69 – The Carbon Tax: Efficient, Effective, and Procedurally Perfect

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Over the past twenty years, litigants have advanced a broad array of claims to press for the U.S. federal and state governments to address climate change. They have brought actions in tort (negligence, public nuisance, trespass), alleged violations of federal statutes (Clean Air Act Endangered Species Act, Clean Water Act, NEPA, FOIA, Administrative Procedures Act and other rule making authority) argued that companies were not complying with securities and financial regulatory laws, that the US is in violation of international trade agreements, and that states are acting in contravention of the public trust doctrine. To date, these law suits have met with limited success. In 2009 legislators proposed multiple cap-and-trade bills, but none were passed, due to the lack of the needed supermajority in the Senate to overcome a filibuster. The Obama Administration's efforts to regulate carbon dioxide emissions under the Clean Air Act were curtailed by litigation. Ultimately the Trump Administration withdrew the Clean Power Plan and replaced it with regulations that were generous to fossil fuels. Most recently, the leading Democratic candidates have advanced plans for implementation of a Green New Deal to overhaul the nation's economy and infrastructure through a massive spending plan.

A carbon tax, on the other hand, has rarely garnered serious consideration, despite its advantages as more efficient, effective, precise, administrable, and amenable to reconciliation with trade policy. Now, however, the carbon tax may finally have its day and not because of its excellence as a regulatory instrument. Given outstanding deficits following the passage of $2 trillion in spending to address COVID-19 under the CARES Act and the rising federal debt resulting from the Tax Cuts and Jobs Act of 2017, a carbon tax may be our only option as a matter of legislative procedure. The carbon tax is the one instrument that can both bypass a Senate filibuster and the budgetary limitations under the Byrd Act because it is "procedurally perfect" for budget reconciliation.

Biographical note

Tracey Roberts is an Associate Professor of Law at Samford University, Cumberland School of Law in Birmingham, Alabama. Her research focuses on the intersection of tax and environmental law. Together with Roberta Mann, at the University of Oregon, published Tax Law and the Environment: A Multidisciplinary and Worldwide Perspective. Her articles have been published in the Northwestern Law Review, the Columbia Journal of Tax Law, the Columbia Journal of Environmental Law, and the Ecology Law Quarterly, among other journals.

She received her A.B. from Harvard University, her J.D. from Vanderbilt University Law School and her LL.M. in Taxation from New York University School of Law.