considered by the appropriate committees of jurisdiction in the classic standard legislative process, as taught in high school civics classes. Second, a carbon tax could be included in a larger economic package being considered by Congress, perhaps as part of a deficit reduction package.<sup>8</sup> This option could have a timely appeal to fiscally-minded legislators, as the 2017 tax legislation is estimated to increase the federal deficit by \$1.8 trillion between 2018 and 2027.<sup>9</sup> Third, a carbon tax could be considered as part of the annual budget reconciliation practice, just as the 2017 tax legislation was considered.<sup>10</sup> The decision about how to process a proposal is one of the most important decisions in considering carbon tax legislation. It would be made by the congressional leadership, likely in consultation with the White House, when the political atmosphere is receptive to the adoption of a carbon tax policy.

This paper focuses on the challenges a carbon tax would likely face in Congress. The unique procedures of Congress, the tactics opponents of climate action use to prevent action, and the inevitable concerns that will be raised about such a tax in that venue are useful to examine well before such a proposal is seriously considered. Indeed, just as the substance of such a proposal could inform the choice of process for its consideration,

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<sup>8</sup> See WARWICK MCKIBBIN ET AL., *THE CLIMATE AND ENERGY ECONOMICS PROJECT, THE POTENTIAL ROLE OF A CARBON TAX IN U.S. FISCAL REFORM* (2012), <https://www.brookings.edu/research/the-potential-role-of-a-carbon-tax-in-u-s-fiscal-reform> [<https://perma.cc/FV2J-EGJ7>] (arguing that one option for establishing a carbon pollution tax would be to embed the tax within a broader tax reform or budget deficit reduction package).

<sup>9</sup> Letter from Keith Hall, Director, Congressional Budget Office, to Sen. Ron Wyden, Ranking Member, Committee on Finance (Jan. 2, 2018), <https://www.cbo.gov/system/files/115th-congress-2017-2018/costestimate/53437-wydenltr.pdf> [<https://perma.cc/W82F-FSZT>].

<sup>10</sup> H.R. 1, 115th Cong. (2017) (enacted) [<https://perma.cc/8TVB-LQRJ>].

the institutional limitations in Congress could well inform the development of a proposal. Legislating in the area of climate change has proven difficult, and the moments of opportunity can be fleeting.<sup>11</sup> Therefore, preparation is essential for success.

An obscure vote on a House concurrent resolution (House Concurrent Resolution 89) provides a window into these issues. Although the resolution was nonbinding, it had political significance and reveals the tactics and arguments against which proponents of carbon taxes can expect to defend. Indeed, this resolution was again considered by the House of Representatives in the summer of 2018. History suggests that a sustained effort will be necessary to prepare Congress to address climate change. This Article illustrates the congressional tactics that can impede solution-oriented action. It foreshadows the types of arguments that a carbon tax will face, should it be seriously considered in Congress, and offers an opportunity to appreciate that those arguments are likely to result in additional complexity. The Article argues that for Congress to pass a complex carbon tax policy, there will need to be a high level of agreement among members of Congress. In fact, it would be practically impossible to enact a carbon tax over the committed opposition of congressional leadership. Understanding these obstacles and the potential limitations they impose will best prepare carbon tax advocates for success.

Part II provides background on House Concurrent Resolution 89 and how it sought to preempt a productive legislative debate about taxing carbon. Part III examines the use of such preemptive votes as a tactic to slow the momentum of policymakers to respond to climate change. Part IV provides insights into why preemptive votes are an effective tool against climate legislation by describing the lengthy time period that has typically been necessary to prepare Congress for consideration of climate legislation. Part V identifies and explains some of the congressional obstacles to climate policy posed by the structural power that a majority holds over the institution. Part VI explains how the arguments used to support House Concurrent Resolution 89 foreshadow the additional complexity and other

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<sup>11</sup> Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1156 (2009).

congressional barriers that await carbon tax legislation. Part VII concludes by arguing that although sufficient policy analysis exists to establish a carbon tax and respond adequately to policy arguments that have been raised against such a tax, enacting a carbon tax at the federal level with the policy elements that are often contemplated will require a great deal of agreement or complaisance among lawmakers.

## II. HOUSE CONCURRENT RESOLUTION 89

On October 29, 2015, just one month before the nations of the world met to finalize the global agreement on climate change in Paris, France, House Majority Whip Steve Scalise, a Republican from oil- and gas-rich Louisiana, introduced House Concurrent Resolution 89.<sup>12</sup> A press release explained that Representative Scalise was “slamming” President Obama and that “President Obama is pursuing his job-killing global warming agenda at any cost, and the people’s House will not stand for his radical scheme.”<sup>13</sup> The text of the resolution emphasized, or exaggerated, the negative consequences of a carbon tax. It stated that “a carbon tax will mean that families and consumers will pay more for essentials like food, gasoline, and electricity,” “a carbon tax will impose disproportionate burdens on certain industries, jobs, States, and geographic regions,” and that “a carbon tax would reduce America’s global competitiveness.”<sup>14</sup> The resolution concluded “[t]hat it is the sense of Congress that a carbon tax would be detrimental to American families and businesses, and is not in the best interest of the United States.”<sup>15</sup>

Although the resolution’s introduction may have been timed in anticipation of the Paris meeting, it ultimately did not affect the successful outcome. In December 2015, to near unanimous praise, 196 governments agreed to act to avoid the

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<sup>12</sup> H. Con. Res. 89, 114th Cong. (2015).

<sup>13</sup> CONGRESSMAN STEVE SCALISE, SCALISE SLAMS OBAMA ADMIN. WITH ANTI-CARBON TAX RESOLUTION (Oct. 30, 2015), <https://scalise.house.gov/press-release/scalise-slams-obama-administration-anti-carbon-tax-resolution> [<https://perma.cc/UTE2-93ZE>].

<sup>14</sup> H. Con. Res. 89, 114th Cong. (2015).

<sup>15</sup> *Id.*

worst impacts of climate change.<sup>16</sup> In fact, rather than rejecting carbon taxes, the agreement seemed to anticipate them. In addition to the most well-known mechanisms to spur national action and increase ambition over time, the Paris agreement included provisions for international mitigation measures, which could possibly lead to an international carbon pricing approach.<sup>17</sup>

Nevertheless, back in the halls of Congress, the Scalise resolution was slowly building a head of steam. In the months following the Paris agreement, more than 80 Republican members of the House signed on as cosponsors.<sup>18</sup>

On June 10, 2016, the U.S. House of Representatives considered House Concurrent Resolution 89.<sup>19</sup> Rep. Scalise went to the House floor to argue for the resolution's passage. He strongly suggested that the Obama Administration had proposed, or was even attempting to implement, a carbon tax.<sup>20</sup> He said that Congress should "go on record" that a carbon tax "is bad policy" and would be "devastating" to the United States economy.<sup>21</sup> Other proponents of the resolution stated that carbon taxes would "destroy well-paying jobs"<sup>22</sup> and "disarm the American economy."<sup>23</sup>

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<sup>16</sup> United Nations Climate Change Secretariat, United Nations Framework Convention on Climate Change, The Paris Agreement, (Dec. 12, 2015), [http://unfccc.int/paris\\_agreement/items/9485.php](http://unfccc.int/paris_agreement/items/9485.php) [<https://perma.cc/YT2T-HJYJ>].

<sup>17</sup> See, e.g., INTERNATIONAL EMISSIONS TRADING ASSOCIATION, A VISION FOR THE MARKET PROVISIONS OF THE PARIS AGREEMENT (MAY 2016), [http://www.ieta.org/resources/Resources/Position\\_Papers/2016/IETA\\_Article\\_6\\_Implementation\\_Paper\\_May2016.pdf](http://www.ieta.org/resources/Resources/Position_Papers/2016/IETA_Article_6_Implementation_Paper_May2016.pdf) [<https://perma.cc/SQ9N-CM5F>].

<sup>18</sup> H. Con. Res. 89, <https://www.congress.gov/bill/114th-congress/house-concurrent-resolution/89/cosponsors?r=1> (last visited Oct. 4, 2017) [<https://perma.cc/B5KN-V97P>] (Expressing the sense of Congress that a carbon tax would be detrimental to the United States Economy).

<sup>19</sup> H. Con. Res. 89, <https://www.congress.gov/bill/114th-congress/house-concurrent-resolution/89/all-actions?r=1&overview=closed#tabs> (last visited Mar. 31, 2018) [<https://perma.cc/RS4Z-D6QN>] (expressing the sense of Congress that a carbon tax would be detrimental to the United States Economy).

<sup>20</sup> "The President needs to stop this radical agenda." 114 CONG. REC. H3667, H3673 (daily ed. June 10, 2016) (statement of Rep. Scalise).

<sup>21</sup> *Id.* at H3673.

<sup>22</sup> 114 CONG. REC. H3667, H3669 (daily ed. June 10, 2016) (statement of Rep. Black).

<sup>23</sup> 114 CONG. REC. H3667, H3670 (daily ed. June 10, 2016) (statement of Rep. Boustany).

Rep. Scalise articulated three principle arguments for rejecting the concept of taxing carbon in any form. First, he said a carbon tax would harm the nation's international competitiveness by sending one million jobs to China and India. Second, a carbon tax would place an unfair burden on middle and lower income families by increasing the cost of food, gasoline, and electricity. Finally, Rep. Scalise said that a carbon tax would actually increase carbon in the Earth's atmosphere as industries move overseas.<sup>24</sup>

The resolution was the first vote on carbon taxes in the U.S. House of Representatives, and it easily passed along party lines with 237 members supporting and 163 members opposing.<sup>25</sup> Even a dozen Republicans, who sponsored a resolution to acknowledge the reality of climate change and seek solutions, supported the Scalise resolution.<sup>26</sup>

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<sup>24</sup> 114 CONG. REC. H3667, H3673 (daily ed. June 10, 2016) (statement of Rep. Scalise). Rep. Scalise said that "There is data all around that confirms how devastating a carbon tax would be to the United States economy. You can just look at what some of the outside groups that look at this said. The National Association of Manufacturers, the people that make things in America, have confirmed we would lose more than a million jobs in America if a carbon tax was imposed. Where would those jobs go? They would go to countries, ironically, that don't have the good environmental standards we already have. So they would go to countries like China and India where, if you are concerned about carbon going into the atmosphere, the things that they do to produce the same things we produce here in America, it creates more than five times the amount of carbon in those countries. So you are shifting jobs out of America to send it to countries where you would actually create more carbon." Rep. Scalise said that a carbon tax "would have a devastating impact on the middle class of this country. The Congressional Budget Office, our own Congressional Budget Office that looked at this, said a carbon tax would actually hit low-income people the hardest, even harder than high-income people. It would have a devastating impact on those people who are least able to afford it because it would increase the cost of everything they do. It would increase your food costs at the grocery store. It would increase, of course, what you pay at the pump. It would increase your electricity prices." *Id.*

<sup>25</sup> *Final Vote Results for Roll Call 295*, OFFICE OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES, (June 10, 2016), <http://clerk.house.gov/evs/2016/roll295.xml> (no Republican Representatives opposed the resolution. Six Democratic Representatives supported it).

<sup>26</sup> In September 2015, Rep. Chris Gibson, a Republican from New York had sponsored House Resolution 424 which acknowledged the danger of climate change and would, if passed, commit the House to finding a solution. H.R. Res. 424, 114th Cong. (2015). Reps. Chris Gibson, Carlos Curbelo, David Reichert,

To someone unfamiliar with congressional tactics, but knowledgeable about carbon taxes, the scene in the House of Representatives might have been perplexing. The president had neither proposed a carbon tax, nor was attempting to implement one.<sup>27</sup> For Congress' part, while carbon tax proposals had been introduced repeatedly since 1990, they had never gathered sufficient support to be seriously considered.<sup>28</sup> The proponents of the resolution revealed no awareness of the numerous carbon tax policy analyses that suggest solutions to the concerns voiced during the resolution's debate.

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Robert Dold, Richard Hanna, Patrick Meehan, Michael Fitzpatrick, Ileana Ros-Lehtinen, Ryan Costello, Elise Stefanik, Frank LoBiondo, and Tom Reed were sponsors of H.R. Res. 424 and voted in favor of the Scalise resolution.

<sup>27</sup> In February 2016, President Obama had proposed a \$10 per barrel fee on oil for the purpose of funding transportation investments. Press Release, The White House—Office of the Press Secretary, FACT SHEET: President Obama's 21st Century Clean Transportation System (Feb. 4, 2016) (on file with author). Some commentators at the time thought the proposal laid the foundation for new transportation funding ideas to be considered in subsequent Congresses. See, e.g., Russell Berman, *Obama's \$10 Oil-Tax Pipe Dream*, THE ATLANTIC, Feb. 4, 2016, <https://www.theatlantic.com/politics/archive/2016/02/obamas-10-oil-tax-pipe-dream/460062>. However, the House approved a different resolution expressing opposition to this fee on oil just minutes after consideration of Concurrent Resolution 89, expressing opposition to a carbon tax. See H. Con. Res. 112, 114th Cong. (2016).

<sup>28</sup> H.R. 4805, 101st Cong. (1990) (introduced by Rep. Fortney Pete Stark [D-CA-9], and reintroduced by Rep. Stark as H.R. 1086, 102nd Cong. (1991) and H.R. 804, 103rd Cong. (1993)); Save Our Climate Act of 2007, H.R. 2069, 110th Cong. (2007); America's Energy Security Trust Fund Act of 2007, H.R. 3416, 110th Cong. (2007); Save Our Climate Act of 2009, H.R. 594, 111th Cong. (2009); America's Energy Security Trust Fund Act of 2009, H.R. 1337, 111th Cong. (2009); Raise Wages, Cut Carbon Act of 2009, H.R. 2380, 111th Cong. (2009); Save Our Climate Act of 2011, H.R. 3242, 112th Cong. (2011); America's Energy Security Trust Fund Act of 2014, H.R. 5307, 113th Cong. (2014); American Opportunity Carbon Fee Act, S. 2940, 113th Cong. (2014); State's Choice Act of 2014, H.R. 5796, 113th Cong. (2014); Gas Tax Replacement Act of 2014, H.R. 5873, 113th Cong. (2014); Gas Tax Replacement Act of 2015, H.R. 309, 114th Cong. (2015); American Opportunity Carbon Fee Act of 2015, S. 1548, 114th Cong. (2015); America's Energy Security Trust Fund Act of 2015, H.R. 3104, 114th Cong. (2015); Climate Protection and Justice Act of 2015, S. 2399, 114th Cong. (2015); American Opportunity Carbon Fee Act of 2017, H.R. 3420, 115th Cong. (2017); American Opportunity Carbon Fee Act of 2017, S. 1639, 115th Cong. (2017).

The text of the resolution and the arguments of its proponents were absolute.<sup>29</sup> There were no specific details that could be weighed and objected to: no details on the point of taxation, use of revenues, distributional effects, level of taxation, offsetting tax cuts, exempted sectors, or any other element of the tax. There were no caveats or nuance. It was not a proposal to ensure that carbon taxes were adequately scrutinized prior to being established, such as Rep. Calise had proposed in 2013.<sup>30</sup> It also was not an actual tax measure that could be understood to relate to carbon emissions, such as the Btu tax President Clinton proposed in 1993.<sup>31</sup> As contemplated by the resolution, a carbon tax seemingly could be one penny per ton or a thousand dollars per ton—either would devastate the economy and both would be ineffective at reducing carbon pollution.

The Scalise resolution did not offer a debate over a well-designed and well-understood carbon tax. Instead, it was offered to create a focal point for advocacy and debate and to force lawmakers to choose a position in a policy discussion before the debate had begun in earnest.

According to its own terms, the Scalise resolution was an uncompleted act. A concurrent resolution is intended to capture the sentiments of *both* chambers of Congress.<sup>32</sup> Yet House Concurrent Resolution 89 was never considered, let alone approved, by the Senate. However, as described below, its political significance remains.

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<sup>29</sup> A similar resolution, S. Res. 472, was introduced in the U.S. Senate by Sen. Blunt and received the support of 24 additional Senators, however it was never brought to a vote. S. Res. 472, 114th Cong. (2016).

<sup>30</sup> In 2013, Rep. Scalise offered a floor amendment in the House to establish a procedural impediment for the imposition of a carbon tax. H. Amdt. 448 to H. R. 367, 113th Cong. (2013). While the 2013 amendment had no likelihood of enactment, it was understood as a tactic for putting lawmakers on the record and pushing back on some conservative think tanks who had entertained the possibility of establishing a carbon tax. Zack Colman, *House Slams Door on Carbon Tax*, THE HILL, (Aug. 2, 2013), <http://thehill.com/policy/energy-environment/315221-house-votes-to-slam-door-on-carbon-tax>.

<sup>31</sup> See Janet E. Milne, *Carbon Taxes in the United States: The Context for the Future*, 10 VT. J. ENVTL. L. 1, 30 (2008) (explaining that the Btu tax exempted renewable sources of energy).

<sup>32</sup> *Bills and Resolutions*, UNITED STATES SENATE

<https://www.senate.gov/legislative/bills.htm> (accessed on May. 22, 2018).

House Concurrent Resolution 89 was not a deliberation rooted in substantive tax, environmental, and economic policy, but rather was an effort to polarize and set guideposts for the narrative arc of the issue in Congress. Press reported the passage of the resolution as a measure designed to create a concrete record of opposition, useful for opposing a carbon tax should one be seriously proposed in the future, and to create an impediment to that possibility.<sup>33</sup> The anti-tax group Americans for Tax Reform touted the vote as a commitment by House members “to oppose any future proposals of a national carbon tax.”<sup>34</sup>

This resolution may one day be a footnote on Congress’ long journey to an effective climate change policy. Until that uncertain future is realized, it appears to be part of an ongoing mobilization effort.<sup>35</sup> As such, it offers a useful tool for examining the rough seas that a carbon tax must sail if it is to be enacted.

House Concurrent Resolution 89 demonstrates the sustained effort necessary for Congress to address climate change. It illustrates the congressional tactics that can impede solution-oriented action. It foreshadows the types of arguments that a carbon tax will face should it be seriously considered in Congress and offers an opportunity to appreciate that those arguments are likely to result in additional complexity. Lastly, it reminds us that the challenges to enacting effective climate change mitigation legislation are rooted in politics, not policy.

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<sup>33</sup> Timothy Cama, *House Votes to Condemn Carbon Tax*, THE HILL (June 10, 2016), <http://thehill.com/policy/energy-environment/283029-house-condemns-carbon-tax>; see also Elana Schor & Andrew Restuccia, *House Message: No Carbon Tax Under Clinton*, POLITICO (June 10, 2016), <http://www.politico.com/story/2016/06/house-carbon-tax-hillary-clinton-224158> (reporting that “the House is staging a vote Friday to express symbolic disapproval of such a tax, in hopes of keeping the idea off the table no matter who occupies the White House”).

<sup>34</sup> Justin Sykes, *Overwhelming Majority in the House Votes to Oppose a Carbon Tax*, AMERICANS FOR TAX REFORM (June 13, 2016), <https://www.atr.org/overwhelming-majority-house-votes-oppose-carbon-tax>.

<sup>35</sup> As discussed in greater detail in the next part, the U.S. House of Representatives voted to approve H. Con. Res. 119, a resolution nearly identical to H. Con. Res. 89 on July 19, 2018.

## III. PREEMPTIVE VOTES, A DECADE APART

Consideration of the Scalise resolution illustrates the tactics used to oppose policies in general and climate policies specifically. It was a preemptive vote used to establish and normalize a policy position. In some cases, members of Congress were fully subscribed to the position ahead of the vote, and in others they were brought to the position. This is, of course, the strategic value of such a vote: it can serve to galvanize support for a position among both strong and weak supporters alike.

As discussed below, opponents of action on climate change have previously used this preemptive vote strategy to curb momentum for climate change policies.

## A. Taxing Carbon

The timing of the Scalise resolution coincided with a nascent and emerging effort to establish a tax on carbon pollution. After the failure to enact federal cap-and-trade legislation for greenhouse gases in 2009, and notwithstanding the Obama Administration's efforts to reduce greenhouse gas emissions utilizing existing authorities, some policy advocates pursued efforts to legislatively establish a carbon tax or other clean energy legislative proposals.

Congress enacted the Budget Control Act of 2011 which established a so-called "Super Committee," a bipartisan, bicameral committee tasked with proposing deficit reduction legislation and given broad latitude.<sup>36</sup> Some carbon tax advocates saw this as an opportunity to press for a carbon tax, but the idea was never acted upon by the Super Committee.<sup>37</sup>

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<sup>36</sup> See Christopher D. Dodge, *Doomed to Repeat: Why Sequestration and the Budget Control Act of 2011 Are Unlikely to Solve Our Solvency Woes*, 15 N.Y.U. J. Legis. & Pub. Pol'y 835 (2012).

<sup>37</sup> See e.g. James Handley, *Carbon Tax Offers Super Powers to Super-Committee*, Carbon Tax Center (2011)

<https://www.carbontax.org/blog/2011/09/11/carbon-tax-offers-super-powers-to-super-committee>; see also Press Release, Friends of the Earth, *Super committee can avoid harmful cuts by protecting the environment* (Sept. 8, 2011), <https://foe.org/news/2011-09-super-committee-can-avoid-harmful-cuts-by->

However, efforts to develop and promote carbon tax proposals gained some steam. Bills were developed and introduced in the U.S House of Representatives and the U.S. Senate.<sup>38</sup> Conservative organizations began to participate in conversations about carbon tax policy.<sup>39</sup> In 2013, the Senate Finance Committee identified the imposition of a carbon tax as one of several possible approaches to reform the tax code.<sup>40</sup> Policy experts in academia and think tanks analyzed, refined, and promoted carbon tax proposals.<sup>41</sup>

In June 2015, Sen. Sheldon Whitehouse and Sen. Brian Schatz unveiled a carbon tax proposal at conservative think tank American Enterprise Institute.<sup>42</sup> A growing body of thought

protecting (arguing that imposing a carbon tax is the “obvious place to start” in current deliberations over deficit reduction).

<sup>38</sup> See e.g., Save Our Climate Act of 2011, H.R. 3242, 112th Cong. (2011); America’s Energy Security Trust Fund Act of 2014, H.R. 5307, 113th Cong. (2014); American Opportunity Carbon Fee Act, S. 2940, 113th Cong. (2014); State’s Choice Act of 2014, H.R. 5796, 113th Cong. (2014); Gas Tax Replacement Act of 2014, H.R. 5873, 113th Cong. (2014); see also Brad Plumer, *What’s the best way to design a carbon tax? Lawmakers ask for suggestions*, WASHINGTON POST (March 13, 2013), <https://www.washingtonpost.com/news/wonk/wp/2013/03/13/lawmakers-unveil-a-choose-your-own-adventure-carbon-tax> (reporting that four lawmakers were seeking public input on how best to structure a carbon tax);

<sup>39</sup> See Jean Chemnick, *Diverse Group Meets in Washington to Discuss Way Forward on Carbon*, GREENWIRE (July 11, 2012), <https://www.eenews.net/greenwire/stories/1059967124>.

<sup>40</sup> See Stephen Stromberg, *Carbon tax on the table in the Senate*, WASHINGTON POST (April 25, 2013), [https://www.washingtonpost.com/blogs/post-partisan/wp/2013/04/25/carbon-tax-on-the-table-in-the-senate/?utm\\_term=.16efaf7e6390](https://www.washingtonpost.com/blogs/post-partisan/wp/2013/04/25/carbon-tax-on-the-table-in-the-senate/?utm_term=.16efaf7e6390).

<sup>41</sup> See Warwick McKibbin et al., *The Potential Role of a Carbon Tax in U.S. Fiscal Reform*, THE CLIMATE AND ENERGY ECONOMICS PROJECT (July 24, 2012), <https://www.brookings.edu/research/the-potential-role-of-a-carbon-tax-in-u-s-fiscal-reform>; See also, Kevin Kennedy et al, *Putting a Price on Carbon: A Handbook for U.S. Policymakers*, World Resources Institute (2015) <http://www.wri.org/publication/putting-price-carbon>; see also Donald Marron & Eric Toder, *Tax Policy Issues in Designing a Carbon Tax*, Urban Institute (2014), <https://www.urban.org/research/publication/tax-policy-issues-designing-carbon-tax>.

<sup>42</sup> Press Release, Office of Senator Sheldon Whitehouse, Sens. Whitehouse and Schatz Unveil Carbon Fee Proposal at Am. Enter. Inst. (June 10, 2015), <https://www.whitehouse.senate.gov/news/release/sens-whitehouse-and-schatz-unveil-carbon-fee-proposal-at-american-enterprise-institute>.

among conservatives and libertarians believed that climate change required a solution and it was more productive to engage in that conversation and work towards a solution that would be acceptable from their viewpoint. The conservative R Street Institute, free-market American Enterprise Institute, and the libertarian Niskanen Institute were all beginning to engage in a carbon tax policy discussion.<sup>43</sup> Perhaps the strongest evidence of conservative interest in carbon taxes is the letter that representatives of these groups and others sent to members of the House preceding the vote on the Scalise resolution.<sup>44</sup> The letter stated, “We are concerned that this resolution offers a limited perspective on carbon taxes and is blind to the potential benefits of market-based climate policy,” and concluded that “By discouraging a long-overdue discussion about sensible carbon pricing, this resolution frustrates the development of better policy.”

A group of House Republicans were also beginning to express concern about climate change. In September 2015, Rep. Chris Gibson, a Republican from New York, introduced House Resolution 424.<sup>45</sup> The resolution acknowledged the danger of climate change and would, if passed, commit the House to working on the problem.<sup>46</sup> Rep. Gibson introduced the resolution with 10 Republican cosponsors, whose ranks grew to 16 over the remainder of the Congress.

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<sup>43</sup> See JERRY TAYLOR, THE NISKANEN CENTER, THE CONSERVATIVE CASE FOR A CARBON TAX, (Mar. 23, 2015), <https://perma.cc/Y4AG-2EE3>; see also Evan Lehmann, *Conservatives Clash Over Taxing Carbon Emissions*, E&E NEWS (June 14, 2013), [<https://perma.cc/8C4F-EMJQ>].

<sup>44</sup> Letter from Jerry Taylor, President, Niskanen Center, Bob Inglis, Exec. Director, RepublicEn, Aparna Mathur, Resident Scholar, Am. Enter. Inst., Eli Lehrer, President, R Street Inst., The Rev. Mitchell C. Hescocx, President, Evangelical Envtl. Network, Alan Viard, Resident Scholar, Am. Enter. Inst., to U.S. Representatives (June 7, 2016) (on file with Niskanen Center).

<sup>45</sup> H. Res. 424, 114th Cong. (2015).

<sup>46</sup> *Id.* (H.R. Res. 424 resolves “[t]hat the House of Representatives commits to working constructively, using our tradition of American ingenuity, innovation, and exceptionalism, to create and support economically viable, and broadly supported private and public solutions to study and address the causes and effects of measured changes to our global and regional climates, including mitigation efforts and efforts to balance human activities that have been found to have an impact”).

Despite the concern these members felt for climate change and the support and encouragement they had from leading conservative thinkers, all but one of them voted in favor of the Scalise resolution. Only Rep. David Jolly, a Republican from Florida, voted “present.” He had been somewhat outspoken on climate change. In April 2016, Jolly publicly expressed frustration with Congress for not taking climate change seriously.<sup>47</sup> Regardless, he did not oppose the Scalise resolution, illustrating the influence of the House leadership on its rank-and-file members, as well as the policy ecosystem that makes it difficult for junior members of Congress to assert their independence. This is illustrated, for example, by reports that the Republican campaign committee decided to withhold support for a House member’s Senate bid because of his support for climate legislation.<sup>48</sup>

The Scalise resolution was led by the Majority Whip in the House, cosponsored by the Ways and Means chairman, and almost unanimously supported by the Republican House caucus. This demonstration of commitment from the Republican House leadership signals the significant challenges a carbon tax would face going forward in a Congress governed by a Republican majority or where Republican support is necessary for passage.

Just eight months after passage of the Scalise resolution, its preemptive value could be realized. In February 2017, a group of prominent Republicans proposed enactment of a carbon

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<sup>47</sup> Alex Leary, *Rep. David Jolly Says He’s “Sick and Tired” of GOP Position on Climate Change*, TAMPA BAY TIMES (Apr. 13, 2016), <http://www.tampabay.com/blogs/the-buzz-florida-politics/rep-david-jolly-says-hes-sick-and-tired-of-gop-position-on-climate-change/2273038> [<https://perma.cc/V6AN-QTMR>].

<sup>48</sup> Faiz Shakir, *RNC Chairman Steele Withdraws Support For Rep. Kirk Over His Cap-And-Trade Vote*, THINKPROGRESS (Sept. 25, 2009), <https://thinkprogress.org/rnc-chairman-steele-withdraws-support-for-rep-kirk-over-his-cap-and-trade-vote-updated-158eb9a9c21b> (reporting that the RNC withdrew support for Rep. Kirk over the vote and then later denying support had been withdrawn); see Eric Kleefeld, *Mark Kirk: I Voted For Cap And Trade In The House, Would Vote No In The Senate (And Crowd Cheers)*, TALKINGPOINTSMEMO.COM (Sept. 15, 2009), <http://talkingpointsmemo.com/dc/mark-kirk-i-voted-for-cap-and-trade-in-the-house-would-vote-no-in-the-senate-and-crowd-cheers>.

tax.<sup>49</sup> The effort was led by James A. Baker III and George P. Schultz, elder statesmen of the Republican party. The proposal was backed by several leading companies, including those in the oil and gas sector.<sup>50</sup> It also received significant editorial support upon its announcement.<sup>51</sup> However, despite the support of Republican party luminaries, companies historically supportive of the Republican party, and elite editorial boards, observers cited the vote on the Scalise amendment as evidence that congressional Republicans remained the “biggest obstacle to a Republican-led climate policy.”<sup>52</sup> Consistent with that assessment, Rep. Scalise reintroduced his anti-carbon tax resolution as House Concurrent Resolution 119 in April 2018.<sup>53</sup> He stated that the goal of the resolution is to “affirm the position of Congress that a carbon tax would run counter to the goals of American energy dominance and national security.”<sup>54</sup>

The updated Scalise resolution was approved by the House on July 19, 2018.<sup>55</sup> Six Republicans opposed the resolution, slightly eroding the previous monolithic opposition to carbon taxes by Republicans in the House. The 2018 Scalise

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<sup>49</sup> See JAMES A. BAKER, III ET AL., CLIMATE LEADERSHIP COUNCIL, THE CONSERVATIVE CASE FOR CARBON DIVIDENDS (Feb. 2017), <https://www.clcouncil.org/wp-content/uploads/2017/02/TheConservativeCaseforCarbonDividends.pdf>.

<sup>50</sup> *Corporate Founding Members*, CLIMATE LEADERSHIP COUNCIL, <https://www.clcouncil.org/founding-members>.

<sup>51</sup> See *Editorial Board Endorsements*, CLIMATE LEADERSHIP COUNCIL, <https://www.clcouncil.org/endorsements>.

<sup>52</sup> Robinson Meyer, *The Republican Carbon Tax Is Republican, Say Republicans*, THE ATLANTIC (February 8, 2017), <https://www.theatlantic.com/science/archive/2017/02/a-republican-proposal-for-a-carbon-tax-okay/516048>.

<sup>53</sup> H. Con. Res. 119, 115th Cong. (2018). The only difference between H. Con. Res. 89 in the 114th Congress and H. Con. Res. 119 in the 115th Congress is an updated statistic regarding the share of U.S. energy consumption made up by fossil fuels.

<sup>54</sup> Naomi Jagoda, *Scalise Offers Anti-carbon Tax Resolution*, THE HILL, (April 27, 2018), <http://thehill.com/policy/finance/385195-scalise-offers-anti-carbon-tax-resolution>.

<sup>55</sup> *Final Vote Results for Roll Call 363*, OFFICE OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES, (July 19, 2018), <http://clerk.house.gov/evs/2018/roll363.xml> (222 Republican Representatives supported the resolution. Six Republican Representatives opposed the resolution. Seven Democratic Representatives supported it).

resolution was also deployed in a preemptive fashion. The House leadership decided to bring the resolution to the floor as Republican Representative Carlos Curbelo circulated a draft proposal to establish a carbon tax.<sup>56</sup> The legislation is notable as the first Republican proposal to put a price on carbon pollution since 2008.<sup>57</sup> By creating an opportunity for more than two hundred House Republican members to vote against the concept of a carbon tax, the Scalise resolution offered a rebuke of the Curbelo legislation on the eve of its introduction. Rep. Curbelo introduced the tax legislation on July 23, 2018.<sup>58</sup>

The 2018 vote also was a preemptive blow to a bipartisan group of House members concerned about climate change called the climate solutions caucus (CSC). The CSC had been created in 2016 as “an organization to educate members on economically-viable options to reduce climate risk and protect our nation’s economy, security, infrastructure, agriculture, water supply and public safety.”<sup>59</sup> By July 2018, the CSC had grown to be comprised of 43 Republicans and 43 Democrats.<sup>60</sup> Rep. Ted Deutch, a Democratic Representative from Florida who cofounded and cochairs the bipartisan caucus issued a statement explaining that the Scalise resolution could undermine the ability of the caucus to identify solutions to climate change before they had had the opportunity to fully consider them. In urging the CSC members to oppose the resolution, Rep. Deutch said, “It is the very mission of the caucus to explore all viable options to address the growing threat of climate change. . . . Every Member of Congress, especially caucus members, should keep all options available and not preempt an

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<sup>56</sup> Zack Colman, *Republicans Duel on Climate Measures Behind the Scenes*, CLIMATEWIRE (July 16, 2018) [<https://www.eenews.net/climatewire/stories/1060089191>].

<sup>57</sup> *Id.*

<sup>58</sup> H.R. 6463, 115th Cong. (2018).

<sup>59</sup> *Climate Solutions Caucus*, CITIZENS’ CLIMATE LOBBY, <https://citizensclimatelobby.org/climate-solutions-caucus> (last visited July 29, 2018).

<sup>60</sup> Office of Rep. Ted Deutch, *Climate Solutions Caucus*, <https://teddeutch.house.gov/climate/members.htm> (last visited July 29, 2018).

effective strategy before we even have an opportunity to debate it.”<sup>61</sup>

If the members of the CSC had been united in voting against the resolution, the resolution would have had insufficient votes to pass the House. However, just four of the 43 Republican House members opposed the Scalise resolution.<sup>62</sup> This vote again demonstrated the significant challenge Representatives have in taking positions opposed to the leaders of their party, especially when a vote is called prior to developing a well-supported position. While the climate solutions caucus could yet prove to be a constructive organization in the House of Representatives, the vote on the Scalise resolution is certainly a setback in momentum towards action on climate change.

While members can certainly change their position as they learn more about an issue, one Republican lobbyist told the press that voting on the Scalise amendment repeatedly is effective at galvanizing opposition to carbon taxes. “The repetition does some damage. . . . You start voting on things three, four, five times, you start building up that record. It’s harder and harder and harder to walk away from it.”<sup>63</sup>

Although the Gibson resolution was also reintroduced in March 2017 by Rep. Elise Stefanik, a Republican Representative from New York, there has been no action taken upon it in the House.<sup>64</sup> It was praised by various environmental and national security experts. Sponsors of the bill indicated that they hoped to identify policies that they could support to address climate change.<sup>65</sup> While the number of Republican cosponsors grew to 23

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<sup>61</sup> Press Release, Office of Rep. Ted Deutch, Rep. Deutch Urges Climate Caucus Members to Oppose Scalise Anti-Climate Resolution (July 17, 2018), <https://teddeutch.house.gov/news/documentsingle.aspx?DocumentID=399379>.

<sup>62</sup> Marianne Lavelle, *House Votes to Denounce Carbon Taxes. Where Was the Climate Solutions Caucus?*, INSIDE CLIMATE NEWS (July 19, 2018), <https://insideclimatenews.org/news/19072018/anti-carbon-tax-resolution-house-vote-climate-solutions-caucus-curbelo-scalise-koch-influence-congress>.

<sup>63</sup> Zack Colman, *Republicans Duel on Climate Measures Behind the Scenes*, CLIMATEWIRE (July 16, 2018) [<https://www.eenews.net/climatewire/stories/1060089191>].

<sup>64</sup> H. Res. 195, 115th Cong. (2017).

<sup>65</sup> Hannah Hess and Erika Bolstad, *17 Republicans Back Resolution Urging Action on Warming*, GREENWIRE (March 15, 2017), <https://www.eenews.net/stories/1060051512>.

by the time of the Scalise vote, just four of the sponsors opposed the Scalise resolution.<sup>66</sup>

### B. The Kyoto Protocol

Another exemplary use of the preemptive vote was in relation to the Kyoto Protocol. In 1995, the parties to the United Nations Framework Convention on Climate Change (the “UNFCCC”) met in Berlin, Germany, to begin the process of addressing climate change through the UNFCCC. The nations agreed to the Berlin Mandate, an agreement to undertake a new process for additional action to respond to climate change, which was to be completed in 1997. The Mandate also stated that the developed countries should take the lead in that effort ahead of the developing countries.<sup>67</sup>

Climate negotiators worked away over the ensuing two years to reach agreement that would ultimately become known as the Kyoto Protocol. Consistent with the Berlin Mandate, the negotiations were expected to produce an agreement that would be binding on *developed* countries, but not *developing* countries.

However, before a final agreement had been reached, Senators Robert C. Byrd and Chuck Hagel crafted a resolution to disapprove of the Kyoto Protocol. The resolution stated that the United States should not be a signatory to any protocol to the UNFCCC that would “mandate new commitments to limit or reduce greenhouse gas emissions . . . unless [it] also mandates new specific scheduled commitments to limit or reduce greenhouse gas emissions for Developing Country Parties within the same compliance period.”<sup>68</sup>

In July 1997, with negotiators just months away from reaching agreement, the U.S. Senate passed the Byrd-Hagel

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<sup>66</sup> *Final Vote Results for Roll Call 363*, OFFICE OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES, (July 19, 2018), <http://clerk.house.gov/evs/2018/roll363.xml> (showing that of the sponsors of H. Res. 195, only Reps. Curbelo, FitzPatrick, Love, and Ros-Lehtinen voted no).

<sup>67</sup> See Framework Convention on Climate Change, *Report of the Conference of the Parties on its First Session, Held at Berlin from 28 March to 7 April 1995*, U.N. Doc FCCC/CP/1995/7/Add.1.

<sup>68</sup> S. Res. 98, 104th Cong. (1997) (passing on a vote of 95-0).

Resolution by a vote of 95–0.<sup>69</sup> The resolution was a stinging rebuke of the Kyoto Protocol before it was even finalized and became a principal talking point against the protocol, which ultimately did not include required actions for the developing countries as called for the Berlin Mandate.<sup>70</sup> Industry supplemented the message of the Byrd-Hagel resolution with an advertising campaign with the message, “It’s not global and it won’t work.”<sup>71</sup>

#### IV. THE LONG ROAD TO BUILDING AGREEMENT ON CLIMATE POLICY

Preemptive voting on climate change policy can be an effective strategy because it takes so much time and effort to build agreement on specific climate policies. Because mitigation policies are likely to affect multiple sectors of the economy, requiring extensive outreach and coordination, the conceptual scope of a climate policy might be apparent to its opponents well before agreement on specifics is reached. This provides the opportunity to both identify the substance of a preemptive vote and to act upon it before a policy has been finalized and publicly revealed. A preemptive vote promotes public disagreement before a private agreement can be reached.

A threshold determination that congressional leaders would need to make in deciding whether to address climate change is whether there is, or could be, sufficient agreement among members of Congress to act. Disagreement within Congress is the principle obstacle to climate change legislation. Disagreement is a precondition for each congressional hurdle or procedure to have its power. Obstacles to legislation are routinely reduced or avoided through cooperation among legislators who agree not to block measures for various

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<sup>69</sup> *Id.*

<sup>70</sup> *But see* Paul G. Harris, *Common but Differentiated Responsibility: The Kyoto Protocol and United States Policy*, 7 N.Y.U. ENVTL. L.J. 27, 48 (1999) (arguing that Byrd-Hagel was not inconsistent with the Berlin Mandate).

<sup>71</sup> John Cushman, Jr., *Intense Lobbying Against Global Warming Treaty*, NEW YORK TIMES (Dec. 7, 1997), <http://www.nytimes.com/1997/12/07/us/intense-lobbying-against-global-warming-treaty.html>.

reasons.<sup>72</sup> In the face of strong agreement to act, all congressional obstacles can fall away. With only minor disagreement, this remains largely true. Yet, the agreement of a bare majority might encounter procedural obstacles too significant to overcome.

The brief history that follows in this Part is intended to provide a sense of the years of conversations, campaigning, phone calls, bill introductions, fact sheets, speeches, door knocking, editorial board visits, congressional fly-ins, and modeling runs that have preceded serious congressional action on climate change. There is every reason to expect the need for years of sustained effort and power-building to carefully cultivate support and build momentum for any effective climate change policy.

The Scalise resolution was three years in the making just to progress to House passage. But it is just the most recent manifestation of a struggle that has been ongoing for more than twenty years between those who want Congress to address the challenge of climate change and those who do not.

As discussed below, years of organized effort to build grassroots and elected-leader opposition to the concept of internalizing the cost of carbon pollution preceded the Scalise resolution. That effort partially overlaps, and is in response to, the decade of counter-momentum to establish a cap-and-trade system for greenhouse gas emissions.

The level of agreement on climate policy is an important factor because the ability of procedural hurdles to interfere with policy making is enhanced where there is less agreement on and commitment to the policy.

### A. Federal Cap-and-Trade Legislation

While the effort to enact cap-and-trade legislation with the so-called Waxman-Markey legislation, in 2009 and 2010 is commonly known, the many years of work leading up to the legislation's consideration is less well appreciated. In 1999, Rep. Henry A. Waxman, Democrat of California, and Rep. Sherwood

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<sup>72</sup> William N. Eskridge, Jr., *Vetogates, Chevron, Preemption*, 83 *Notre Dame L. Rev.* 1441, 1448 (2008).

L. Boehlert, Republican of New York, introduced the *Clean Smokestacks Act*, the precursor to the bill that would be considered a decade later.<sup>73</sup> This was the first of the so-called “4-P” bills—proposals to achieve large pollution reductions from power plants of four pollutants of concern: sulfur dioxide, nitrogen oxides, mercury, and carbon dioxide. The proposal would have set targets for power plant pollution reductions, while also authorizing market-based mechanisms to achieve those reductions. More than 120 members of the House cosponsored the proposal over the remainder of that Congress.

Sen. Jim Jeffords, a Republican from Vermont who would later famously change his party affiliation to independent, championed the *Clean Energy Act* in the U.S. Senate.<sup>74</sup> That legislation would have set “4-P” emissions targets, and included other energy sector reforms, such as a national renewable energy standard, a national public benefit fund, and distributed generation requirements.

During this same time frame, representatives of electric utilities and environmental groups were holding private, off-the-record meetings to discuss how to resolve the various regulatory requirements they were facing while delivering the sought after public health and environmental protections. After the presidential election of 2000, the urgency around these conversations diminished, and progress slowed.

In 2001, Rep. Waxman reintroduced the *Clean Smokestacks Act of 2001*.<sup>75</sup> Sen. Jeffords also reintroduced the *Clean Power Act*.<sup>76</sup> Neither bill was expected to have much prospect of consideration, let alone passage, in the Republican-controlled Congress. However, that outlook soon changed for the Jeffords bill.

After the November 2000 election, the Republicans controlled the 50–50 Senate, due to the tie-breaking vote of Vice President Dick Cheney. Once the 107<sup>th</sup> Congress convened, Congress moved quickly to develop and pass the Bush tax plan. Sen. Jeffords found himself at odds with the Bush II White

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<sup>73</sup> Clean Smokestacks Act, H.R. 2900, 106th Cong. (1999).

<sup>74</sup> Clean Energy Act, S. 1369, 106th Cong. (1999).

<sup>75</sup> Clean Smokestacks Act, H.R. 1256, 107th Cong. (2001).

<sup>76</sup> Clean Power Act, S. 556, 107th Cong. (2001).

House, and the members of his own caucus, over funding for special education. He became increasingly frustrated that, despite being the Republican Chair of the education committee, he was unable to secure adequate funding for the issue that he had championed for much of his career. His frustration culminated in a May 2001 decision to depart from the Republican Party and identify as an independent that caucused with the Democrats.<sup>77</sup> With that decision, the Democrats controlled the Senate, and Sen. Jeffords became the chair of the Senate Environment and Public Works Committee. This put Sen. Jeffords in the ideal position to ensure his legislation was seriously considered.

Sen. Jeffords announced a summit to hear from stakeholders on the legislation.<sup>78</sup> Unfortunately, he scheduled it for September 11, 2001. As lobbyists, trade association representatives, environmental protection advocates, and other interested stakeholders lined the halls of Dirksen Senate Office Building, news spread of the attack on New York's World Trade Center. The meeting was cancelled. The group disbanded as reports of the attack on the Pentagon came in.<sup>79</sup> Although the stakeholder meeting was ultimately held several weeks later with bipartisan statements of support,<sup>80</sup> more urgent matters diverted Congress' attention in the months that followed, and the process never regained steam.<sup>81</sup>

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<sup>77</sup> See Christopher Graff, *An Inside Look at a Party Switch That Changed History*, LA TIMES (June 24, 2001),

<http://articles.latimes.com/2001/jun/24/news/mn-14081>.

<sup>78</sup> Darren Samuelsohn, *Senate Panel Launches In-Depth Talks on Air Pollution Proposals*, E&E DAILY (September 10, 2001) [<https://perma.cc/3DX3-YZ38>].

<sup>79</sup> Author's personal experience.

<sup>80</sup> Senator George V. Voinovich, Statement at The Multi-Emission Stakeholders Process (October 2001), [<https://perma.cc/NHS6-9RDW>] (including an opening statement from Sen. Voinovich (R-OH) stating "I'm hoping that we can get some compromise so we can move forward with improving the environment and protecting public health").

<sup>81</sup> Sen. Jeffords successfully reported the Clean Power Act from the Senate Environment and Public Works Committee after the 2002 midterm elections during the 107<sup>th</sup> Congress' lame duck session. COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS, CLEAN POWER ACT OF 2002: REPORT (2002), <ftp://ftp.loc.gov/pub/thomas/cp107/sr347.txt>. However, the Democrats lost control of the Senate in the 2002 elections and the legislation was never taken up on the Senate floor. Rep. Waxman reintroduced the *Clean Smokestacks Act*

Instead, momentum began to shift from a utility-sector approach to an economy-wide approach in addressing climate change. In 2003, Sen. John McCain and Sen. Joseph Lieberman proposed the *Climate Stewardship Act*, which would have established a cap on domestic greenhouse gases at 2000 emissions levels.<sup>82</sup> A test vote in October 2003 received 43 “yes” votes,<sup>83</sup> which environmentalists touted as a “solid show of support.”<sup>84</sup>

In 2005, Sens. McCain and Lieberman tried again, offering their legislation to a pending energy bill. The amendment was rejected on a vote of 38–60.<sup>85</sup> However, just hours later, Senators agreed to include in the energy bill, a nonbinding “sense of the Senate,” acknowledging climate change and calling on the Congress to “enact a comprehensive and effective national program of mandatory, market-based limits on emissions of greenhouse gases that slow, stop and reverse the growth of such emissions.”<sup>86</sup> Notably, even Senators who voted against the McCain-Lieberman legislation publicly indicated at the time that they thought such a policy would eventually be adopted.<sup>87</sup>

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in the subsequent Congress. Clean Smokestacks Act, H.R. 2042, 108th Cong. (2003). Sen. Jeffords reintroduced the Clean Power Act in 2003 as well. Clean Power Act, S. 366, 108th Cong. (2003). No action was taken in either chamber on these bills during the 108<sup>th</sup> Congress. Rep. Waxman reintroduced the *Clean Smokestacks Act* in the subsequent Congress. Rep. Waxman and Sen. Jeffords again introduced their respective bills in 2005. Clean Smokestacks Act, H.R. 1451, 109th Cong. (2005); Clean Power Act, S. 150, 109th Cong. (2005).

<sup>82</sup> S. 139, 108th Cong. (2003), revised as S. Amend. 2028, 108th Cong. (2003).

<sup>83</sup> *Roll Call Vote 108<sup>th</sup> Congress—1<sup>st</sup> Session*, U.S. SENATE, (Oct. 30, 2003), [<https://perma.cc/WVA7-E2K5>] (recording Vote Number 420 on the Lieberman Amndt. No. 2028, which failed on a vote of 43–55).

<sup>84</sup> LEAGUE OF CONSERVATION VOTERS, NATIONAL ENVIRONMENTAL SCORECARD (Feb. 2004),

[http://scorecard.lcv.org/sites/scorecard.lcv.org/files/LCV\\_Scorecard\\_2003.pdf](http://scorecard.lcv.org/sites/scorecard.lcv.org/files/LCV_Scorecard_2003.pdf).

<sup>85</sup> *Roll Call Votes 109<sup>th</sup> Congress—1<sup>st</sup> session (2005)*, U.S. SENATE, [https://www.senate.gov/legislative/LIS/roll\\_call\\_lists/vote\\_menu\\_109\\_1.htm](https://www.senate.gov/legislative/LIS/roll_call_lists/vote_menu_109_1.htm) (recording S. Amend. 826 to H.R. Res. 6, 109<sup>th</sup> Cong. (2005)).

<sup>86</sup> S. Amend. 866 to H.R. 6, 109<sup>th</sup> Cong. (2005).

<sup>87</sup> Darren Samuelsohn, *Senate Seesaws on Climate with McCain-Lieberman Defeat, Bingaman Win*, E&E DAILY (June 23, 2005),

<https://www.eenews.net/stories/9934> (reporting that Sen. Pete Domenici (R-NM) had “in recent weeks shown a growing acceptance that lawmakers will soon need to enact a mandatory limit on greenhouse gas emissions” and that Sen.

Rep. Wayne Gilchrest (R-MD) and Rep. John Olver (D-MA) introduced a companion bill to McCain-Lieberman in the House of Representatives in 2005 and reintroduced the legislation in 2007, garnering significant support.<sup>88</sup>

In 2006, Rep. Waxman introduced the *Safe Climate Act*, which spelled out a clear trajectory for electric utilities and the rest of the economy under a declining cap that would achieve an 80 percent reduction in emissions by 2050. The trajectory might have been clear, but the bill was a conceptual rallying point, saying little more than the Administrator of the EPA was to issue regulations that “allow emissions trading among covered entities” to achieve the major air pollution reductions.<sup>89</sup> The cosponsors of this legislation ultimately became the core supporters of climate change legislation three years later.<sup>90</sup>

In 2007, Democrats assumed control of the House of Representatives and advocates for climate action had the upper hand. As part of the December 2007 omnibus appropriations bill, Congress required—largely due to the work of Senate Appropriations Subcommittee Chair Dianne Feinstein—that the Environmental Protection Agency (EPA) establish its Greenhouse Gas Reporting Program, which is a prerequisite for an effective cap and trade program.<sup>91</sup> With the close personal

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Mike DeWine (R-OH) said “I think eventually we’re going to have a bill that passes the Senate” [<https://perma.cc/HDE7-8G95>].

<sup>88</sup> Climate Stewardship Act of 2005, H.R. 759, 109th Cong. (2005). Climate Stewardship Act of 2007, H.R. 620, 110th Cong. (2007). The legislation garnered 122 cosponsors in the 109th Congress and 136 cosponsors in the 110th Congress.

<sup>89</sup> Safe Climate Act of 2006, H.R. 5642, 109th Cong. (2006). Sen. Jeffords introduced the Global Warming Pollution Reduction Act which also called for an 80 percent reduction in emissions. Global Warming Pollution Reduction Act, S. 3698, 109th Cong. (2006). The Safe Climate Act would ultimately become the title of the cap and trade provisions in the Waxman-Markey legislation.

<sup>90</sup> See Darren Samuelsohn, *House Wheels Start Turning in Push to Win 218 Votes on Emissions Bill*, E&E DAILY (Feb. 9, 2009), <https://www.eenews.net/stories/74074>, [<https://perma.cc/WP3L-A7LM>].

<sup>91</sup> Press Release, Office of Sen. Dianne Feinstein, FY 2008 Omnibus Appropriations Bill Includes Feinstein-Boxer Measure to Provide \$3.5 Million for the EPA to Develop New Economy-Wide Greenhouse Gas Emissions Registry (Dec. 21, 2007), <https://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=fe4fd65f-d430-38eb-ad97-3e587c81c9d9>. This proposal had its roots in earlier bipartisan proposals to establish greenhouse gas registries. Sen. Sam

attention of Speaker Nancy Pelosi, Congress crafted, and President George W. Bush signed, the *Energy Independence and Security Act*, which was the first broadly encompassing energy policy law that had climate change mitigation as a guiding principle. The Act increased energy efficiency in buildings, lighting, and vehicles, and boosted the use of renewable energy.<sup>92</sup>

Going into the 2008 Presidential election, leadership on climate legislation on the Republican side of the aisle in the Senate was handed from presidential candidate Sen. John McCain to Sen. John Warner, Republican of Virginia.<sup>93</sup> The new Lieberman-Warner legislation, which required 70 percent reduction in the nation's emissions by 2050, was introduced by five Democratic Senators and four Republican Senators.<sup>94</sup> Although the legislation was debated on the Senate floor in May 2008, it was withdrawn without a final vote when an insufficient number of Senators were willing to end debate on the legislation. *The Washington Post* reported at the time:

Both sides did their best to tout their gains in the debate: Backers of the bill noted that six absent senators indicated they would have supported the motion to end debate, including Barack Obama (D-Ill.), John McCain (R-Ariz.) and Hillary Rodham Clinton (D-N.Y.). That would have translated into 54 votes in favor of cloture, a significant improvement over the 38 votes in favor of climate legislation in 2005.

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Brownback (R-KS) had proposed a registry with Sen. Jon Corzine (D-NJ) and others in 2002. S. Amend. 3239 to S. Amend. 2917 to S. 517, 107th Cong. (2001) (the amendment was agreed to by voice vote in the Senate but was not enacted). Sen. Hagel (R-NE) had also proposed a greenhouse gas registry in 2002. S. Amend. 3186 to S. Amend. 2917 to S. 517, 107th Cong. (the amendment was not voted upon) [<https://perma.cc/9C2N-WQY5>].

<sup>92</sup> H.R. 6, 110th Cong. (2007).

<sup>93</sup> Lieberman-Warner Climate Security Act of 2007, S. 2191, 110th Cong. (2007).

<sup>94</sup> Introduced by Sen. Joseph Lieberman (D-CT) with the following cosponsors: Sen. John Warner (R-VA), Sen. Tom Harkin (D-IA), Sen. Norm Coleman (R-MN), Sen. Elizabeth Dole (R-NC), Sen. Susan Collins (R-ME), Sen. Benjamin Cardin (D-MD), Sen. Amy Klobuchar (D-MN) and Sen. Robert Casey (D-PA).

But 10 Democrats—including nine who voted for cloture—signed a letter yesterday saying they could not support the bill in its current form, and McCain indicated in his statement he would have opposed it on the grounds that it did not offer enough financial aid to the nuclear industry.

President Bush, who opposes mandatory limits on greenhouse gases emitted by burning fossil fuels, issued a veto threat against the bill Monday. Asked about it yesterday, White House spokeswoman Dana Perino criticized both the bill and the process.<sup>95</sup>

In the House of Representatives, efforts continued on the *Safe Climate Act*, and more than 35 percent of House members became cosponsors of the proposal.<sup>96</sup> Importantly, the environmental groups and a broad swath of major companies, including those responsible for large emissions, announced their support for an economy-wide cap-and-trade policy through the U.S. Climate Action Partnership.<sup>97</sup>

On June 26, 2009, the U.S. House of Representatives passed H.R. 2454, the *American Clean Energy and Security Act of 2009*.<sup>98</sup> H.R. 2454 was a comprehensive climate and clean energy bill.<sup>99</sup> The centerpiece of the legislation was a cap and trade program designed to reduce emissions by more than 80 percent by 2050 compared to 2005 levels. Although the Senate Environment and Public Works Committee reported comparable

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<sup>95</sup> Juliet Eilperin, *Senate Leaders Pull Measure on Climate: Democrats Lacked Votes to End Filibuster*, WASH. POST, (June 7, 2008), <http://www.washingtonpost.com/wp-dyn/content/story/2008/06/06/ST2008060601769.html> [ <https://perma.cc/4ACD-WTZS>].

<sup>96</sup> Safe Climate Act of 2007, H.R. 1590, 110th Cong. (2007) (cosponsored by 155 members of the House of Representatives).

<sup>97</sup> *U.S. Climate Action Partnership, Webpage*, MERIDIAN INSTITUTE, [http://www.merid.org/en/Content/Projects/United\\_States\\_Climate\\_Action\\_Partnership.aspx](http://www.merid.org/en/Content/Projects/United_States_Climate_Action_Partnership.aspx) [ <https://perma.cc/S6UB-QPK7>].

<sup>98</sup> American Clean Energy and Security Act, H.R. 2454, 111th Cong. (2009).

<sup>99</sup> Energy and Commerce Committee, H.R. 2454 “The American Clean Energy and Security Act,” [ <https://perma.cc/8LGW-9Z4J>].

legislation, climate change legislation was not considered on the Senate floor. H.R. 2454 represents the high-water mark for economy-wide climate policies in the United States as it passed one chamber of Congress and had significant stakeholder support.

### B. Anti-Carbon Tax Efforts

The momentum quickly reversed. The tea party movement of 2009 and 2010 resulted in a rout of the Democratic majority in the U.S. House of Representatives, and put the Republican Party in control. The movement had both stoked and capitalized on a backlash to the *Affordable Care Act* and promised to be a check on the Obama Administration.<sup>100</sup>

The agenda of Americans for Prosperity (AfP), the politically-active free market organization founded by the Koch Brothers in 2004 was becoming realized. AfP had provided organizational assistance and resources to the Tea Party movement, and it was beginning to reap the benefits. In 2008, AfP had initiated a “No Climate Tax Pledge.”<sup>101</sup> The one-line pledge is crafted broadly to express opposition to any carbon tax or cap-and-trade policy that would generate revenue.<sup>102</sup>

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<sup>100</sup> Krissah Thompson and Amy Gardner, *Victories give force to tea party movement*, WASHINGTON POST (November 3, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/02/AR2010110201301.html?sid=ST2010110201489>. Some have claimed that the climate change legislation was also a factor in House races, such as that of Rep. Rick Boucher, a 14-term Democratic Representative from Southwest Virginia’s coal country, who lost a reelection bid in 2010. See Louis Peck, *A Veteran of the Climate Wars Reflects On U.S. Failure to Act*, YALE ENVIRONMENT 360 (Jan. 4, 2011), [http://e360.yale.edu/features/a\\_veteran\\_of\\_the\\_climate\\_wars\\_reflects\\_on\\_us\\_failure\\_to\\_act](http://e360.yale.edu/features/a_veteran_of_the_climate_wars_reflects_on_us_failure_to_act) (assessing the role climate change played in his race) [<https://perma.cc/8U6D-CBTX>].

<sup>101</sup> Eric Holmberg & Alexia Fernandez Campbell, *Koch: Climate Pledge Strategy Continues to Grow*, INVESTIGATIVE REPORTING WORKSHOP (July 1, 2013), [http://investigativereportingworkshop.org/investigations/the\\_koch\\_club/story/Koch\\_climate\\_pledge\\_strategy](http://investigativereportingworkshop.org/investigations/the_koch_club/story/Koch_climate_pledge_strategy) [<https://perma.cc/5CC4-DW9J>].

<sup>102</sup> *The Pledge*, NO CLIMATE TAX, <http://noclimatetax.com/the-pledge> (last visited Oct. 3, 2017) [<https://perma.cc/SU9R-QNVA>] (the No Climate Tax Pledge states, “I, \_\_\_\_\_, pledge to the American people that I will oppose any

The pledge was already having success. Many right-leaning state and federal elected officials had taken the pledge, and it had been a tool to oppose cap-and-trade legislation in the 111<sup>th</sup> Congress. However, the 2010 midterm elections took it to a new level. Of the 85 freshmen Republicans joining the House of Representatives, 76 had signed the Americans for Prosperity pledge.<sup>103</sup>

Between the election and the convening of the 112<sup>th</sup> Congress in January 2011, Rep. Fred Upton, a long-serving Republican from Michigan who had a reputation as a moderate and for being willing to cross the aisle to legislate, campaigned to become the new chair of the Energy and Commerce Committee, which has jurisdiction over energy and climate policy. He could have claimed the position based on seniority alone, but after the 1994 election, the House Republicans had replaced a seniority-based approach for their committee chairs with a process that was based more on capability, ideology, and strategic vision. By 2011, there had been a number of high profile examples of environmentally-moderate members being passed over for chairmanships.<sup>104</sup>

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legislation relating to climate change that includes a net increase in government revenue”).

<sup>103</sup> Holmberg & Campbell, *supra* note 101.

<sup>104</sup> Barbara Sinclair, *Spoiling the Sausages? How a Polarized Congress Deliberates and Legislates, in RED AND BLUE NATION?: CONSEQUENCES AND CORRECTION OF AMERICA'S POLARIZED POLITICS* 55, 68 (Pietro S. Nivola & David W. Brady eds., 2008) (explaining that Republican Representatives Marge Roukema, Tom Petri, and Jim Saxton were passed over to chair congressional committees for more conservative Representatives). According to the League of Conservation Voters, Rep. Roukema voted to protect the environment 63 percent of the time during the Congress before she was passed over for a chair. Rep. Petri scored 27 percent—significantly higher than the House Republican average of 17 percent. In both Roukema's and Petri's cases, the chairs went to Representatives who had a score of 0 percent (Rep. Oxley and Rep. Boehner). LEAGUE OF CONSERVATION VOTERS, NATIONAL ENVIRONMENTAL SCORECARD, 8, 37, 39, 44 (Louis Bayard et. al. eds., 2000), [http://scorecard.lcv.org/sites/scorecard.lcv.org/files/LCV\\_Scorecard\\_2000.pdf](http://scorecard.lcv.org/sites/scorecard.lcv.org/files/LCV_Scorecard_2000.pdf). Rep. Saxton scored a 59 percent, and he lost the Chairmanship of the House Resources Committee to a Representative with a score of 9 percent (Rep. Pombo). LEAGUE OF CONSERVATION VOTERS, NATIONAL ENVIRONMENTAL SCORECARD, (Louis Bayard et. al. eds., 2002), 29, 37, [http://scorecard.lcv.org/sites/scorecard.lcv.org/files/LCV\\_Scorecard\\_2002.pdf](http://scorecard.lcv.org/sites/scorecard.lcv.org/files/LCV_Scorecard_2002.pdf).

Rep. Upton had once expressed the view that climate change demanded a serious response.<sup>105</sup> However, his views hardened in the opposite direction as he fought for the chairmanship of the Committee in the new Congress.<sup>106</sup> Rep. Upton coauthored an op-ed in the *Wall Street Journal* in which he asserted doubt about the reality of climate change and promised to oppose EPA's actions to regulate climate change, which he called unconstitutional.<sup>107</sup> Upton's op-ed was coauthored by Tim Phillips, CEO of Americans for Prosperity. Rep. Upton subsequently secured the chairmanship of the Committee.

The 112<sup>th</sup> Congress convened in January 2011 with a fury. Chairman Upton acted quickly on his newly found doubt of climate change. He quickly developed, moved through Committee, and brought to the House floor H.R. 910, *The Energy Tax Prevention Act*, which would excise all authority to address greenhouse gases from the *Clean Air Act*.<sup>108</sup> The misnamed, antiregulatory bill actually had nothing to do with taxes, as Rep. Earl Blumenauer, a Democrat from Oregon who sat on the House's tax-writing committee, wryly illustrated by attempting to offer an amendment to address energy taxes and having it ruled nongermane.<sup>109</sup> In April 2011, H.R. 910 was

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<sup>105</sup> Chris Wallace, *Darrell Issa, Fred Upton Talk Oversight; Allen West, Mike Lee on Tea Party Conservatives*, FOX NEWS SUNDAY (Jan. 2, 2011) <http://www.foxnews.com/on-air/fox-news-sunday/transcript/darrell-issa-fred-upton-talk-oversight-allen-west-mike-lee-tea-party-conservatives?page=2> [<https://perma.cc/KNN8-97D4>] (quoting Rep. Upton's website) ("I strongly believe that everything must be on the table as we seek to reduce carbon emissions. Climate change is a serious problem that necessitates serious solutions").

<sup>106</sup> Coral Davenport & Eric Lipton, *How G.O.P. Leaders Came to View Climate Change as Fake Science*, N.Y. TIMES (June 3, 2017), <https://www.nytimes.com/2017/06/03/us/politics/republican-leaders-climate-change.html> [<https://perma.cc/FZ5N-XAU5>].

<sup>107</sup> Fred Upton & Tim Phillips, *How Congress Can Stop the EPA's Power Grab*, WALL ST. J. (Dec. 28, 2010, 12:01 AM), <https://www.wsj.com/articles/SB10001424052748703929404576022070069905318> [<https://perma.cc/L6NQ-2XVS>].

<sup>108</sup> The Energy Tax Prevention Act, H.R. 910, 112th Cong. (2011).

<sup>109</sup> See 157 Cong. Rec. H2355 (daily ed. Apr. 6, 2011) (statement of Rep. Blumenauer) ("The bill has nothing to do with taxes. I had an amendment to actually prevent the EPA from imposing an energy tax that the Rules

approved in the House of Representatives by a largely party-line vote.<sup>110</sup>

Sen. Inhofe introduced a companion bill in the Senate<sup>111</sup> which was broadly supported by the Republican caucus and one Democratic Senator. In March 2011, then-Senate Minority Leader Mitch McConnell offered the legislation as an amendment to a bill to reauthorize programs to assist small businesses, but the amendment failed to receive sufficient support to be adopted.<sup>112</sup>

After the presidential election of November 2012, during the lame-duck session of the 112<sup>th</sup> Congress, the anti-climate tax effort manifested itself in a new effort that would become the basis for the Scalise resolution. Rep. Mike Pompeo, who would later become the Director of the Central Intelligence Agency and subsequently the Secretary of State, and Sen. David Vitter introduced barebones concurrent resolutions, in their respective chambers, to denounce the concept of a carbon tax in December 2012.<sup>113</sup> The Pompeo resolution was introduced with 26 cosponsors, and the numbers of supporters climbed to 32 before the session was gaveled out. The Vitter resolution had the support of 20 Senate Republicans.

In the 113<sup>th</sup> Congress, Rep. Scalise took over Rep. Pompeo's resolution, revised and lengthened the text, and introduced it with 104 cosponsors in March 2013.<sup>114</sup> Americans

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Committee would not allow. During the rules debate, my colleague Mr. Sessions from Texas indicated the committee did not because my amendment was "not germane", because the bill doesn't have anything to do with taxes".

<sup>110</sup> *Final Vote Results for Roll Call 249*, OFFICE OF THE CLERK OF THE U.S. HOUSE OF REPRESENTATIVES, <https://www.congress.gov/congressional-record/2011/04/06/house-section/article/H2350-4> (last visited Oct. 5, 2017) [<https://perma.cc/FW29-7H62>] (the vote was 255 yeas to 172 nays. No Republican opposed the measure and just 19 Democrats supported it).

<sup>111</sup> Energy Tax Prevention Act, S.482, 112th Cong. (2011).

<sup>112</sup> S. Amend. 183 to S. 493, 112th Cong. (2011).

<sup>113</sup> H. Con. Res. 144, 112th Cong. (2012) (expressing the sense of Congress that a carbon tax is not in the economic interest of the United States and sponsored by Rep. Mike Pompeo, R-KS-4); see S. Con. Res. 61, 112th Cong. (2012) (a concurrent resolution expressing the sense of Congress that a carbon tax is not the economic interest of the United States).

<sup>114</sup> H. Con. Res. 24, 113th Cong. (2013) (expressing the sense of Congress that a carbon tax would be detrimental to the United States economy sponsored by Rep. Steve Scalise, R-LA-1).

for Prosperity launched an ad campaign to urge the public to contact Senators in opposition to a carbon tax.<sup>115</sup> The political importance of the resolution significantly advanced in 2013 and 2014 as 155 members of the House cosponsored the legislation, including future House Ways and Means Chairman and Speaker of the House, Rep. Paul Ryan. Sen. Vitter reintroduced a resolution identical to that from the previous Congress, which was supported by the same Senators who had supported it in the previous Congress.<sup>116</sup>

As described above, the Scalise resolution passed the House of Representatives in 2016 and after reintroduction in 2018 passed again.

This Part has demonstrated the lengthy and complicated legislative process that has been associated with climate change policy over the last twenty years. The timeframe that has been required for consideration of these proposed policies create opportunities for support and opposition alike to build. This creates opportunities for preemptive legislative attacks on proposals which can galvanize opposition to those proposals. When opposition hardens to policy proposal, the legislative obstacles in Congress that any legislation potentially faces take on their full effect. A representative of a right-leaning conservation group captured the challenge well in asking, “What do we do as a planet in trying to deal with this stuff if every solution that comes up gets shot down and ridiculed and demonized successfully before there’s any chance to get political momentum behind it?”<sup>117</sup> The following two Parts explain these congressional obstacles in greater detail.

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<sup>115</sup> Suzanne Goldenberg, *US Ultra-Conservatives Target Carbon Tax in Online Advertising Campaign*, THE GUARDIAN (June 6, 2013, 7:25), <https://www.theguardian.com/environment/2013/jun/06/americans-for-prosperity-carbon-tax> [https://perma.cc/RH8L-DP6S].

<sup>116</sup> S. Con. Res. 4, 113th Cong. (2013) (a concurrent resolution expressing the sense of Congress that a carbon tax is not in the economic interest of the United States, sponsored by Sen David Vitter, R-LA, cosponsors nineteen Senate Finance Committee).

<sup>117</sup> Jean Chemnick, *Diverse Group Meets in Washington to Discuss Way Forward on Carbon*, GREENWIRE (July 11, 2012), <https://www.eenews.net/greenwire/stories/1059967124>.

## V. THE POWER OF THE MAJORITY AND SUPERMAJORITY

Perhaps the best known congressional obstacle to action is the Senate's filibuster, which has been used extensively in recent years to prevent action on many policy issues. The filibuster requires the support of 60 Senators to open or close debate on a legislative matter. Because the features of a filibuster have been extensively examined elsewhere,<sup>118</sup> this Article will merely note its importance and observe that a filibuster has been used in consideration of climate change policy. In 2008, when the Democratic-controlled Senate moved to consider the Lieberman-Warner climate change legislation,<sup>119</sup> a GOP-led filibuster prevented the legislation from being voted upon.<sup>120</sup>

Concern over the challenge posed by the filibuster has led Congress to act through the budget reconciliation process, which allows the Senate to act on certain budgetary matters with a simple majority. As a result, the reconciliation process has increasingly been the process for acting upon partisan proposals or proposals where there is not broad agreement among members of Congress. For example, reconciliation was used to pass the 2017 tax cuts signed by President Trump, as well as the Bush tax cuts of 2001 and 2003. Reconciliation was also used in 2010 to make important amendments to the *Affordable Care Act*. While reconciliation provides a pathway through Congress that avoids the filibuster, it also has limitations that ensure that "extraneous matters" are not considered in the reconciliation process.<sup>121</sup>

This supermajority requirement is a significant obstacle for successful consideration of a carbon tax. The filibuster has been used to defeat any number of high-profile legislative

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<sup>118</sup> See, e.g., Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181 (1997).

<sup>119</sup> Lieberman-Warner Climate Security Act, S. 2191, 110th Cong. (2007).

<sup>120</sup> Juliet Eilperin, *Senate Leaders Pull Measure on Climate: Democrats Lacked Votes to End Filibuster*, WASH. POST, (June 7, 2008), <http://www.washingtonpost.com/wp-dyn/content/story/2008/06/06/ST2008060601769.html> [<https://perma.cc/6VYF-YPPZ>].

<sup>121</sup> 2 U.S.C. § 644 (2012) (known as the Byrd rule).

proposals. However, it is far from the only congressional obstacle to anticipate. This Part examines how numerous other obstacles promise to complicate congressional consideration of a carbon tax. To illustrate these points, this Part examines congressional efforts to pass a resolution accepting climate change science in the 107<sup>th</sup>, 108<sup>th</sup>, and 109<sup>th</sup> Congresses (2001 to 2006). During this time, there was significant bipartisan interest in Congress acknowledging the need for effective climate change policies.

In March 2001, President George W. Bush rejected the Kyoto Protocol.<sup>122</sup> The move harmed U.S. relationships with international allies and infuriated domestic advocates of climate action.<sup>123</sup> Support for renewed international engagement on climate change quickly grew in Congress. Within one month, the U.S. Senate was considering bipartisan proposals to fund, collect data, promote technology, reengage internationally, and simply acknowledge the reality of climate change.<sup>124</sup> Yet, as this Part describes below, numerous obstacles prevented Congress from formally acknowledging the status of climate change science, even when that acknowledgement was put forward in a manner as to have no legally-binding effect. These obstacles proved insurmountable despite bipartisan support and five years of intermittent effort.

In May 2001, the Bush II Administration released a proposed national energy policy and called upon Congress to act upon it. Both chambers began working on energy bills, developing legislative language, holding committee hearings and markups, and passing bills as they advanced through the

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<sup>122</sup> Peter Baker, *16 Years Later, Bush's Climate Pact Exit Holds Lessons for Trump*, N.Y. TIMES (June 4, 2017), <https://www.nytimes.com/2017/06/04/us/politics/trump-paris-accord-bush-kyoto.html?mcubz=3> [https://perma.cc/WVB2-GDK3].

<sup>123</sup> Peter Baker, *16 Years Later, Bush's Climate Pact Exit Holds Lessons for Trump*, NEW YORK TIMES (June 4, 2017), <https://www.nytimes.com/2017/06/04/us/politics/trump-paris-accord-bush-kyoto.html?mcubz=3>.

<sup>124</sup> See S. Amend. 249 to S. Amend. 170 to H. Con. Res 83, 107th Cong. (2001) (agreed to by voice vote) (a bipartisan amendment to the budget resolution to increase funding “to determine what we can do to understand global warming better, to fund new technologies, and to fund the export of American products with respect to those technologies”).

process. On April 23, 2002, during consideration of energy legislation on the Senate floor, the Senate approved, without any objection, an amendment offered by Sen. Jeff Bingaman (D-NM), along with Sen. Frank Murkowski (R-AL) and other Senators, to establish a national climate change policy.<sup>125</sup> This amendment, had it been enacted, would have prescribed that the President develop a national climate change strategy to stabilize carbon dioxide concentrations in the atmosphere, would have created the Office of National Climate Change Policy within the Executive Office of the President, and would have incorporated an examination of greenhouse gas effects into the interagency process used when federal agencies take action that affects the energy sector. The Bush II Administration objected to these provisions, and although the amendment passed the Senate, it was never enacted into law.<sup>126</sup>

The Bingaman-Murkowski amendment also included a sense of Congress on climate change. This language would not have had the force of law if enacted, but instead would have made a series of findings about what is known about climate change, and would have expressed a sense of Congress that the United States should demonstrate leadership on the issue. The sense of Congress included findings that acknowledged the scientific agreement about the human causes of climate change, the observed effects of climate change, the serious potential future impacts of climate change and the fact that the United States had ratified a treaty to address the problem. The provision then detailed three categories of actions that Congress should take to meet its leadership and responsibility obligations.

The text of the sense of Congress is excerpted below:

SEC. 1001(b) Sense of Congress.—It is the sense of the United States Congress that the United States

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<sup>125</sup> S. Amend. 3232 to S. Amend. 2917 to S. 517, 107th Cong. (2002) (agreed to in the Senate by voice vote).

<sup>126</sup> Energy Policy Act of 2002, S. 517, 107th Cong. (2002), <http://www.presidency.ucsb.edu/ws/index.php?pid=24651> (arguing that the legislation was inconsistent with the President's climate change policy, was too prescriptive and unconstitutionally constrained the President's ability to supervise the Executive branch and exercise his appointment power).

should demonstrate international leadership and responsibility in reducing the health, environmental, and economic risks posed by climate change by:

(1) taking responsible action to ensure significant and meaningful reductions in emissions of greenhouse gases from all sectors:

(2) creating flexible international and domestic mechanisms, including joint implementation, technology deployment, tradable credits for emissions reductions and carbon sequestration projects that will reduce, avoid, and sequester greenhouse gas emissions; and

(3) participating in international negotiations, including putting forth a proposal to the Conference of the Parties, with the objective of securing United States' participation in a future binding climate change Treaty in a manner that is consistent with the environmental objectives of the UNFCCC, that protects the economic interests of the United States, and recognizes the shared international responsibility for addressing climate change, including developing country participation.

The 107<sup>th</sup> Congress adjourned in December 2002 without completing action on the energy bill, so this clear-eyed description of the challenge and call to action was not enacted. However, lawmakers concerned about climate change became focused on this language for several reasons. First, it offered the promise of all members of Congress stipulating to some agreed upon facts. Second, the language diverted the question of climate change away from potential disagreements about mitigation strategies, compliance costs, and implementation challenges to the more fundamental question of whether climate change is a problem that should be addressed. Surely, if Congress can acknowledge a

problem, the selection of a solution would become more likely. Finally, the bipartisan origin of the amendment and the unanimous support it enjoyed in the Senate was a break from the more partisan dynamics on climate change that had been taking hold of the institution. For the next four years, members of both parties attempted to enact this language, or a version almost identical to it. However, as described below, the power of the majority thwarted its passage in the House and prolonged the language's passage in the Senate. The language was never passed by both chambers of Congress.

#### A. Policy Views of Committee Chairs

A carbon tax proposal is most likely to primarily be under the jurisdiction of the tax-writing committees in the House and Senate—namely, the House Ways and Means Committee and the Senate Finance Committee. The Chair of these Committees sets the agenda for the Committees' actions, and determines what legislation will and will not be considered. Therefore, the policy view of the chairs of these Committees—that is, their policy preferences and ideological priorities—is one of the most important factors in consideration of a carbon tax. While this is obvious to Congressional observers, it may not be appreciated by a broader community of climate advocates. Whether a carbon tax is seriously considered and in what form is likely to be heavily influenced, if not determined, by the Chairs of the tax-writing committees. As the experience described in Part VI.B with Rep. Upton illustrates, a member's views on climate change appear to be an important factor to today's GOP on whether that member is appropriate for a chairmanship. The identities of the chairs of the tax-writing committees and their views on climate change are critically important to the consideration that a carbon tax would receive.

Consider the recent experience with the committees of primary jurisdiction over climate change. Climate change, of course, is not solely or even necessarily a tax issue. In the House of Representatives, the Energy and Commerce Committee is the primary committee of jurisdiction over climate change, due to its jurisdiction over national energy policy, public health, and other issues of energy production, regulation, transmission, and

conservation.<sup>127</sup> In the Senate, the Senate Environment and Public Works Committee has jurisdiction over air pollution and environmental policy.<sup>128</sup>

In the 108<sup>th</sup> and 109<sup>th</sup> Congresses, these committees were chaired by members who actively dismissed concerns over climate change. Sen. James Inhofe (R-OK) was the Chair of the Senate Committee on Environment and Public Works from 2003 to 2007. Rep. Joe Barton (R-TX) was the Chair of the House Committee on Energy and Commerce from 2004 to 2007.

Sen. Inhofe is perhaps the most well-known and most outspoken Senator to dismiss the issue of climate change. In 2003, Sen. Inhofe delivered a speech on the Senate floor announcing his view that “manmade global warming is the greatest hoax ever perpetrated on the American people.”<sup>129</sup> In 2005, he explained his view that international efforts to address climate change, such as the Kyoto Protocol, are veiled efforts by European nations to gain competitive advantage over the United States.<sup>130</sup>

Rep. Barton similarly rejected the scientific consensus on climate change. In 2001, as a subcommittee Chairman, Rep. Barton announced, “as long as I am chairman, [regulating global warming pollution] is off the table indefinitely. I don’t want there to be any uncertainty about that.”<sup>131</sup>

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<sup>127</sup> See KAREN L. HAAS, CLERK OF THE HOUSE OF REPRESENTATIVES, 115TH CONG., RULES OF THE HOUSE OF REPRESENTATIVES, Rule X (1)(f) (last revised Jan. 5, 2017)

<https://rules.house.gov/sites/republicans.rules.house.gov/files/115/PDF/House-Rules-115.pdf> [<https://perma.cc/XNE6-PBLX>].

<sup>128</sup> *Jurisdiction: Rule XXV*, SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS <https://www.epw.senate.gov/public/index.cfm/committee-jurisdiction> (accessed on Feb. 1, 2018) [<https://perma.cc/N7YV-XERG>].

<sup>129</sup> 149 Cong. Rec. S10012-S10023 (2003), <https://www.gpo.gov/fdsys/pkg/CREC-2003-07-28/html/CREC-2003-07-28-pt1-PgS10012.htm> [<https://perma.cc/PKF7-B7Q8>].

<sup>130</sup> *Climate Change Update*, U.S. SEN. FOR OKLA. SEN. JAMES INHOFE, (Jan. 4, 2005) <https://www.inhofe.senate.gov/newsroom/speech/climate-change-update> (accessed on Feb 11, 2018) [<https://perma.cc/4MWD-7BVR>].

<sup>131</sup> On March 13, 2001, President George W. Bush announced in a letter to members of the U.S. Senate that he would not support mandatory limits on greenhouse gas emissions as he had proposed during his presidential campaign. Office of Pres. George W. Bush, *Letter to Members of the Senate on the Kyoto Protocol on Climate Change*, THE AMERICAN PRESIDENCY PROJECT (Mar. 13,

His tenure as chair reflected this statement. When the Energy and Commerce Committee was considering energy legislation on April 2, 2003, Rep. Henry A. Waxman offered an amendment substantially similar to the Bingaman-Murkowski amendment. When Chairman Barton and other Republicans opposed the amendment, it was rejected on a largely party-line vote of 18 “ayes” and 34 “nos”.<sup>132</sup>

In 2004 a group of prominent bipartisan leaders issued a report calling for an energy policy that takes climate change into account, entitled *Ending the Energy Stalemate: A Bipartisan Strategy to Meet America’s Energy Challenges*.<sup>133</sup> The Committee was working on legislation that would become the Energy Policy Act of 2005, and 15 members of the Committee

2001) <http://www.presidency.ucsb.edu/ws/?pid=45811> [<https://perma.cc/XX2R-YVJD>]. The following day in a congressional hearing on coal policy, Rep. Barton stated:

**Mr. Barton.** . . . Now, having said that, without the announcement from the White House yesterday, my assumption is that President Bush is going to be President for at least 3 years and 11 months longer, and I hope for 7 years and 11 months longer, although that will be determined 4 years from now.

So any mandatory regulation of CO<sub>2</sub> is off the table for at least 3 years and 11 months, and hopefully for 7 years, 11 months, and as long as I am subcommittee chairman, it is off the table indefinitely. I don’t want there to be any uncertainty about that.

**Mr. Barrett.** Mr. Chairman, what if President Bush changes his mind again?

**Mr. Barton.** Well, if he changes his mind, that does not change my mind.

*Hearing on National Energy Policy: Coal Before the Subcommittee on Energy and Air Quality of the House Energy and Commerce Committee*, 107th Cong. 2 (2001),

<https://www.gpo.gov/fdsys/pkg/CHRG-107hhrg71503/html/CHRG-107hhrg71503.htm> [<https://perma.cc/2E9B-4UM9>].

<sup>132</sup> H.R. REP. NO. 108-65, pt. 1 at 139 (2003)

<https://www.congress.gov/108/crpt/hrpt65/CRPT-108hrpt65.pdf> [<https://perma.cc/HPW2-EV3Q>] (Five Democrats joined a unanimous Republican majority in opposing the amendment).

<sup>133</sup> Juliet Eilperin & Justin Blum, *Bipartisan Panel Seeks Greenhouse Gas Limits*, WASH. POST (Dec. 8, 2004), <http://www.washingtonpost.com/wp-dyn/articles/A45176-2004Dec7.html> [<https://perma.cc/D57Q-RW66>].

urged Chairman Barton to hold a hearing on the bipartisan proposal. Rep. Barton never responded to the request.<sup>134</sup>

Rather than examine these bipartisan calls for action on climate change, Rep. Barton instead attempted to cast doubt on the scientific basis for climate change. In 2005, he famously used the investigative authority of the committee to make onerous demands of the authors of an influential climate science paper. His demand for decades worth of financial information from the scientists led the *Washington Post* to editorialize that his actions were “outrageous,” and constituted “harassment.”<sup>135</sup>

Perhaps the strongest evidence of the importance of the Chairs in determining how and whether a committee might address climate change is that during a time in which these committees of jurisdiction were not acting on climate change, other committees, as described below, were attempting to act on a bipartisan basis to acknowledge the science and the need for action.

## B. Committee Venue

In May 2003, the Republican-controlled House Foreign Relations Committee reported a foreign relations authorization

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<sup>134</sup> 151 Cong. Rec. H2438 (Apr. 21, 2005),

<https://www.congress.gov/crec/2005/04/21/CREC-2005-04-21-house.pdf>

[<https://perma.cc/ZVD8-4969>] (floor statement of Rep. Eliot Engel).

Rep. Eliot Engel explained on the House floor:

Although I appreciate Chairman Barton’s willingness to extend hearings on energy this year prior to the 109th Congress’ consideration of the Energy Policy Act, I was very disappointed that a letter that 14 of my colleagues and I sent to Chairman Barton at the beginning of February requesting that our committee invite the National Commission on Energy Policy to testify went unanswered. In February, Secretary Bodman testified that of his familiarity with the NCEP’s report and of his willingness to work with Congress to produce a bill in a bipartisan fashion. If the NCEP was able to bridge the differences between Republicans and Democrats, industry and labor, perhaps we could have too.

<sup>135</sup> Editorial, *Hunting Witches*, WASH. POST (July 23, 2005),

[http://www.washingtonpost.com/wp-](http://www.washingtonpost.com/wp-dyn/content/article/2005/07/22/AR2005072201658.html)

[dyn/content/article/2005/07/22/AR2005072201658.html](http://www.washingtonpost.com/wp-dyn/content/article/2005/07/22/AR2005072201658.html) [<https://perma.cc/92WY-3KWY>].

act.<sup>136</sup> The legislation included an amendment that was nearly identical to the Bingaman-Murkowski amendment from the previous year. The amendment was adopted when two Republican House members decided to support a Democratic amendment.<sup>137</sup> The Foreign Relations Committee's report explained this section:

SEC. 730. SENSE OF CONGRESS ON CLIMATE CHANGE.

This section cites scientific evidence that confirms global climate change is occurring and is attributable to human activities, and restates U.S. international treaty obligations pursuant to the United Nations Framework Convention on Climate Change (UNFCCC). . . . It also makes clear that U.S. business interests are best served by knowing how other governments are addressing the risks of climate change, and that U.S. investments in research, development, and deployment of clean energy technologies can reduce the risks of climate change and its impacts, while benefiting the U.S. economy.

The section also states the sense of Congress that the U.S. should demonstrate international leadership and responsibility by reducing health, environmental, and economic risks posed by climate change by: (1) taking actions to ensure "significant and meaningful" reductions of greenhouse gasses "from all sectors," (2) creating mechanisms, including tradable credits to reduce, avoid, and sequester greenhouse gas emissions, (3) participating in international negotiations with the objective of gaining U.S. participation in a future

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<sup>136</sup> H.R. 1950, 108th Cong. (2003).

<sup>137</sup> The amendment was offered in Committee by Rep. Menendez (D-NJ) and supported by Rep. James Leach (R-IA), Rep. Christopher Smith (R-NJ), and 19 Democratic members of the Committee. H.R. REP. NO. 108-105, pt. 1, at 88 (2003).

binding climate change treaty that will protect U.S. economic interests and be consistent with UNFCCC environmental objectives, and (4) establish a bipartisan observer group of members of the U.S. House of Representatives to monitor international negotiations on climate change.

This provision narrowly passed the Committee by a vote of 21–18.<sup>138</sup>

Once this legislation was reported by the House Foreign Relations Committee, the House Energy and Commerce Committee asserted jurisdiction because of its purview over energy and climate change policy. The Committee held a markup session on the legislation, so that Rep. Joe Barton could offer an amendment to strike the climate change provision from the bill.<sup>139</sup> The Barton amendment was adopted with unanimous support of the Republican members of the committee and with several Democratic votes.<sup>140</sup>

This intervening maneuver stopped the language from ever being considered on the floor of the House of Representatives. It also allowed the provision to be considered in a more favorable venue for opponents of climate action than potentially the House as a whole.<sup>141</sup> It was not until 2006 that the U.S. Senate Foreign Relations Committee reported out a comparable resolution, but it was never considered by the full Senate.<sup>142</sup>

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<sup>138</sup> H.R. REP. NO. 108-105, pt.1, at 53 & 88 (2003).

<sup>139</sup> <http://energycommerce.house.gov/108/Markups/07092003markup1010.htm>

<sup>140</sup> See H.R. REP. NO. 108-105, pt. 4, at 4 (2003).

<sup>141</sup> The partisan breakdown of the House in the 108<sup>th</sup> Congress was 229 Republicans to 205 Democrats and one independent (Bernie Sanders).

Therefore just 12 Republicans would have needed to support the measure for it to withstand challenge on the House floor. A number of Republican members' votes showed concern for energy policies that failed to address climate change in that Congress. See LEAGUE OF CONSERVATION VOTERS, NATIONAL ENVIRONMENTAL SCORECARD, (Louis Bayard et. al. eds., 2004), [http://scorecard.lcv.org/sites/scorecard.lcv.org/files/LCV\\_Scorecard\\_2003.pdf](http://scorecard.lcv.org/sites/scorecard.lcv.org/files/LCV_Scorecard_2003.pdf) [<https://perma.cc/H5JN-F8TU>].

<sup>142</sup> S. Res. 312, 109th Cong. (2005) (a resolution expressing the sense of the Senate regarding the need for the United States to address global climate

### C. Rules Committee

The House Speaker enjoys strong control over the actions of the House floor. A key tool for maintaining this control is the House Rules Committee, which is known as “The Speaker’s Committee.”<sup>143</sup> The Rules Committee issues rules that govern what legislative measures can be considered on the House floor and under what terms. The sense of Congress on climate change illustrates the important role that the Rules Committee has played in Congress’ consideration of climate legislation.

After the sense of Congress was rejected in Committee as described above in Part V.A, Rep. Waxman filed the amendment with the House Rules Committee for floor consideration during the Energy Bill of 2003.<sup>144</sup> On April 9, 2003, although the Rules Committee had not yet determined which amendments would be permitted to be debated during consideration of the bill, Rep. Waxman wrote to his congressional colleagues about the amendment.<sup>145</sup> He explained the lineage of the language and urged members to support its adoption:

While I strongly believe that we should be acting today to account for and reduce our greenhouse gas emissions, my amendment puts aside these debates. It does not require cuts in greenhouse gas emissions. It does not require greenhouse gas emissions to be reported. It does not address the Kyoto Protocol. In fact, it does not require any specific action.

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change through the negotiation of fair and effective international commitments, reported by the U.S. Senate Foreign Relations Committee).

<sup>143</sup> *About the Committee on Rules: History and Processes*, H. COMM. ON RULES, <https://rules.house.gov/about> (last visited Jan. 28, 2018) [<https://perma.cc/8MXA-D8FD>] (on file with author).

<sup>144</sup> Amend. to H.R. 6 (April 8, 2003 4:45PM), (submitted to the House Rules Committee) (offered by Mr. Waxman) (on file with author).

<sup>145</sup> Dear Colleague letter from Rep. Henry A. Waxman, entitled, “It’s Time to Do Something About Global Warming: Support the Waxman Climate Change Amendment” (April 9, 2003) (on file with author).

Instead, my amendment is the least controversial portion of an amendment that was approved by voice vote by the U.S. Senate during the last Congress. This amendment merely summarizes the current scientific understanding of climate change, its potential effects, and the United States position regarding climate change. The amendment states that it is the sense of Congress that the United States should demonstrate international leadership and responsibility in addressing climate change.

Climate change is the most serious environmental threat we face. From thawing tundra in Alaska to drought in the Midwest to severe storms, signs of a planet affected by global warming are becoming more and more apparent. It is time that the U.S. House of Representatives begin to take this issue seriously.

Not a single Senator objected to this amendment, and I hope you will join me in sending this to the President's desk.

On the other side of the Capitol grounds, shortly after this letter was circulated to members of the House, the Senate Foreign Relations Committee adopted a sense of the Senate that was practically identical to the Bingaman-Murkowski amendment.<sup>146</sup> This amendment was reported by the Committee as section 813 of S. 925.<sup>147</sup> Once news of the committee's action

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<sup>146</sup> An amendment offered by Senators Kerry and Biden and amended by the Chairman and Senator Hagel expressing the sense of the Congress on climate change. S. REP. NO. 108-39, at 2 (2003)

<https://www.congress.gov/108/crpt/srpt39/CRPT-108srpt39.pdf>

[<https://perma.cc/YK8Z-BFU4>].

<sup>147</sup> Foreign Relations Authorization Act, Fiscal Year 2004, S. 925 108th Cong.

(2003) <https://www.congress.gov/bill/108th-congress/senate-bill/925/text>

[<https://perma.cc/4HPG-45E7>]. The primary difference between this legislation and the Bingaman-Murkowski amendment was the addition of language stating that it was the sense of Congress that the United States should: establish a bipartisan Senate observer group designated by the chairman and ranking member of the Committee on Foreign Relations of the Senate, to monitor any international negotiations on climate change, to ensure that the advice and

had travelled to the House, Rep. Waxman circulated a second letter to his colleagues informing them of the bipartisan support for the language in the Senate.<sup>148</sup> He explained the differences between the approved Senate language and his amendment and announced his plan to conform his amendment to the text of the Senate-approved language:

Specifically, there are only two differences. First, Sen. Richard Lugar (R-IN) added a provision stating that it is the sense of Congress that a bipartisan Senate observer group should be established to monitor any international negotiations on climate change. Second, Sen. Chuck Hagel (R-NE) added language that stated that at this time the U.S. has not elected to become a party to the Kyoto Protocol.

I believe that these are noncontroversial changes, so when I offer my amendment tomorrow, I will perfect my amendment with the language from Senators Lugar and Hagel. This perfecting amendment will make my amendment identical to the language adopted by unanimous consent by the Senate Foreign Relations Committee today.

This letter demonstrated the ultimate reasonableness of the amendment by showing the broad ideological spectrum of lawmakers to whom it was acceptable. The letter in fact identified the membership of the Senate Foreign Relations Committee:

<b>Senate Foreign Relations Committee Members</b>	
<i>Republicans</i>	<i>Democrats</i>

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consent function of the Senate is exercised in a manner so as to facilitate timely consideration of any new treaty submitted to the Senate.

<sup>148</sup> Letter from Rep. Henry A. Waxman, Dear Colleague: "Liberals and Conservatives Agree Global Warming is Real and It's Time for the United States to Demonstrate 'Leadership and Responsibility'" (April 9, 2003) (on file with author).

<b>Senate Foreign Relations Committee Members</b>	
Sen. Richard Lugar	Sen. Joseph Biden
Sen. Chuck Hagel	Sen. Paul Sarbanes
Sen. Lincoln Chaffee	Sen. Chris Dodd
Sen. George Allen	Sen. John Kerry
Sen. Sam Brownback	Sen. Russell Feingold
Sen. Michael Enzi	Sen. Barbara Boxer
Sen. George Voinovich	Sen. Bill Nelson
Sen. Lamar Alexander	Sen. Jay Rockefeller
Sen. Norm Coleman	Sen. Jon Corzine
	Sen. John Sununu

This information might have been particularly relevant to Republican members of the House who represented districts in the states represented by the Senators who served on the Senate Foreign Relations Committee. It invited those members to ask themselves, “if this language on climate change was acceptable to the conservative Senator from my state, why would it not be acceptable to me?”

Later that evening, the House Rules Committee reported House Resolution 189 to govern floor debate of the energy legislation. This rule provides a good example of how the Rules Committee can constrain debate over certain topics or proposals. As rules commonly do, H. Res. 189 stated,

No amendment shall be in order except those printed in the report of the Committee on Rules accompanying this resolution. Each amendment may be offered only in the order printed in the report may be offered only by a Member designated in the report, shall be considered as read, shall be debatable for the time specified in the report equally divided and controlled by the proponent and an opponent, shall not be subject to amendment . . . (emphasis added)

Accompanying this resolution was a committee report that specified each of the amendments that could be debated during consideration of the Energy Policy Act of 2003.<sup>149</sup> The sense of Congress on climate change was not permitted to be offered, debated, or voted upon. Rep. Waxman expressed his concern on the House floor, saying, “the House does not have the chance to debate a single measure on global warming, even a consensus one with bipartisan support like I proposed.”<sup>150</sup> The 108<sup>th</sup> Congress adjourned without either acknowledging climate change or enacting major energy legislation.

During the 109<sup>th</sup> Congress, energy legislation was again brought to the Senate floor on June 22, 2005. Sen. Bingaman, along with Sen. Arlen Specter and other Senators, proposed a new nonbinding “sense of the Senate” acknowledging climate change and calling on the Congress to “enact a comprehensive and effective national program of mandatory, market-based limits on emissions of greenhouse gases that slow, stop and reverse the growth of such emissions.”<sup>151</sup> The amendment passed without any objection and added section 1612 to the legislation. While having its roots in the Bingaman-Murkowski amendment from three years prior, it now contained greater specificity regarding the type of domestic program Congress should adopt to address climate change:

Sec. 1612(b) Sense of the Senate.—It is the sense of the Senate that Congress should enact a comprehensive and effective national program of mandatory, market-based limits and incentives on emissions of greenhouse gases that slow, stop, and reverse the growth of such emissions at a rate and in a manner that—

(1) will not significantly harm the United States economy; and

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<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> H.R. 6, 109th Cong. (2005) (the amendment was sponsored by Sen. Bingaman (D-NM), Sen. Specter (R-PA), Sen. Domenici (R-NM), Sen. Alexander (R-TN), Sen. Cantwell (D-WA), Sen. Lieberman (D-CT), Sen. Lautenberg (D-NJ), Sen. McCain (R-AZ), Sen. Jeffords (I-VT), Sen. Kerry (D-MA), Sen. Snowe (R-ME), Sen. Collins (R-ME), and Sen. Boxer (D-CA)).

(2) will encourage comparable action by other nations that are major trading partners and key contributors to global emissions.

The House had no corresponding provision in its energy bill, and this sense of the Senate was dropped out of the final version of the Energy Policy Act of 2005, which was enacted in August 2005.

The Rules Committee played a pivotal role the following year as well. In May 2006, Rep. Norm Dicks, a senior Appropriations Committee Democrat from Washington, offered the Bingaman-Specter amendment to the annual appropriations bill for the U.S. Environmental Protection Agency. The amendment passed on a voice vote after Chairman Jerry Lewis (R-Calif.) and Rep. Charles Taylor (R-N.C.) announced their support for the amendment.<sup>152</sup> The environmental group the Natural Resources Defense Council announced that there would finally be “a moment of truth” on the House floor with respect to climate change when the bill was scheduled to be considered the following week.<sup>153</sup> However, Rep. Joe Barton wrote to the Rules Committee and requested that the rule governing floor debate of the legislation leave the climate change provision “unprotected.”<sup>154</sup> Without the protection of the rule, any member can have the language stricken by merely raising a point of order that the provision violates the prohibition against legislating on an appropriations bill. There is no debate or vote on that point.

Although Rep. Dicks argued that the provision was nonbinding, would not change spending in any agency, and authorized no additional spending, and Rep. Wayne Gilchrest (R-

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<sup>152</sup> Darren Samuelsohn, *House Appropriators OK Resolution on Need to Cap Emissions*, E&E DAILY (May 10, 2006), <https://www.eenews.net/eedaily/stories/44352/search?keyword=house+appropriators>.

<sup>153</sup> Press release, Natural Resources Defense Council, *House Faces Moment of Truth on Global Warming* (May 12, 2006), <https://www.nrdc.org/media/2006/060512>.

<sup>154</sup> Darren Samuelsohn, *House Panel Leaves Global Warming Resolution Unprotected*, E&E DAILY (May 18, 2006), <https://www.eenews.net/eedaily/stories/44608/search?keyword=house+panel>.

MD) and Rep. John Olver (D-CT) circulated a letter to all members urging them to retain the language, Rep. Don Young (R-AK) raised a point of order and had the provision stricken from the legislation.<sup>155</sup> Rep. Sherwood Boehlert (R-N.Y.), the chairman of the House Science Committee, called the episode a “missed opportunity,” and estimated that about 40 Republican House members would have voted in favor of the provision if given the opportunity.<sup>156</sup> He also cautioned that some Democrats would have opposed the language.

Sen. Lugar took one last attempt at putting Congress on record with a nonbinding resolution acknowledging climate change later that same month. The Senate Committee on Foreign Relations reported a bipartisan resolution acknowledging climate change on May 25, 2006.<sup>157</sup> However, the resolution was not brought to the Senate floor prior to the adjournment of the 109<sup>th</sup> Congress.

This interesting example, from early in the congressional debate over climate change, demonstrates how congressional hurdles can allow disagreement over climate change to prevent enactment of a provision that had bipartisan support, had been reported favorably from committees in both the House and the Senate, passed the Senate twice unanimously, and had never endured a losing a vote on the floor of either the House or the Senate.

## VI. WHY THE RHETORIC MATTERS

The previous Part demonstrated the difficulty of advancing policy issues when the governing majority of Congress does not wish to have those issues advanced. Fortunately, when the governing majority instead wants to advance a policy issue and the key Committee Chairs are supportive, the difficulties described above can fall away or be alleviated. However, other

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<sup>155</sup> Dan Berman, *Global Warming Resolution Struck From Appropriations Bill*, E&E NEWS PM (May 18, 2006), <https://www.eenews.net/eenewspm/stories/44665/search?keyword=global+warming>.

<sup>156</sup> Darren Samuelsohn, *With Resolution Struck, House Left with Little to Debate*, E&E DAILY (May 19, 2006), <https://www.eenews.net/eedaily/stories/44676/search?keyword=resolution+struck>.

<sup>157</sup> S. Res. 312, 109th Cong. (2006).

significant institutional obstacles remain, and these obstacles can be well exploited in the hands of a motivated minority. This Part explains how the rhetoric used against carbon taxes can structurally dovetail with institutional obstacles: the more the rhetoric is relied upon, the more it is responded to by carbon tax advocates, the more power and opportunity these institutional barriers provide for preventing enactment of a carbon tax.

As discussed above, the Scalise resolution makes clear that opponents of carbon taxes are prepared to focus on three dimensions of concern: effects on international competitiveness, regional domestic equity, and economic digestibility at the household level. There are three ways that these concerns could activate or reinforce the structural obstacles that might face a carbon tax.

These themes are consistent with one side of a polarized set of deep-seated beliefs about environmental protection identified in the cultural cognition literature.<sup>158</sup> This literature convincingly argues that individuals take on cultural commitments that guide formation of their views on highly charged political issues. These cultural commitments can be more determinative to an individual's views on something like a carbon tax, than the facts themselves. Kahan and Braman write:

[C]itizens aren't in a position to figure out through personal investigation whether the death penalty deters, gun control undermines public safety, commerce threatens the environment, et cetera. They have to take the word of those whom they trust on issues of what sorts of empirical claims, and what sorts of data supporting such claims, are credible. The people they trust, naturally, are the ones who share their values—and who as a result of this same dynamic and others are predisposed to a particular view. As a result, even citizens who earnestly consider empirical policy issues in an

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<sup>158</sup> Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL'Y REV. 149, 151 (2006).

open-minded and wholly instrumental way will align themselves into warring cultural factions.

Therefore, the rhetoric likely to be used against a carbon tax is not only likely to be compelling among those members of Congress most predisposed to be skeptical of environmental protection, it will also have an intuitive resonance with the broader public who share that same cultural worldview. This rhetorical power could have political salience, and that salience could require a policy response from carbon tax advocates.

Policy answers to the dimensions of concern raised during debate of the Scalise resolution are available in the public literature about carbon taxes. For instance, border adjustments can effectively respond to international competitiveness and the offering of dividends, or other tax benefits could address important equity issues. Yet, these dimensions of concern are unlikely to lose their political importance unless the very members of Congress raising these concerns are satisfied. Because individuals aren't in a position to evaluate whether a concern over a carbon tax is adequately addressed, they "must defer to the opinion of persons whom they believe are knowledgeable and share their interests to tell them which policies and candidates to support." Kahan and Braman argue that "the persons to whom citizens attribute these attributes, unsurprisingly, are the ones who share their cultural worldviews, and who, as a result of the various mechanisms of cultural cognition, are likely to be slanted toward one particular policy position or candidate."<sup>159</sup>

Therefore, in a congressional debate setting, this rhetoric has the potential to empower carbon tax opponents, whether the arguments advanced with the rhetoric are meritorious or otherwise. Moreover, as discussed in greater detail below, any policy proposals that respond to the rhetoric have the potential to increase the procedural complication of processing the legislation. Proposals to blunt or ameliorate rhetoric concerns therefore have the potential to activate the availability of additional institutional obstacles to enactment.

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<sup>159</sup> *Id.* at 164.

Additionally, policy proposals to respond to this rhetoric are likely to require the need for additional funding and the budgetary challenge of satisfying that need could be difficult or impossible, as described in Part VI.B–VI.C.

Finally, beyond the political necessity of responding to arguments about carbon taxes, it is likely that legitimate policy concerns will come to lawmakers' attention as a carbon tax is advanced through the legislative process. This too can result in activating institutional barriers to enactment. Congress' experience in handling the cap-and-trade legislation in 2009 can be instructive. Some proponents of carbon taxes often state that cap-and-trade mechanisms are complex and carbon taxes are simple.<sup>160</sup> Just as cap-and-trade legislation became more complicated through the legislative process, it is reasonable to anticipate a similar result as a carbon tax advances through the process.

In 2009, under the intense scrutiny of potential enactment, many related issues were brought to the attention of elected officials for consideration. As policymakers addressed issues, some additional amount of complexity was often added. To a certain extent, these issues and the importance they carried were the product of the time, societal priorities, and contemporaneous views of the individual legislators who considered them. However, it would be prudent to expect serious consideration of a carbon tax to similarly invite issues to Congress' attention. The same forces that result in added complexity in cap-and-trade programs have a strong potential to add complexity to carbon tax initiatives.

As explained below, legislative proposals with more expansive subject matter can result in the active engagement of more policy actors in Congress with their own processes, ideologies, and agendas.

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<sup>160</sup> See, e.g., *Carbon Tax Center*, CAP AND TRADE, <https://www.carbontax.org/dead-ends/cap-and-trade> (stating that while cap-and-trade is “devilishly complex,” a carbon tax is transparent and easy to understand).

### A. Procedural Complication

Perhaps the primary process advantage that a carbon tax has over competing economy-wide approaches to carbon mitigation such as cap-and-trade, is that theoretically, action could be taken by one Committee in each chamber—the Ways and Means Committee in the House and the Senate Finance Committee in the Senate. A legislative proposal that raises revenue and allocates the revenue in reduced taxes could be acted upon by a single committee in each chamber.

However, this is highly unlikely to actually happen. While the tax-writing Committees have incomparable expertise and access to resources in questions of U.S. taxation, their expertise in energy and environmental policy is limited. Legislative action that doesn't address related issues within the jurisdiction of other Committees could risk the adoption of an ineffective or even harmful policy if important details of emitting sources are not properly factored in.

The Committee may wish to draw on the expertise of other Committees. Informal consultations between committees' staff occur commonly. But, as legislation substantively expands into the jurisdiction of other committees, these interactions often become more formal. The Committee chairs can consult, work on legislative language that is mutually acceptable, exchange correspondence acknowledging and preserving each Committee's jurisdiction, and subsequently waive the need for the Committee to formally consider the legislation.

If legislation is sequentially referred to a committee for jurisdictional concerns, committee chairs could also use this approach to resolve the jurisdictional issues and discharge the legislation. Alternatively, when legislation is sequentially referred to additional committees, the chairs could provide for the committees to take formal action.

The Waxman-Markey bill, H.R. 2454 in the 111<sup>th</sup> Congress, received a referral to nine House Committees.<sup>161</sup> The involvement of these Committees was critical for the policy as developed. Reps. Waxman and Markey crafted the legislation

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<sup>161</sup> H.R. REP. NO. 111-137(1), 111th Cong. (2009), *reprinted in* 2009 U.S.C.C.A.N. 1, 319 WL 1578975.

from the Energy and Commerce Committee, which had jurisdiction over national energy policy and climate change policy. Other Committees were also involved, as the legislation sought to adopt complementary policies. The cap-and-trade mechanism raised significant revenue (overseen by the Ways and Means Committee), which was used for scientific research (Science and Technology Committee), worker training (Education and Labor Committee), addressing international deforestation (Foreign Affairs Committee), and adaptation (Transportation and Infrastructure Committee and Natural Resources Committee). The agricultural sector could provide carbon offsets into the cap-and-trade market (Agriculture Committee). Policy mechanisms to prevent market abuses were also included (Financial Services Committee).

As proposals become more thoughtful and address more issues, more Committees receive referrals. Consider the first carbon tax introduced in Congress in 1990. This legislation simply assessed a tax on coal, petroleum, and natural gas.<sup>162</sup> The referral was solely to the Ways and Means Committee.

In comparison, the carbon tax legislation introduced 27 years later grapples with significantly more issues, which has resulted in more Committee referrals. Sen. Whitehouse and Rep. Blumenauer introduced legislation to collect a fee on a per-ton basis of greenhouse gas emissions.<sup>163</sup> The legislation preemptively addresses various stakeholder concerns with a carbon tax by directing portions of revenue to certain Social Security beneficiaries, veterans, and disabled individuals. It also makes mitigation grants to assist low-income and rural households and provide job training and worker transition assistance. The legislation would also reduce the corporate tax rate.

As result of these policies, five Committees received referrals: Ways and Means, Transportation and Infrastructure, Veterans' Affairs, Energy and Commerce, and Education and the

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<sup>162</sup> To amend the Internal Revenue Code of 1986 to reduce emissions of carbon dioxide by imposing a tax on certain fuels based on their carbon content, H.R.4805 101st Cong. (1990).

<sup>163</sup> American Opportunity Carbon Fee Act, H.R. 3420, 115th Cong. (2017). American Opportunity Carbon Fee Act of 2017, S. 1639, 115th Cong. (2017).

Workforce. Additional Committees will add time and complexity to the legislative process, as each Committee, in theory, is provided an opportunity to perfect the provisions that fall within their legislative jurisdiction. It should also be noted that there can be additional sequential referrals that are not identified upon initial introduction. Therefore, if this legislation is acted upon by Congress at least five Committees, and perhaps more, would be expected to consider its provisions.

The carbon tax legislation introduced by Rep. Curbelo in July 2018 commits resources to transportation infrastructure, assistance for low-income households, flood protection for coastal cities and other purposes.<sup>164</sup> As a result, the legislation was referred to seven Committees: Ways and Means, Energy and Commerce, Natural Resources, Education and the Workforce, Transportation and Infrastructure, Science, Space, and Technology, and Agriculture.

The referrals on these pieces of legislation demonstrate how additional congressional committees can become involved in the consideration of legislation as a proposal is developed to respond to the concerns of opponents or to attract possible allies. With each additional committee referral can come the need for hearings and markups. But more importantly, with each referral comes an additional committee chair with their own prerogatives and priorities and additional groups of members each with their own constituent and stakeholder priorities. As each committee works its will, these referrals can have significant effects on the substance of a legislative proposal and the timing under which it is considered.

#### B. Complying With PAYGO and Mandatory Spending Requirements

Addressing the rhetorical arguments against a carbon tax would likely have budgetary impacts. For example, using a portion of the revenue to ensure that low-income households are not further burdened by a carbon tax would require significant revenue, as described in greater detail below. Using revenue for

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<sup>164</sup> H.R. 6463, 115th Cong. (2018).

these purposes will have budgetary effects that will impact consideration of the legislation in Congress.

When legislation is considered by Congress, the Congressional Budget Office (CBO) is responsible for “scoring” the legislation—that is, estimating the budgetary effects of the legislation.<sup>165</sup> These cost estimates are completed when legislation is reported from committee prior to consideration on the floor of either chamber. The estimates show how discretionary spending, mandatory spending, and federal revenues are affected by new legislation. A bill’s score is typically important because it informs members of Congress and the public about how a proposal affects the national budget. Although Congress has at times shown a special receptiveness to increasing deficit spending, this receptiveness is not typical.<sup>166</sup>

To protect against increasing the budget deficit or undercutting deficit reduction actions that have already been taken, Congress passed the Statutory Pay-As-You Go (PAYGO) Act in 2010. PAYGO requires that any legislative changes to taxes or mandatory spending that increase multiyear deficits must be “offset,” or paid for, by other changes to taxes or mandatory spending that reduce deficits by an equivalent amount.

Additionally, the Senate has an internal “pay-as-you-go” rule.<sup>167</sup> This rule prohibits consideration of legislation that has the net effect of increasing the deficit or reducing the surplus over a 5-year or 10-year period. It is enforced on the Senate floor by any Senator who can assert a “point of order”—literally, making the point that it is not in order to consider the legislation

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<sup>165</sup> Section 402 of the Congressional Budget and Impoundment Control Act of 1974 created CBO and established this mission. *See generally* Adam Fletcher & Trenton Hamilton, Scoring and Revenue Estimation (Mar. 16, 2008) (briefing paper presented at Harvard Law School Federal Budget Policy Seminar).

<sup>166</sup> Republicans demonstrated such a receptiveness during consideration of tax cuts: Bush tax cuts and quote from Republican members during current tax consideration. Democrats have shown the receptiveness during periods of counter-cyclical spending like the Recovery Act. Both parties tend to agree with deficit spending in times of disaster or military conflict.

<sup>167</sup> The House of Representatives had a similar internal rule but repealed it in 2011.

under the governing rules. If meritorious, the legislation is withdrawn from consideration.

The House had a similar pay-as-you-go rule prior to 2011, but in the 111<sup>th</sup> Congress, the incoming Republican leadership replaced the rule with a prohibition on considering legislation “if the provisions of such measure have the net effect of increasing mandatory spending” over a 5-year or 10-year period.<sup>168</sup> As a side note, this rule prevents legislation that requires spending from being considered, but does not guard against increasing deficits, as it allows tax reductions to be considered regardless of their effect on the deficit. This rule is enforced by members of the House who can assert a “point of order” and have the legislation withdrawn from floor consideration.

These rules pose significant challenges for carbon tax legislation. To comply with the House rule, the legislation cannot, on a mandatory basis, spend any of the revenue generated by the carbon tax. That means that, to the extent revenue could address the rhetorical arguments used against a carbon tax by easing the burden on low-income families or seniors, the legislation would be prohibited from being considered on the House floor.

The statutory PAYGO rule and the Senate PAYGO rule would set a tough standard of ensuring that carbon tax legislation does not make the deficit worse over a 5-year or 10-year period. While this may seem easy, there are many purposes being identified for the use of carbon tax revenues, such as investments in coal mining communities, reductions in the corporate tax rate, increases in social security benefits, and other purposes. Demand is likely to quickly exceed supply, complicating the effort to align political support for the legislation.

It should be noted that these rules are more restrictive than when the House of Representatives considered the Waxman-Markey bill in 2009. At that time, legislation only had to meet PAYGO requirements over a 10-year period. Even with that test, the drafters of Waxman-Markey found temporarily high demand for revenue during the early years of the bill as the nation transitioned to internalize the cost of carbon pollution. To

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<sup>168</sup> H.R. DOC. NO. 114-192, Rule XXI, cl. 10.

meet this demand, the legislation designated a limited number of emissions allowances from years outside of the 10-year budget window to be sold during the early auctions of the bill. This approach provided for more resources to be available in the early years, although overall the legislation still helped reduce the deficit over time. It also offered certain policy benefits by allowing industry to purchase allowances for the out years. However, such an option will not be available under a carbon tax approach.

These rules are restrictive, but a future Congress cannot be bound by a previous Congress, and these rules can be modified, waived, or abandoned with the support of 60 Senators and a majority in the House of Representatives. Indeed, the House Rules Committee touts that “so long as a majority of the House is willing to vote for a special rule, there is little that the Rules Committee cannot do.”<sup>169</sup>

### C. Offsets in Revenue Estimates

Complying with the PAYGO rules described above is even more difficult than it might first appear because of the methodology used to estimate revenue.

The Joint Committee on Taxation (JCT) is a nonpartisan committee of the United States Congress that assists Members of the majority and minority parties in both houses on tax legislation. They possess the technical expertise that Congress relies on for all tax matters. A key function of the Joint Committee is to prepare revenue estimates of all revenue legislation considered by the Congress. CBO uses these revenue estimates when scoring legislation, as discussed in the previous part.

For purposes of congressional budgeting, a carbon tax would be considered an excise tax. As the Joint Committee on Taxation explains:

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<sup>169</sup> *About the Committee on Rules—History and Processes*, HOUSE COMMITTEE ON RULES, <https://rules.house.gov/about> [<https://perma.cc/RL39-F4WW>] (last visited Jan. 28, 2018).

In estimating the revenue effects of changes in excise taxes, the Joint Committee staff (along with staff at CBO and Treasury's Office of Tax Analysis) generally assumes that the net effect on total Federal tax receipts from an increase in Federal excise taxes is less than the increase in gross excise tax receipts. The difference between the change in excise tax receipts and the change in total Federal tax receipts is referred to as the "income and payroll tax offset." The difference arises from the fact that an increase (decrease) in excise taxes results in a decrease (increase) in income subject to Federal income and payroll taxation.<sup>170</sup>

To execute this methodology, staff for JCT applied a 25 percent offset to excise tax estimates.<sup>171</sup> This means that in crafting a carbon tax proposal, legislators could spend just 75 cents for every dollar in revenue. This offset is significant enough in size that, as the various uses of revenue begin to line up, legislators are likely to realize that there won't be enough resources to meet every demand.

Consider efforts to shield low-income households from the effects of a new carbon tax. A senior analyst at the Congressional Budget Office reports that the aggregate gross cost to households in the bottom quintile under a carbon tax would equal roughly 12 percent of the gross revenue collected from a carbon tax, and aggregate gross costs in the second quintile would be roughly 15 percent of gross revenue.<sup>172</sup> In 2015, the most recent year for which there is data, the upper

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<sup>170</sup> *Joint Committee Revenue Estimation Process*, JOINT COMM. ON TAXATION, last visited Oct. 8, 2017) <https://www.jct.gov/about-us/revenue-estimating.html> [<https://perma.cc/24EW-SCRC>]. (last visited Oct. 8, 2017).

<sup>171</sup> JOINT COMM. ON TAXATION, JCX-1-05 OVERVIEW OF REVENUE ESTIMATING PROCEDURES AND METHODOLOGIES USED BY THE STAFF OF THE JOINT COMM. ON TAXATION, 15 (Feb. 2005).

<sup>172</sup> Terry Dinan, *Offsetting a Carbon Tax's Costs on Low-Income Households*, (Cong. Budget Off., Working Paper 2012–16), <http://www.cbo.gov/sites/default/files/11-13LowIncomeOptions.pdf> [<https://perma.cc/ZA9X-SMFT>].

limit of annual household income for those in the second quintile was \$43,511.<sup>173</sup>

Accordingly, Chad Stone of the Center for Budget and Policy Priorities calculated that if Congress chose to ameliorate the effects of a carbon tax on the two bottom quintiles of the population, an amount of the revenue approaching one-third would need to be devoted to this effort.<sup>174</sup> When combined with the income and payroll tax offset, less than one-half of the gross receipts from a carbon tax would be available for other purposes.

This reality could thwart or at least greatly complicate any grand spending plans.

#### D. The Origination Clause

The House rules on mandatory spending are more stringent than the Senate PAYGO rules, yet a carbon tax would need to be considered first in the House. The Origination Clause of the U.S. Constitution states, “All bills for raising Revenue shall originate in the House of Representatives.”<sup>175</sup>

Blue-slipping is the procedural manifestation of this constitutional requirement. If the Senate were to introduce and pass a carbon tax bill (or any tax bill), that bill would be returned to the Senate without House consideration, accompanied by a blue slip, a resolution asserting the constitutional privilege of the House.<sup>176</sup>

This has a practical effect for consideration of a carbon tax measure in Congress. Although a carbon tax must first be passed by the House, it is highly unlikely that the Senate would ever simply defer to the House’s approach to such major

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<sup>173</sup> *Household Income Quintiles*, TAX POL’Y CTR., (May 3, 2017), <http://www.taxpolicycenter.org/statistics/household-income-quintiles> [<https://perma.cc/RLY9-B3XW>].

<sup>174</sup> Chad Stone, *The Design and Implementation of Policies to Protect Low-Income Households under a Carbon Tax*, CTR FOR BUDGET AND POL’Y PRIORITIES (Sept. 21, 2015), [https://www.cbpp.org/research/climate-change/the-design-and-implementation-of-policies-to-protect-low-income-households#\\_ftn14](https://www.cbpp.org/research/climate-change/the-design-and-implementation-of-policies-to-protect-low-income-households#_ftn14) [<https://perma.cc/52NS-N557>].

<sup>175</sup> U.S. CONST. art. I § 7, cl. 1.

<sup>176</sup> See generally JAMES SATURNO, CONG. RES. SERV., RL31399, THE ORIGINATION CLAUSE OF THE U.S. CONSTITUTION: INTERPRETATION AND ENFORCEMENT, (2011).

legislation. Instead, a constructive Senate would make its own changes to the legislation and return it to the House, where House members would have to vote a second time. This second vote somewhat magnifies the challenge a carbon tax faces.

House members are invited to game these votes, understanding that their first vote on the tax is unlikely to lead to a law. In fact, sometimes the Senate will simply refuse to act on the measure, as it did with President Clinton's Btu tax.<sup>177</sup> This is considered to create a political vulnerability for House members who might take a controversial vote and yet ultimately not have a defensible outcome or law to show for it.

During consideration of cap-and-trade legislation in 2009, the House Republican Members were cognizant of this dynamic. "I think a lot of people at the [National Republican Congressional Committee] hope it passes by just one vote," Energy and Environment Subcommittee ranking member Fred Upton (R-Mich.) said at the time.<sup>178</sup> This led to open musings by at least one Republican representative that a smart strategy would be to vote against the bill when first considered in the House but then in favor of it once it passes the Senate.<sup>179</sup> While this strategy is rational for any one member, if every member employs that strategy no bill will ever pass the House of Representatives.

This dynamic is not completely unavoidable. The Senate can effectively act first on a specific revenue proposal by striking the content of any House-passed revenue measure and replacing

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<sup>177</sup> "Getting BTU'd" is a phrase that has come into common usage among observers of Congress to describe this dynamic. See generally Ezra Klein, *Did the House GOP get BTU'd?*, WASH. POST (May 5, 2011), [https://www.washingtonpost.com/blogs/ezra-klein/post/did-the-house-gop-get-btud/2011/05/03/AFowahyF\\_blog.html?utm\\_term=.04fd10016fef](https://www.washingtonpost.com/blogs/ezra-klein/post/did-the-house-gop-get-btud/2011/05/03/AFowahyF_blog.html?utm_term=.04fd10016fef) [https://perma.cc/4CPV-TVMS].

<sup>178</sup> Darren Samuelsohn, *GOP on Offense in Fight Against Dems' Global Warming Bill*, E&E NEWS (Apr. 28, 2009), <https://www.eenews.net/eedaily/stories/77264/search?keyword=offense> [https://perma.cc/7GNY-G8CH] (explaining how the committee responsible for electing Republican House members saw an electoral opportunity with the legislation).

<sup>179</sup> Author's personal experience.

it with the text of any other revenue bill.<sup>180</sup> For this reason, House leadership is always careful about how many revenue measures it sends to the Senate.

## VII. CONCLUSION

History shows that lengthy periods of sustained effort are necessary to build sufficient agreement in Congress to even attempt to pass climate change legislation. Agreement to act on climate change has been repeatedly undermined by preemptive votes that harden opposition to action on climate policy before agreement has the opportunity to form. Overcoming the opposition of a governing majority of Congress to actively pass legislation is very difficult, and practically impossible. There are no helpful examples in the climate change space for doing so.

Even when a governing majority in Congress wishes to address climate change, strong minority opposition is difficult to overcome because of the many institutional obstacles that exist. These obstacles are particularly powerful because the arguments used against carbon taxes can act as pry bars to force consideration of more expansive policies. These expansive policies can trigger the engagement of additional congressional committees and demand the commitment of additional, and perhaps unavailable, resources. Therefore, enacting a carbon tax with the accompanying policies to address the opposition's stated concerns will require a great deal of agreement or complaisance among lawmakers.

Proponents of carbon taxes should not enter the legislative discussion without anticipating the foreseeable challenges that climate change legislation will face in Congress. Proponents should expect that policymakers will want to respond to concerns they deem credible, especially concerns that a tax is unaffordable at the household level, treats one region of the country unfairly compared to another, or may put the

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<sup>180</sup> Saturno, *supra* note 176; For a detailed discussion of the Senate's practice of striking the content of House revenue bills to create "shell bills" for Senate proposals and the constitutional issues this practice raises. See Rebecca M. Kysar, *The 'Shell Bill' Game: Avoidance and the Origination Clause*, 91 WASH. U. L. REV. 659 (2014).

nation's industries at a competitive disadvantage compared to their international competitors.

If these readily foreseeable arguments result in expanding the content of a proposal, carbon tax proponents should expect the involvement of additional committees—each with its own priorities and expectations—and additional demands on the revenues of a carbon tax. All of this will take place against a backdrop of congressional rules that set specific and challenging hurdles for consideration.

Fortunately, carbon tax policies are sufficiently studied to allow for the adoption of an effective and sensible policy that can mitigate greenhouse gas emissions. With sufficient support, Congress has demonstrated time and again that it can act, despite the significant challenges of its own internal politics and processes. Identifying these obstacles and how they relate to carbon tax proposals can be an important step in determining how to navigate them.

