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ESSAY

CAP-AND-TRADE SPELLS ECONOMIC DISASTER FOR AMERICA'S POOR

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I. INTRODUCTION

The United States House of Representatives passed the American Clean Energy and Security Act of 2009 (ACESA), also known as the Waxman-Markey Clean Energy Bill, by a vote of 219 to 212.[1] The ACESA's stated purpose is "[t]o create clean energy jobs, achieve energy independence, reduce global warming pollution and transition to a clean energy economy."[2] Its sponsors' goal is "to promote America's energy security and to create millions of clean energy jobs that will drive our economic recovery and long-term growth."[3] Many have heralded the ACESA as Congress's first successful attempt at managing global climate change.[4] Among them, the Environmental Defense Fund president, Fred Krupp, called the ACESA "'the most important environmental and energy legislation in our nation's history.'"[5]

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1. James Oliphant & Jim Tankersley, *Climate Vote Is Obama Victory: House Democrats Drum Up Last-Minute Support to Win Narrow Approval of Sweeping Energy Legislation*, L.A. TIMES, June 27, 2009, at 1, *available at* 2009 WLNR 12297568 ("In one of the narrowest votes in its recent history, the House on Friday evening passed a sweeping energy and climate-change bill that supporters say could revolutionize the nation's industrial economy."). According to one of the bill's sponsors, the Waxman-Markey Clean Energy Bill "will revitalize our economy by creating millions of new jobs, increase our national security by reducing our dependence on foreign oil, and preserve our planet by reducing the pollution that causes global warming." Press Release, Henry Waxman, U.S. Rep., House Passes Historic Waxman-Markey Clean Energy Bill (June 26, 2009), *available at* http://waxman.house.gov/News/DocumentSingle.aspx?DocumentID=134768.

2. The American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (1st Sess. 2009), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h2454pcs.txt.pdf. The bill effectively makes excess carbon emissions an extra cost of businesses. *Id.* Some commentators, however, have expressed concern with the way in which the bill was diluted as it made its way through the House. *E.g.*, Thomas L. Friedman, Op-Ed., *Just Do It*, N.Y. TIMES, July 1, 2009, at A33, *available at* 2009 WLNR 12522440 ("There is much in the House cap-and-trade energy bill that just passed that I absolutely hate. It is too weak in key areas and way too complicated in others.").

3. Press Release, Henry Waxman, U.S. Rep., House Passes Historic Waxman-Markey Clean Energy Bill (June 26, 2009), *available at* http://waxman.house.gov/News/DocumentSingle.aspx?DocumentID=134768. Sponsor, Representative Henry Waxman, describes the legislation as "break[ing America's] addiction to imported foreign oil [which will] put us on a path to true energy security." *Id.*

4. *E.g.*, Bryan Walsh, *What the Energy Bill Really Means for CO2 Emissions*, TIME, June 27, 2009, *available at* http://www.time.com/time/health/article/0,8599,1907528,00.html.

5. *Id.*; *see also* Lori Montgomery, *House Approves $3.5 Trillion Budget of Obama Initiatives*, WASH. POST, Apr. 3, 2009, *available at* 2009 WLNR 6218288 (addressing the importance of the cap-and-trade system to reduce gases in the environment). With President Obama's $3.5 trillion spending plan and the approved blueprint in place, the President is close to accomplishing a goal of his presidency—implementation of the cap-and-trade system. Lori Montgomery, *House Approves $3.5 Trillion Budget of Obama Initiatives*, WASH. POST, Apr. 3, 2009, *available at* 2009 WLNR 6218288.

Both major U.S. presidential candidates in 2008 supported the general principle of cap-and-trade.[6] Cap-and-trade was a "signature issue" for Barack Obama in his historic campaign for the presidency.[7] In President Obama's inaugural address, he called for national efforts to "harness the sun and the winds and the soil to fuel our cars and run our factories. . . . All this we can do. All this we will do."[8] At a 2009 Earth Day event in Iowa, President Obama made his position clear:

> [T]he choice we face is not between saving our environment and saving our economy. The choice we face is between prosperity and decline. We can remain the world's leading importer of oil, or we can become the world's leading exporter of clean energy. We can allow climate change to wreak unnatural havoc across the landscape, or we can create jobs working to prevent its worst effects . . . . The nation that leads the world in creating new energy sources will be the nation that leads the [twenty first century] global economy.[9]

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6. Lawrence Kudlow, Editorial, *Winner's Tax Strategy*, N.Y. SUN, Aug. 28, 2008, *available at* http://www.nysun.com/opinion/winners-tax-strategy/84799/ (reviewing both then-Senator Barack Obama's and Senator John McCain's views on cap-and-trade programs). Notably, Senator McCain only favored the cap-and-trade program if China and India participated; the Obama camp's endorsement of the program was not contingent upon similar caveats. *Id.* Cap-and-trade is a market-based approach to emissions reduction. Environmental Defense Action Fund, Cap and Trade 101, http://www.edf.org/page.cfm?tagID=43849 (last visited Dec. 20, 2009). The "cap" refers to a mandatory ceiling on greenhouse gas emissions that is set by Congress. Environmental Defense Action Fund, Cap and Trade 101, http://www.edf.org/page.cfm?tagID=43849 (last visited Dec. 20, 2009). The "trade" permits polluters, typically businesses, to buy and sell emissions permits among themselves, thereby allowing the market the cheapest means to keep emissions low. *Id.*

7. Posting of Peter Roff to Thomas Jefferson Street Blog, http://www.usnews.com/blogs/peter-roff/2009/07/07/numbers-adding-up-against-obamas-cap-and-trade-bill-in-the-senate.html (July 7, 2009, 11:31 EST); *see also* BRYAN BUCKLEY & SERGEY MITYAKOV, THE MARSHALL INSTITUTE, THE COST OF CLIMATE REGULATION FOR AMERICAN HOUSEHOLDS 2 (2009), *available at* http://www.marshall.org/pdf/materials/636.pdf. President Obama's policy on climate change aims to reduce carbon emissions by eighty percent below 1990 levels by the year 2050. BRYAN BUCKLEY & SERGEY MITYAKOV, THE MARSHALL INSTITUTE, THE COST OF CLIMATE REGULATION FOR AMERICAN HOUSEHOLDS 2 (2009), *available at* http://www.marshall.org/pdf/materials/636.pdf. The authors predict that "some form of cap-and-trade system to cut greenhouse gas . . . emissions will be enacted in the U.S. in the coming years." *Id.*

8. President Barack Obama, Inaugural Address 2 (Jan. 21, 2009) (transcript available at 2009 WL 135031).

9. President Barack Obama, Remarks by the President on Clean Energy (Apr. 22, 2009) (transcript available at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-in-Newton-IA) (proposing a "new era of energy exploration").

Battle lines have been drawn on this legislation, with conservative activists, talk radio, and GOP activists organizing heavily against it,[10] while Democratic leadership in Congress, left-wing blogs, and environmental groups heavily support it.[11]

This Essay will demonstrate that a fundamental misinterpretation of economic forces among environmental advocates and their allies in Congress could lead to a regulatory scheme that destroys production and has a harmful effect on poor Americans through job losses and higher energy costs. Part II of this Essay outlines the economic theory supporting the cap-and-trade system set forth in the ACESA. Part III inspects the ACESA and Congressional Budget Office (CBO) estimates to better understand the effect this legislation would have on the national economy. Part IV argues that the ACESA would have a chilling effect on the U.S. economy by raising the cost of energy for all consumers with an exceptionally harmful impact on America's poor and minority communities.

II. BACKGROUND

A. *Cap-and-Trade*

Cap-and-trade was developed by economists as a response to traditional "command and control" regulatory schemes that environmentalists have historically championed, advocating greater reliance "on property

10. Sara Jerome, *Cap and Trade Used to Build E-Mail Lists*, NAT'L J., July 28, 2009, *available at* http://undertheinfluence.nationaljournal.com/2009/07/cap-and-trade-used-to-build-em.php (discussing online activities of anti-climate change legislation advocates and groups). "Ire over cap-and-trade is helping conservative groups grow their Rolodex of supporter e-mail addresses this summer as their online advocacy efforts enjoy unprecedented participation levels." *Id.*; Rob Jordan, *Top 10 Reasons to Oppose Cap and Trade*, FREEDOMWORKS FOUND., Mar. 6, 2009, at 1, http://www.freedomworks.org/files/Top%2010%20cap%20and%20trade_0.pdf (arguing against cap-and-trade regulation). Jordan argues that cap-and-trade regulation has long been an agenda for liberal Americans and "extremist environmentalists." Rob Jordan, *Top 10 Reasons to Oppose Cap and Trade*, FREEDOMWORKS FOUND., Mar. 6, 2009, at 1, http://www.freedomworks.org/files/Top%2010%20cap%20and%20trade_0.pdf. Among the proposed ten reasons to oppose Obama's cap-and-trade plan, Jordan cites rising energy costs for average Americans. *Id.* ("[T]he costs to the average American household would be between $800 and [$1300] by 2015, and then increasing to [$1500] to [$2500] by 2050.").

11. Organizing for America, New Energy for America, http://www.barackobama.com/issues/newenergy/index.php (last visited Nov. 11, 2009) (outlining President Barack Obama's proposal "to put people back to work, fight global warming, increase our energy independence and keep us safe" by, in relevant part, investing in "energy efficiency and conservation"); Ben Smith, *Groups Target GOP On Cap and Trade*, Aug. 25, 2009, POLITICO, http://www.politico.com/news/stories/0809/26410.html (describing a million-dollar advertisement campaign, paid for by the League of Conservation Voters, the Sierra Club, MoveOn.org, and Americans United for Change, targeting House Republicans who did not support the June 2009 energy legislation).

rights and market incentives" to lessen pollution.[12] Emissions, those economists argue,

> [could be reduced] by assigning to individual facilities a property right to release a specified number of emissions that the facility could then either apply to its own emissions or sell to another facility for application to the latter's emissions. If a particular source had the option of either reducing its pollution by a prescribed amount or purchasing the reductions that another facility could achieve less expensively, both environmental protection and economic efficiency would be simultaneously promoted. Those with higher pollution control costs would buy emissions rights from those with lower pollution control costs. Overall emissions would be reduced, and the actual reductions would be achieved by those who could do so less expensively.[13]

Cap-and-trade regulations place a price on pollution, encouraging polluters to find new ways to reduce emissions.[14] Cap-and-trade systems create a ceiling on the amount of pollutants that can be emitted and divide "portions of that cap [among] the various emitters."[15]

Under a cap-and-trade system, an emission permit will be required for every ton of carbon dioxide a producer discharges.[16] The permits allow a

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12. RICHARD J. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW 183 (2004) (illustrating the convergence of pollution control, natural resource law, and property law concepts).

13. *Id.* Lazarus suggests that permitting the purchase and sale of emission rights could lead to greater environmental protection. *Id.* Nonetheless, this emission policy approach was never implemented, as "[s]ome environmentalists questioned the morality of creating [tradable] 'property rights to pollute' at all." *Id.*

14. Environmental Defense Action Fund, Cap and Trade 101, http://www.edf.org/page.cfm?tagID=43849 (last visited Nov. 11, 2009) (explaining "cap-and-trade" economics). The "cap" establishes a limit on the amount of total greenhouse gases one company can discharge into the atmosphere. *Id.* The emissions cap is periodically lowered over time, eventually resulting in the creation of a "low carbon infrastructure." *Id.* The "trade" aspect of this system regulates emissions by monetarily rewarding those who cut their carbon emissions. *Id.* Companies then trade excess emissions among themselves, similar to an economic marketplace. *Id.* This trading system promotes "a strong profit incentive for firms to develop new and innovative technologies." *Id.*

15. Dennis Hirsch et al., *Emissions Trading–Practical Aspects*, *in* GLOBAL CLIMATE CHANGE AND U.S. LAW 627, 629 (Michael B. Gerrard ed., 2007) (describing the difference between cap-and-trade and baseline-credit trading programs). "Cap-and-trade systems set an overall cap on the amount of a given pollutant that can be emitted during a specified period of time." *Id.*

16. Ronald Bailey, *Congress Is Hiding Cap-and-Trade Energy Price Increases*, REASON FOUND., June 10, 2009, http://reason.org/news/show/congress-is-hiding-cap-and-tra (arguing that the permits required by the cap-and-trade system will increase the price of energy).

certain amount of pollution per permit-holder.[17] Producers can meet the regulatory ceiling by reducing their emissions, or they can buy emissions allowances from other producers who have not met their emissions limit and, therefore, have excess allowances to sell.[18]

Some, however, question the moral acquiescence of allowing "'property rights to pollute'" or whether trading will ensure a proper amount of administrative regulation to keep producers from cheating the system.[19] Environmental advocates who favor the traditional "command and control" approach to environmental regulation also caution that for cap-and-trade to be effective, the policy depends upon the participation of a sufficient number of market participants.[20] If there are not enough participants, environmental advocates argue that the emissions trading will not meet the requisite market incentives to actually control pollution.[21]

But in the early 1980s, the EPA instituted a program that allowed gasoline refiners to satisfy lead content regulations through trading.[22] And, in 1990, the Clean Air Act created a nationwide tradable emissions program for acid deposition.[23] In 1998, the EPA added a new provision to the Clean Air Act requiring twenty-two states and the District of Columbia to reduce nitrogen dioxide emissions under a cap-and-trade program for emissions reductions.[24] The U.S. also currently administers the cap-and-trade sulfur dioxide (acid rain) market incentive program.[25]

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17. Dennis Hirsch et al., *Emissions Trading–Practical Aspects*, *in* GLOBAL CLIMATE CHANGE AND U.S. LAW 627, 629 (Michael B. Gerrard ed., 2007) (describing the cap-and-trade system).

18. *Id.*

19. RICHARD J. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW 183 (2004). Critics of cap-and-trade point out that the program will require significant bureaucratic oversight—exactly what the program is supposed to obviate. *Id.* at 202.

20. *Id.* at 201.

21. *Id.* (identifying important characteristics of a successful tradable emission policy). For instance, the Clean Air Act Acid Deposition Program has been largely ineffective due to the fact that public utilities, which are not market participants and, therefore, not susceptible to market forces, are the program's primary participants. *Id.*

22. *Id.* at 200.

23. *Id.* The Clean Air Act program allowed trading for sulfur dioxide emission permits, which reduced emissions to levels lower than in the 1980s and ultimately saved more than one billion dollars annually in compliance costs. *Id.*

24. RICHARD J. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW 200 (2004).

25. Clean Air Act Amedments of 1990 § 401, 42 U.S.C. §§ 7651-7651o (2006) (curbing acidic deposition by reducing sulfuric acid emissions in the United States). The statute's secondary purpose is to stimulate energy conservation practices in the long-run by preventing pollution and encouraging clean and renewable sources of energy. *Id.* Its main mechanism for enforcement is a prescribed pre-determined emission limitation on certain indentified industries at specified deadlines. *Id.*

Thus, in recent years, the United States has embraced several cap-and-trade programs to reduce environmental degradation. The results of these measures have shown that a cap-and-trade program can "work most efficiently when there is a sufficiently stringent cap on overall emissions that creates scarcity in the marketplace."[26]

B. *Current Political Context*

By 2000, the United States emitted the most greenhouse gases of any country in the world, roughly equaling the combined output of China and India.[27] In 2001, the Intergovernmental Panel on Climate Change (IPCC) concluded that in the twentieth century,

> the duration of ice cover of rivers and lakes very likely decreased by about two weeks in mid- and high latitudes of the Northern Hemisphere; that Arctic sea-ice likely thinned by [forty percent] in recent decades in late summer to early autumn; that non-polar glaciers experienced widespread retreat; that permafrost thawed, warmed, and degraded in parts of the polar, sub-polar, and mountainous regions; that El Niño events became more frequent, persistent, and intense; that plant and animal ranges shifted poleward and up in elevation for plants, insects, birds and fish; and that global mean sea level increased at an average annual rate of [one to two] millimeters."[28]

The IPCC also found that carbon dioxide levels increased "from 280 parts per million (ppm)," in 1750, "to 368 ppm in 2000," or by more than thirty percent.[29] The IPCC found that such temperature increases and greater pollution levels are largely due to human activity.[30]

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26. Maria Savasta-Kennedy, *The Newest Hybrid: Notes Toward Standard Certification of Carbon Offsets*, 34 N.C. J. INT'L L. & COM. REG. 851, 859 (2009) (footnote omitted).

27. Michael B. Gerrard, *Introduction and Overview* to GLOBAL CLIMATE CHANGE AND U.S. LAW 1, 6 (Michael B. Gerrard ed., 2007) (listing the greenhouse emissions of several countries). It is projected that by the year 2020, China will surpass the United States as the number one polluter. *Id.* at 7.

28. *Id.* at 4–5 (explaining the findings of the Intergovernmental Panel on Climate Change (IPCC) regarding the effects of pollution). The IPCC also found that carbon dioxide levels increased every year since 1958. *Id.* at 5.

29. *Id.* at 5 (referring to the increase in carbon dioxide in the atmosphere after the pre-industrial period). The IPCC analyzed the increases in temperature and pollution levels and the correlation with the "greenhouse effect." *Id.* The "greenhouse effect" includes "[s]olar radiation [passing] through the atmosphere, [which] is absorbed by the earth's surface, and warms it." *Id.*

30. *Id.* (explaining the causes of increased temperature and pollution levels). According to the author, the fact that human activity is a large component of the increases in temperature and pollution levels is not in controversy. *Id.*

In 2002, the National Academy of Sciences published a study concluding that "'humanity's load corresponded to [seventy percent] of the capacity of the global biosphere in 1961, and grew to 120% in 1999.'"[31] NASA reported that 2005 "was the warmest year in over a century," followed by 1998, 2002, 2003, and 2004.[32] Over the last millennium, the Northern Hemisphere was reported to be the warmest during the late twentieth century.[33] And, in 2006, the National Research Council (NRC) concluded "'with a high level of confidence that global mean surface temperature was higher during the last few decades of the [twentieth] century than during any comparable period during the preceding four centuries.'"[34]

Industrial carbon emissions have been blamed for atmospheric warming via the so-called greenhouse effect, which has caused the polar icecaps to melt and ocean levels to rise.[35] Estimates indicate that humans are responsible for the twenty percent increase in the carbon dioxide level,[36] and the scientific community has reached consensus that "'carbon dioxide levels from human activity probably already affects climate detectably and will drive substantial climate change in the [twenty-first] century.'"[37]

Some environmental advocates question whether environmental activism should result in a decrease in economic growth and reduced living standards.[38] These concerned advocates wonder if "[p]erhaps our social

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31. RICHARD J. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW 13 (2004) (footnote omitted) (analyzing the biochemical flows in the biosphere).

32. Michael B. Gerrard, *Introduction and Overview* to GLOBAL CLIMATE CHANGE AND U.S. LAW 1, 3 (Michael B. Gerrard ed., 2007) (footnote omitted).

33. *Id.*

34. *Id.* (footnote omitted).

35. RICHARD J. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW 8, 20 (2004) (discussing the extent of human influence on climate change). Other man-made contributors to climate change include deforestation, which lowers consumption of carbon dioxide and aerosols that impact the balance of solar radiation in the Earth's atmosphere. *Id.* at 8.

36. *Id.* at 9. Humans are also responsible for transforming forty percent of the Earth's land surface and for using half of the total fresh water available. *Id.*; *see also* RICHARD N.L. ANDREWS, MANAGING THE ENVIRONMENT, MANAGING OURSELVES: A HISTORY OF AMERICAN ENVIRONMENTAL POLICY 353 (1999).

37. RICHARD J. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW 10 (2004) (footnote omitted) (noting that increased levels in carbon dioxide are the most significant human alteration to the Earth's atmosphere). While it is possible to predict levels of carbon dioxide emissions in the coming years, it is uncertain how these emissions will impact climate change and, in turn, human health and biodiversity. *Id.* Human activity has not only had a global impact, but has caused local problems as well. *Id.* For example, low concentration of trace metal pollutants create serious threats to the environment in certain geographical locations. *Id.*

38. THOMAS MORE HOBAN & RICHARD OLIVER BROOKS, GREEN JUSTICE: THE ENVIRONMENT AND THE COURTS 5 (1987).

goals of higher employment rates and an ever-increasing standard of living *do* conflict with our newly enunciated goals of maintaining and protecting a clean environment."[39] Thus, environmentalism has come to encompass not only trees, water, and animals, but also analyses of "corporate and governmental responsibility."[40]

The environmental movement's argument has always had economic overtones; however, predictions of economic impact have become much more austere in recent years. For instance, Patrick Hossay assails the "small, privileged minority of the earth's residents who live in excess, consuming huge amounts of the earth's resources."[41] Since a minority of the global population consumes the majority of the earth's resources, the majority lacks "the basic necessities of life."[42] The excessive use of resources by a few and the fact that many are deprived of resources are not "separate problems: the destruction of the global ecosystem and the violent inequity in the distribution of wealth and resources are two sides of the same coin; we cannot address one without addressing the other."[43] The gap in energy use between rich and poor countries is astonishing.[44]

The 111th Congress and, especially, Speaker of the House Nancy Pelosi have made environmental protection a top agenda item.[45] But environmental protection will be a challenging task for Congress because the largest share of greenhouse gas production contributing to global warming is carbon dioxide, which has increased by more than one-third since

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39. *Id.* (emphasis in original) (addressing growing concerns among environmentalists that pro-environment reforms may create new social and economic problems).

40. *Id.* at 17–18.

41. PATRICK HOSSAY, UNSUSTAINABLE: A PRIMER FOR GLOBAL ENVIRONMENTAL AND SOCIAL JUSTICE 2 (2006) (finding that only a small fraction of the planet's inhabitants consume the majority of the its resources).

42. *Id.*

43. *Id.* (emphasizing that, in order to rectify the destruction of the ecosystem, it is necessary to also address the unequal distribution of wealth and resources). The environmental situation is even more urgent than it may appear because the gap in distribution between the rich and the poor is getting wider. *Id.* at 3. For example, the disparity in access to energy and energy-related resources has doubled in thirty years. *Id.* And, perhaps most alarming, about one quarter of the Earth's population lacks food and other necessary resources. *Id.* at 2.

44. "The wealthiest 20% consume 84% of all paper products; the poorest consume 1%. The wealthiest 20% own 87% of the world's vehicles; the poorest 20% have less than 1%." PATRICK HOSSAY, UNSUSTAINABLE: A PRIMER FOR GLOBAL ENVIRONMENTAL AND SOCIAL JUSTICE 3 (2006) (footnote omitted). "Even cautious estimates put the most destructive effects of global warming only a couple of decades away." *Id.* at 7.

45. *See* Press Release, Henry Waxman, U.S. Rep., House Passes Historic Waxman-Markey Clean Energy Bill (June 26, 2009), *available at* http://waxman.house.gov/News/DocumentSingle.aspx?DocumentID=134768 (noting Congress's commitment to protect the environment).

the beginning of the Industrial Revolution due to the "combustion of fossil fuels in cars, aircraft, power plants, and factories."[46] The U.S. contributes more than "[ten] billion [tons] of carbon dioxide into the atmosphere every year,"[47] and eighty-five percent of U.S. energy is derived from fossil fuels.[48]

III. THE ACESA

According to the Congressional Research Service, the ACESA

> [a]mends the Public Utility Regulatory Policies Act of 1978 (PURPA) to establish a combined efficiency and renewable electricity standard that requires each retail electric supplier that sells more than [four] million megawatt hours of electricity to consumers for purposes other than resale to supply an increasing percentage of its demand each year . . . from a combination of electricity savings and renewable electricity.[49]

A. *Cap-and-Trade*

The centerpiece of the ACESA is the establishment of a national cap-and-trade program designed to create economic incentives for energy producers to begin using low-carbon energy alternatives by capping the amount of greenhouse gas (GHG) emissions[50] companies can emit each year.[51] The ACESA would limit the quantity of certain GHGs, most im-

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46. PATRICK HOSSAY, UNSUSTAINABLE: A PRIMER FOR GLOBAL ENVIRONMENTAL AND SOCIAL JUSTICE 5 (2006).

47. *Id.* at 6.

48. Nicolas Loris & Ben Lieberman, *Cap and Trade: A Handout for Corporations and a Huge Tax on Consumers*, Web Memorandum #2476, THE HERITAGE FOUND., June 17, 2009, at 1, http://www.heritage.org/Research/EnergyandEnvironment/upload/wm_2476.pdf.

49. LIBR. OF CONG., THOMAS, http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR02454:@@@D&summ2=M& (last visited Nov. 11, 2009) (summarizing the requirements of the ACESA).

50. U.S. Environmental Protection Agency, Greenhouse Gas Emissions, http://www.epa.gov/climatechange/emissions/index.html (last visited Nov. 11, 2009) (defining greenhouse gases). Greenhouse gases reach the atmosphere either through naturally occurring processes or human activity. *Id.* Examples of greenhouse gases emitted by human activities include: carbon dioxide, methane, nitrous oxide, and fluorinated gases. *Id.*

51. OFFICE OF ATMOSPHERIC PROGRAMS, U.S. ENVIRONMENTAL PROTECTION AGENCY, EPA ANALYSIS OF THE AMERICAN CLEAN ENERGY AND SECURITY ACT OF 2009 H.R. 2454 IN THE 111TH CONGRESS, at 6 (2009), http://www.epa.gov/climatechange/economics/pdfs/HR2454_Analysis.pdf (analyzing the ACESA). "The cap gradually reduces covered greenhouse gas emissions to [seventeen] percent below 2005 levels by 2020, and [eighty-three] percent below 2005 levels by 2050." *Id.*; Ronald Bailey, *Congress Is Hiding Cap-and-Trade Energy Price Increases*, THE REASON FOUND., June 10, 2009, http://rea-

portantly carbon dioxide,[52] emitted by energy producers from 2012 until 2050.[53] Under the bill, the Environmental Protection Agency (EPA) would issue allowances to determine the amount of GHGs businesses can emit,[54] and those businesses can use or trade the allowances to other covered entities that have exceeded their own allotted allowances.[55] This more flexible alternative to traditional "command and control" regulations allows emitters to determine whether to reduce pollution at their own facility or to purchase the right to pollute above their limit by paying someone else for unused allowances.[56]

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son.org/news/show/congress-is-hiding-cap-and-tra (discussing ACESA's cap-and-trade program and arguing that the proposal would increase the price of energy for individual consumers); Cap and Trade, http://blogs.abcnews.com/scienceandsociety/2009/05/cap-and-trade.html (May 22, 2009, 10:42 EST) (discussing ACESA). The bill is the first federally mandated regulation to curb greenhouse gas emissions. Cap and Trade, http://blogs.abcnews.com/scienceandsociety/2009/05/cap-and-trade.html (May 22, 2009, 10:42 EST). Its objective is to break the United States' dependence on foreign oil and to cut global warming pollution. *Id.* The bill's opponents accuse Congress of implementing a "covert energy tax" at a time when the economy is struggling. *Id.*

52. "The most important greenhouse gas (GHG) is carbon dioxide. It is emitted in by far the greatest quantities." Michael B. Gerrard, *Introduction and Overview* to GLOBAL CLIMATE CHANGE AND U.S. LAW 1, 5 (Michael B. Gerrard ed., 2007).

53. CONG. BUDGET OFFICE, COST ESTIMATE: H.R. 2454 AMERICAN CLEAN ENERGY AND SECURITY ACT OF 2009, at 1 (2009), http://www.cbo.gov/ftpdocs/102xx/doc10262/hr2454.pdf.

54. *Id.* (stating that the government allowances "would be auctioned by the federal government, and the remainder would be distributed at no charge").

55. Gregory Gotwald, Note, *Cap-and-Trade Systems, with or Without New Source Review? An Analysis of the Proper Statutory Framework for Future Electric Utility Air Pollution Regulation*, 28 VT. L. REV. 423, 440 (2004) (explaining how the cap-and-trade program actually unfolds in practice); Editorial, *The Cap and Tax Fiction: Democrats Off-Loading Economics to Pass Climate Change Bill*, WALL ST. J., June 26, 2009, at A12, *available at* http://online.wsj.com/article/SB124588837560750781.html (predicting that companies will need to purchase expensive allowances once they overstep their emissions limit). As the cap on emissions begins to tighten, the price of allowances will rise exponentially. Editorial, *The Cap and Tax Fiction: Democrats Off-Loading Economics to Pass Climate Change Bill*, WALL ST. J., June 26, 2009, at A12, *available at* http://online.wsj.com/article/SB124588837560750781.html. Naturally, the extra cost of the allowances will trickle down to the consumer. *Id.* Faced with growing energy prices, consumers will be forced to minimize their use of electricity. *Id.*

56. David M. Driesen, *Trading and Its Limits*, 14 PENN ST. ENVTL. L. REV. 169, 169 (2006) (explaining emissions-trading). Emissions-trading has become a growing trend that has spread internationally, but there is a divide between experts on the effects such trading has on the environment and the economy. *Id.* Trading advocates argue that the benefits of emissions trading are comparable to those of traditional regulation without the high cost. *Id.* Opponents, however, argue that emissions-trading only has beneficial results when emission reductions can be monitored, which can prove to be a near impossible task for some pollutants. *Id.* at 169-70.

B. *Estimates*

Some analysts predict the ACESA will trigger a seventeen percent drop in U.S. carbon emissions by 2020 and over eighty percent by 2050.[57] The EPA calculates that the ACESA will postpone 2015 consumption levels until 2040.[58] In an analysis of the ACESA, the EPA found:

> The share of low- or zero-carbon primary energy (including nuclear, renewables, and [carbon capture and storage, or CCS]) rises substantially under the policy to [eighteen percent] of primary energy by 2020, [twenty-six percent] by 2030, and to [thirty-eight percent] by 2050, whereas without the policy the share would remain steady at [fourteen percent]. Increased energy efficiency and reduced energy demand simultaneously reduces primary energy needs by [seven percent] in 2020, [ten percent] in 2030, and [twelve percent] in 2050.[59]

So, for instance, under the ACESA, a wind farm will have far fewer regulatory roadblocks than would the traditional power plant using carbon-based fuels.[60] The government intervenes to stack the deck in favor of the favored industry—the wind farm.[61]

IV. ANALYSIS

This Essay contends that, according to immutable economic principles governing free markets, the higher cost of energy under the ACESA will result in a reduction in economic growth. This reduction in economic growth will negatively impact America's poor.

A. *Basic Economic Rules*

The true impact of the ACESA becomes clear through an examination of fundamental economic principles. Ultimately, all economic phenomena can be traced to individuals acting in order to satisfy their prefer-

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57. David A. Fahrenthold, *Environmentalists Slow to Adjust in Climate Debate*, WASH. POST, Aug. 31, 2009, *available at* 2009 WLNR 16987495 (commenting on the environmentalists' struggle to get a cap-and-trade bill passed in the Senate); Press Release, Henry Waxman, U.S. Rep., House Passes Historic Waxman-Markey Clean Energy Bill (June 26, 2009), *available at* http://waxman.house.gov/News/DocumentSingle.aspx?DocumentID=134768.

58. OFFICE OF ATMOSPHERIC PROGRAMS, U.S. ENVIRONMENTAL PROTECTION AGENCY, EPA ANALYSIS OF THE AMERICAN CLEAN ENERGY AND SECURITY ACT OF 2009 H.R. 2454 IN THE 111TH CONGRESS, at 3 (2009), http://www.epa.gov/climatechange/economics/pdfs/HR2454_Analysis.pdf.

59. *Id.*

60. *Id.* at 24.

61. *See id.* (listing wind as a preferred renewable source of energy).

ences for a good or service.[62] Those individuals, acting singularly, are what determine the market price of goods or services.[63] The fundamental principle of scarcity relies on the objective reality that people cannot possess everything they desire.[64] The price of goods and services depend on the varying conditions of supply and demand.[65]

When the cost of production increases, the cost of goods produced also increases.[66] The effect of higher prices for consumers is less consumption and, therefore, a decrease in demand.[67] Producers, responding to lower demand, produce less of that product.[68] Government intervention in the market is necessarily government regulation of prices, which affects both supply and demand.[69] As William Beach, director of the Center for Data Analysis at the Heritage Foundation, puts it: "Nearly everyone lives in the massive currents of the rise and tumble of great companies, and the ebb and flow of everyday working life. These are the economic rhythms that shape people's lives and punctuate their everyday work . . . ."[70] In a market economy, consumers wield considerable influence through their decisions about what products, if any, to consume, and the competition for profit helps ensure that all potential resources are used.[71]

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62. Dawinder S. Sidhu, *The Immorality and Inefficiency of an Efficient Breach*, 8 TENN. J. BUS. L. 61, 68–70 (2006).

63. *See* Henry E. Smith, *Mind the Gap: The Indirect Relation Between Ends and Means in American Property Law*, 94 CORNELL L. REV. 959, 965–66 (2009) (stating that consumers can pick their own prices for goods and services in order to meet their own goals).

64. Arthur B. Laffer, *Violate at Your Own Risk: The Immutability of Economic Laws*, TEX. PUB. POL'Y FOUND., 2008, at 5, http://www.texaspolicy.com/pdf/2008-TE-Lesson1-posting.pdf (explaining that the principle of scarcity concerns the choices and alternatives consumers use in satisfying their desires). "People have to choose, and such choices necessarily involve tradeoffs." *Id.*

65. *Id.* (explaining that people change their desires based on what is actually available).

66. DAVID W. KREUTZER ET AL., THE HERITAGE FOUND., THE ECONOMIC CONSEQUENCES OF WAXMAN-MARKEY: AN ANALYSIS OF THE AMERICAN CLEAN ENERGY AND SECURITY ACT OF 2009, at 11 (2009), http://www.heritage.org/Research/Energyand Environment/upload/CDA_09-041.pdf.

67. *Id.* (arguing that increased energy costs will result in decreased production in the energy-intensive sector and decreased demand in other sectors).

68. *Id.*

69. *Id.* (showing how the ACESA will have a negative effect on supply and demand).

70. William W. Beach, Dir., Ctr. for Data Analysis, The Heritage Found., Heritage Foundation Lecture: Why Taxes Affect Economic Growth 2 (Aug. 17, 1998) (transcript available at http://www.heritage.org/Research/Taxes/upload/hl_624.pdf).

71. ISRAEL M. KIRZNER, LUDWIG VON MISES: THE MAN AND HIS ECONOMICS 109 (2001) (describing consumer sovereignty). "It is by [the consumer's] decisions to buy or to refrain from buying that the consumer controls the pattern of production." *Id.*

Unfortunately, unnecessary government regulations "raise the cost of producing goods and services and make innovation and invention more expensive."[72] Furthermore, tax rates matter to economic growth because if "an additional hour of labor or dollar of capital [means] having to pay more taxes because that additional unit is taxed at a higher rate, then staying put may make good sense."[73] While this simple illustration may seem elementary, we all make economic choices every day that add up and affect the economy as a whole. Therefore, when a decision is made by a few billion people simultaneously, large economies succumb to a systemic lack of growth.[74]

B. *Direct Economic Impact*

The very *purpose* of the ACESA is to raise the price of energy.[75] An increase in the cost of high-carbon energy, such as coal and oil, is designed to be the market force driving consumers and energy-providers toward low-carbon energies like wind and solar power.[76] President Barack Obama himself stated that "electricity rates would necessarily skyrocket" under this legislation.[77] The Obama administration concluded that a national cap-and-trade program would cost taxpayers as much as two hundred billion dollars per year, the economic equivalent of a fifteen

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72. William W. Beach, Dir., Ctr. for Data Analysis, The Heritage Found., Heritage Foundation Lecture: Why Taxes Affect Economic Growth 3 (Aug. 17, 1998) (transcript available at http://www.heritage.org/Research/Taxes/upload/hl_624.pdf).

73. *Id.* at 2.

74. *See id.* at 4 (describing the domino effect that high tax rates have on economic growth). Beach explains that "[i]n tax economics, it is the marginal unit or the next piece of the decision puzzle that really matters." *Id.* Therefore, it is imperative to understand that an "individual decision to do more with his or her labor or capital is crucial to [economic] change." *Id.*

75. Ronald Bailey, *Congress Is Hiding Cap-and-Trade Energy Price Increases*, THE REASON FOUND., June 10, 2009, http://reason.org/news/show/congress-is-hiding-cap-and-tra; DAVID W. KREUTZER ET AL., THE HERITAGE FOUND., THE ECONOMIC CONSEQUENCES OF WAXMAN-MARKEY: AN ANALYSIS OF THE AMERICAN CLEAN ENERGY AND SECURITY ACT OF 2009, at 8 (2009), http://www.heritage.org/Research/EnergyandEnvironment/upload/CDA_09-041.pdf; *see also* CONG. BUDGET OFFICE, COST ESTIMATE: H.R. 2454 AMERICAN CLEAN ENERGY AND SECURITY ACT OF 2009, at 19 (2009), http://www.cbo.gov/ftpdocs/102xx/doc10262/hr2454.pdf ("[G]ross receipts to the federal government from the auction and free allocation of allowances under the bill would total $298 billion over the 2010-2014 period and $973 billion over the 2010-2019 period.").

76. Ronald Bailey, *Congress Is Hiding Cap-and-Trade Energy Price Increases*, THE REASON FOUND., June 10, 2009, http://reason.org/news/show/congress-is-hiding-cap-and-tra.

77. *Political Headlines* (FOX News television broadcast Mar. 3, 2009) (transcript available at 2009 WLNR 4110910) (quoting then-presidential candidate Barack Obama in a January 17, 2008 interview with the *San Francisco Chronicle*).

percent raise in personal income tax, or $1761 annually for every U.S. household.[78]

The EPA estimates the annual energy cost increase per household under the ACESA to be between $80 and $111.[79] However, the EPA's finding that the ACESA would have only "a relatively modest impact on U.S. consumers" assumes that higher energy bills will be mitigated by rebates to consumers.[80] In short, the federal government, through the ACESA, "creates a scarce new commodity—in this case the right to emit carbon—and then mandates that businesses buy it," with costs filtering down to all consumers.[81]

C. *Problems with the CBO Analysis*

The Energy Information Administration (EIA) and the CBO calculate that the ACESA's annual cost per household by 2020 will rise by $165 and $175, respectively.[82] The chief problem with the CBO analysis, however, is that it ignores the broad economic consequences that energy re-

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78. Obama Admin: Cap and Trade Could Cost Families $1,761 a Year, http://www.cbsnews.com/blogs/2009/09/15/taking_liberties/entry5314040.shtml (Sept. 15, 2009, 21:03 EST).

79. OFFICE OF ATMOSPHERIC PROGRAMS, U.S. ENVIRONMENTAL PROTECTION AGENCY, EPA ANALYSIS OF THE AMERICAN CLEAN ENERGY AND SECURITY ACT OF 2009 H.R. 2454 IN THE 111TH CONGRESS, at 4 (2009), http://www.epa.gov/climatechange/economics/pdfs/HR2454_Analysis.pdf.

80. *Id.*

81. Editorial, *Who Pays for Cap and Trade?*, WALL ST. J., Mar. 9, 2009, at A18, *available at* http://online.wsj.com/article/SB123655590609066021.html (arguing that cap-and-trade is a deeply unequal system for redistributing climate costs). President Obama's budget director, Peter Orszag, told Congress in 2008 that for cap-and-trade to work successfully, "price increases are essential." *Id.*; *see also* President Barack Obama, Remarks by the President on Clean Energy (Apr. 22, 2009) (transcript available at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-in-Newton-IA) (proposing a cap-and-trade approach to reducing carbon pollution). On Earth Day in 2009, President Obama stated, "Over time, as the cap on greenhouse gases is lowered, the commodity becomes scarcer—and the price goes up. And year by year, companies and consumers would have greater incentive to invest in clean energy and energy efficiency as the price of the status quo became more expensive." President Barack Obama, Remarks by the President on Clean Energy (Apr. 22, 2009) (transcript available at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-in-Newton-IA). Obama argued that this approach would make wind and solar power more economical, which would in turn make clean energy more economical overall. *Id.*

82. OFFICE OF INTEGRATED ANALYSIS & FORECASTING, ENERGY INFO. ADMIN., U.S. DEP'T OF ENERGY, ENERGY MARKET AND ECONOMIC IMPACTS OF H.R. 2454, THE AMERICAN CLEAN ENERGY AND SECURITY ACT OF 2009, at 32 (2009), http://www.eia.doe.gov/oiaf/servicerpt/hr2454/pdf/sroiaf(2009)05.pdf. "Increases in light-duty vehicle energy expenditures account for about [eighty-one] percent of the increase in 2020. . . . In 2030, the cost to the consumers increases to $501 per household . . . with the non-transportation costs accounting for about [fifty-two] percent of the increase." *Id.*; Bryan Walsh, *What the*

striction would impose on the U.S. economy, instead favoring an approach that only examines the day-to-day operational costs of running the cap-and-trade scheme.[83] The CBO's analysis is a "one-year snapshot" of taxes extending to infinity and ignoring the ACESA's reductions in the emissions cap over time.[84] Further, the CBO's estimates are based only on the year 2020—before strong regulations set in.[85] In a footnote to its report, the CBO states, "The resource cost does not indicate the potential decrease in gross domestic product (GDP) that could result from the cap."[86]

In addition, "[a]s the cap is tightened and companies are stripped of initial opportunities to 'offset' their emissions, the price of permits will skyrocket beyond the CBO estimate of twenty-eight dollars per ton of carbon."[87] Therefore, the permit cost will pass to the consumer.[88] In 2015, the cost of a carbon dioxide allowance is estimated to be $24 per metric ton.[89] By 2030, the allowance cost could increase to $49 per metric ton of carbon dioxide, and by 2050, the allowance cost could reach $131 per metric ton.[90] In 2008, former CBO director Peter Orszag (currently President Obama's budget director) told Congress, "'Those price increases are essential to the success of a cap-and-trade program.'"[91] The CBO analysis understates the long-term economic effect of the ACESA and is simply not a realistic measurement of its true impact.

Energy Bill Really Means for CO2 Emissions, TIME, June 27, 2009, *available at* http://www.time.com/time/health/article/0,8599,1907528,00.html.

83. Editorial, *The Cap and Tax Fiction: Democrats Off-Loading Economics to Pass Climate Change Bill*, WALL ST. J., June 26, 2009, at A12, *available at* http://online.wsj.com/article/SB124588837560750781.html (criticizing the CBO's approach in analyzing the economic implications of the allowance trading program).

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. Editorial, *The Cap and Tax Fiction: Democrats Off-Loading Economics to Pass Climate Change Bill*, WALL ST. J., June 26, 2009, at A12, *available at* http://online.wsj.com/article/SB124588837560750781.html.

89. DAVID MONTGOMERY ET AL., CRA INT'L, IMPACT ON THE ECONOMY OF THE AMERICAN CLEAN ENERGY AND SECURITY ACT OF 2009 (H.R. 2454), at 3–4 (2009), http://www.nationalbcc.org/images/stories/documents/CRA_Waxman-Markey_Aug2008_Update_Final.pdf.

90. *Id.* at 4.

91. Editorial, *Who Pays for Cap and Trade?*, WALL ST. J., Mar. 9, 2009, at A18, *available at* http://online.wsj.com/article/SB123655590609066021.html.

D. *The Higher Cost of Energy*

The artificial increases in the price of carbon-based energy will force consumers to pay a higher price for the same amount of energy.[92] The ACESA gambles on the premise that the expected reduction in production and consumption due to the higher cost of carbon-based fuels will be offset by an increase in the use of alternative energies.[93] Some economists argue that utility bills could even decline in the first years of the policy due to a greater reliance on cleaner alternatives or to less energy consumption overall.[94] As one author explains:

> Initially one-quarter of [carbon dioxide] emission allowances would be auctioned to recipients, raised to more than two-thirds by 2031. Fitch Ratings estimated that the initial phase of U.S. cap-and-trade [carbon dioxide] emission reductions will cost electric utilities approximately $6.5 billion annually. The [ACESA will result in] a similar reduction.[95]

More sober analyses, however, belie those predictions. The Heritage Foundation calculates that the average family of four will pay just under $500 more per year for residential electricity by 2012 and more than $1000 per year for both gasoline and electricity by 2035.[96] The price of

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92. DAVID W. KREUTZER ET AL., THE HERITAGE FOUND., THE ECONOMIC CONSEQUENCES OF WAXMAN-MARKEY: AN ANALYSIS OF THE AMERICAN CLEAN ENERGY AND SECURITY ACT OF 2009, at 8 n.7 (2009), http://www.heritage.org/Research/EnergyandEnvironment/upload/CDA_09-041.pdf (noting the effects of artificial increases in carbon-based fuel prices). The incentive to consume and develop clean energy technology "is policy-induced and is not driven by the real fundamental incentive of relative costs to relative benefits." *Id.* Consequently, the incentive handicaps the competitive carbon-based energy sources to open the market for clean energy. *Id.* In other words, the ACESA exchanges economic efficiency for environmental efficiency. *Id.*

93. *Id.* at 8 (explaining the goals of the ACESA). Essentially, the ACESA seeks to reduce both consumption and production of carbon-based energy and, in exchange, increases supply and demand of alternative energy sources. *Id.* Fueling the United States economy by clean energy, however, may not lead to the ultimate goal of reducing carbon emissions. *Id.*

94. DAVID MONTGOMERY ET AL., CRA INT'L, IMPACT ON THE ECONOMY OF THE AMERICAN CLEAN ENERGY AND SECURITY ACT OF 2009 (H.R. 2454), at 4 (2009), http://www.nationalbcc.org/images/stories/documents/CRA_WaxmanMarkey_Aug2008_Update_Final.pdf.

95. Steven Ferrey, *Auctioning the Building Blocks of Life: Carbon Auction, the Law, and Global Warming*, 23 NOTRE DAME J.L. ETHICS & PUB. POL'Y 317, 369 (2009) (footnotes omitted). Thus, a carbon allowance auction is another way of levying a tax against carbon emissions. *Id.*

96. DAVID W. KREUTZER ET AL., THE HERITAGE FOUND., THE ECONOMIC CONSEQUENCES OF WAXMAN-MARKEY: AN ANALYSIS OF THE AMERICAN CLEAN ENERGY AND SECURITY ACT OF 2009, at 10 (2009), http://www.heritage.org/Research/Energyand Environment/upload/CDA_09-041.pdf.

natural gas will rise by 55%, and the price of heating oil will rise by 56%.[97] Shockingly, the price of electricity will rise by 90%.[98] Under the ACESA, the price of gasoline will increase to an estimated "19 cents per gallon in 2015," rising an additional "7% (38 cents per gallon) in 2030," followed "by 16% (95 cents per gallon) in 2050."[99]

E. *Layoffs*

On the evening of the close vote on the ACESA in the House, Speaker Nancy Pelosi addressed the House floor, urging her colleagues to support the bill by stating: "Remember these four words for what this legislation means: jobs, jobs, jobs, and jobs. Let's vote for jobs."[100] But the ACESA will likely have the opposite effect.[101] Higher energy prices drive up the cost of production in all parts of the economy, influencing consumers to cut back their consumption and prompting producers to reduce production.[102] The ACESA assumes cleaner fuels will fill the gap,[103] but it ignores the likely impact of less production—a decline in job creation, reduced income, and less economic growth.[104]

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97. *Id.* at 14.

98. *Id.*

99. DAVID MONTGOMERY ET AL., CRA INT'L, IMPACT ON THE ECONOMY OF THE AMERICAN CLEAN ENERGY AND SECURITY ACT OF 2009 (H.R. 2454), at 4 (2009), http://www.nationalbcc.org/images/stories/documents/CRA_WaxmanMarkey_Aug2008_Update_Final.pdf.

100. Speaker of the U.S. House of Representatives Nancy Pelosi, Address to the House Floor for the ACESA (June 26, 2009) (transcript available at http://speaker.house.gov/newsroom/speeches?id=0204).

101. DAVID W. KREUTZER ET AL., THE HERITAGE FOUND., THE ECONOMIC CONSEQUENCES OF WAXMAN-MARKEY: AN ANALYSIS OF THE AMERICAN CLEAN ENERGY AND SECURITY ACT OF 2009, at 9–10 (2009), http://www.heritage.org/Research/EnergyandEnvironment/upload/CDA_09-041.pdf. The study predicts widespread but uneven job losses. *Id.*

102. Editorial, *The Cap and Tax Fiction: Democrats Off-Loading Economics to Pass Climate Change Bill*, WALL ST. J., June 26, 2009, at A12, *available at* http://online.wsj.com/article/SB124588837560750781.html (predicting a decrease in consumer spending as a result of energy cost increases).

103. *See* CONG. BUDGET OFFICE, COST ESTIMATE: H.R. 2454 AMERICAN CLEAN ENERGY AND SECURITY ACT OF 2009, at 9 (2009), http://www.cbo.gov/ftpdocs/102xx/doc10262/hr2454.pdf (explaining that the ACESA will provide incentives for fuel-efficient vehicles and other energy-reducing practices). "H.R. 2454 would establish a Clean Energy Deployment Administration (CEDA) within [the Department of Energy], which would be authorized to provide direct loans, loan guarantees, and letters of credit for privately sponsored projects using clean energy technologies." *Id.* Additionally, under the program, the government will provide loans to automobile manufacturers that are researching and developing more fuel-efficient vehicles. *Id.*

104. Editorial, *The Cap and Tax Fiction: Democrats Off-Loading Economics to Pass Climate Change Bill*, WALL ST. J., June 26, 2009, at A12, *available at* http://online.wsj.com/

According to the Heritage Foundation's Center for Data Analysis, higher energy prices will reduce the "GDP by nearly $200 billion" a year for the first few years, growing to over $400 billion in losses by 2025, and peaking at over $700 billion lost by 2031.[105] Between 2012 and 2035, the GDP will have lost $9.4 trillion.[106] In 2015, declining consumption will drive GDP to just under one percent ($110 billon) below the baseline level, one percent ($250 billion) under the baseline level by 2030, and 1.5 percent ($630 billion) under the baseline level in 2050.[107]

The Heritage Foundation's analysis reveals that the ACESA will eliminate an average of 1.1 million jobs per year.[108] In the program's first

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article/SB124588837560750781.html (summarizing the consequences of high energy prices). A Heritage Foundation study compared economic conditions both with and without the proposed carbon tax. *Id.* "Under this more comprehensive scenario, [the Heritage Foundation] found that the ACESA would cost the economy $161 billion in 2020 . . . ." *Id.*; *see* Nicolas Loris & Ben Lieberman, *Cap and Trade: A Handout for Corporations and a Huge Tax on Consumers*, Web Memorandum #2476, THE HERITAGE FOUND., June 17, 2009, at 2–3, http://www.heritage.org/Research/EnergyandEnvironment/upload/wm_2476.pdf (predicting the impact of higher energy prices).

105. DAVID W. KREUTZER ET AL., THE HERITAGE FOUND., THE ECONOMIC CONSEQUENCES OF WAXMAN-MARKEY: AN ANALYSIS OF THE AMERICAN CLEAN ENERGY AND SECURITY ACT OF 2009, at 9 (2009), http://www.heritage.org/Research/EnergyandEnvironment/upload/CDA_09-041.pdf (discussing additional adverse effects on GDP). Although annual losses are predicted to decrease after 2032, the ACESA will continue to create a yearly reduction in GDP at nearly a six hundred billion dollar clip through 2035. *Id.*; *see also* BRYAN BUCKLEY & SERGEY MITYAKOV, GEORGE C. MARSHALL INST., THE COST OF CLIMATE REGULATION FOR AMERICAN HOUSEHOLDS 3 (2009), http://www.marshall.org/pdf/materials/636.pdf (reviewing climate regulation's impact on GDP). Current varying estimates of GDP losses predict "a 0.3% to 3% drop in GDP below the business-as-usual projections in 2015 and a 1% to 10% drop in 2050." BRYAN BUCKLEY & SERGEY MITYAKOV, GEORGE C. MARSHALL INST., THE COST OF CLIMATE REGULATION FOR AMERICAN HOUSEHOLDS 3 (2009), http://www.marshall.org/pdf/materials/636.pdf. The discrepancy in estimates can be traced to how new technology and clean energy development, among other things, are integrated into estimates. *Id.* All estimates, though, predict a constant and consistent GDP drop. *Id.*

106. DAVID W. KREUTZER ET AL., THE HERITAGE FOUND., THE ECONOMIC CONSEQUENCES OF WAXMAN-MARKEY: AN ANALYSIS OF THE AMERICAN CLEAN ENERGY AND SECURITY ACT OF 2009, at 9 (2009), http://www.heritage.org/Research/EnergyandEnvironment/upload/CDA_09-041.pdf.

107. DAVID MONTGOMERY ET AL., CRA INT'L, IMPACT ON THE ECONOMY OF THE AMERICAN CLEAN ENERGY AND SECURITY ACT OF 2009 (H.R. 2454), at 5 (2009), http://www.nationalbcc.org/images/stories/documents/CRA_Waxman-Markey_Aug2008_Update_Final.pdf.

108. DAVID W. KREUTZER ET AL., THE HERITAGE FOUND., THE ECONOMIC CONSEQUENCES OF WAXMAN-MARKEY: AN ANALYSIS OF THE AMERICAN CLEAN ENERGY AND SECURITY ACT OF 2009, at 9 (2009), http://www.heritage.org/Research/EnergyandEnvironment/upload/CDA_09-041.pdf ("Instead of creating jobs, [the ACESA] is a job destroyer."). "Because the distribution of energy-intensive jobs across the country is unequal, some states and congressional districts will be hit particularly hard." *Id.* at 10.

year, unemployment will increase by nearly two million in 2012 and to 2.5 million in 2035.[109] By 2050, the U.S. economy can expect to lose about 2.2 million jobs each year, despite expected gains in "green jobs."[110] American workers can expect to see their wages decline under the ACESA—the average worker earning "approximately $250 less by 2015, $510 less by 2030, and [$1250] less by 2050 . . . ."[111]

Unfortunately, this misguided legislation places America's poor firmly in its crosshairs. Higher prices on goods and utilities places an acute burden on the poor because they spend a much higher percentage of their income on basic needs.[112] We can expect an economic contraction to have a disproportionate negative impact on racial minorities as well,[113] as minorities make up the majority of the thirteen million low-income families with children in the U.S.[114] Four million of those families are Hispanic and about three million are Black.[115]

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109. Karen A. Campbell & David W. Kruetzer, *Waxman-Markey Global Warming Bill: Economic Impact by Congressional District*, Web Memorandum #2504, THE HERITAGE FOUND., June 25, 2009, at 1, http://www.heritage.org/Research/EnergyandEnvironment/upload/wm_2504-2.pdf.

110. DAVID MONTGOMERY ET AL., CRA INT'L, IMPACT ON THE ECONOMY OF THE AMERICAN CLEAN ENERGY AND SECURITY ACT OF 2009 (H.R. 2454), at 4 (2009), http://www.nationalbcc.org/images/stories/documents/CRA_WaxmanMarkey_Aug2008_Update_Final.pdf.

111. *Id.*

112. VINCA LAFLEUR ET AL., BROOKINGS INST., DOUBLE JEOPARDY: WHAT THE CLIMATE CRISIS MEANS FOR THE POOR 8 (2008), http://www.brookings.edu/~/media/Files/rc/reports/2009/02_climate_change_poverty/02_climate_change_poverty.pdf (detailing the basic needs that poor families will have to forgo in the case of climate shock).

> [T]he poor are especially vulnerable to climate shocks because they have such meager resources to fall back on. When faced with rising prices of food or fuel, the wealthy can cope by curbing consumption or dipping into savings. But for the poorest families, which spend [fifty] to [eighty] percent of their income just to get enough food to survive, rising prices force life-altering choices like pulling children out of school or selling precious livestock—choices that tighten the shackles of poverty beyond any chance of escape.

Id.

113. Algernon Austin, *What a Recession Means for Black America*, Issue Brief #241, ECON. POLICY INST., Jan. 18, 2008, http://www.epi.org/publications/entry/ib241/.

114. MARGARET C. SIMMS ET AL., THE URBAN INST., RACIAL AND ETHNIC DISPARITIES AMONG LOW-INCOME FAMILIES 1 (2009), http://www.urban.org/uploadedpdf/411936_racialandethnic.pdf.

115. *Id.*

F. *Poverty*

The poverty level[116] in the U.S. stands at 13.2%, yet more than 20% of American Hispanics live in poverty.[117] Black Americans are similarly situated, with the poverty rate for Black individuals exceeding that of the national poverty rate for all other races.[118] Of the fifty-two congressional districts with at least twenty percent of their population at or below the poverty level, the average Gross State Product (GSP) loss in 2012 is more than $322 million for a total of $16.7 billion in lost product.[119] The average 2012 GSP loss in the nineteen congressional districts with median household incomes below $35,000 per year is $310 million, totaling more than $5 billion dollars.[120]

V. CONCLUSION

Curiously, the ACESA concedes that low-income families will be disproportionately impacted by the cap-and-trade program through higher energy prices, so the bill establishes a refundable energy tax credit and rebate program based on the "average loss of purchasing power for the poorest fifth of people caused by higher prices for energy and other

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116. U.S. Census Bureau, Poverty—How the Census Bureau Measures Poverty, http://www.census.gov/hhes/www/poverty/povdef.html (last visited Nov. 11, 2009) ("If a family's total income is less than the family's threshold, then that family and every individual in it is considered in poverty.").

117. Poverty in the United States Frequently Asked Questions, http://www.npc.umich.edu/poverty (last visited Nov. 11, 2009) (noting how poverty affects different racial groups).

118. Black Poverty and Housing, http://blackdemographics.com/housing_poverty.html (last visited Nov. 11, 2009); *see also* Gordon M. Fisher, *The Development of the Orshansky Poverty Thresholds and Their Subsequent History as the Official U.S. Poverty Measure* (U.S. Census Bureau, Working Paper, 1997), *available at* http://www.census.gov/hhes/www/povmeas/papers/orshansky.html (explaining that the poverty measurements gather data in order to estimate the number of individuals nationwide who live in poverty and classify them according to race, residence, and other social and demographical characteristics).

119. Karen A. Campbell & David W. Kruetzer, *Waxman-Markey Global Warming Bill: Economic Impact by Congressional District*, Web Memorandum #2504, THE HERITAGE FOUND., June 25, 2009, at 3-14, http://www.heritage.org/Research/Energyand Environment/upload/wm_2504-2.pdf (itemizing the predicted GSP loss by district). This figure is comprised of both the GSP loss in 2012 and the average GSP loss from 2012-2035. *Id.* at 1. The average GSP loss is the same as mentioned above, but averaged for the first twenty-four years of the bill's enactment. *Id.*

120. *Id.* (estimating future personal income loss). The personal income loss represents how much consumer spending will decrease within the first year of the cap-and-trade regime. *Id.* The average personal income loss reflects the effect spread out over twenty-four years. *Id.*

goods."[121] The credit would vary with family size, based on the average spending for families of different sizes at the bottom of the income scale.[122] The ACESA also allocates thirty percent of the emissions permits free to local utilities, which are then expected to "sell the permits and then pass along the money to consumers" to offset their higher energy bills in the form of lump sum payments.[123]

But even if the ACESA's low-income credit design is successfully implemented, lower electricity prices will lead to more consumption.[124] Higher electric consumption then leads to higher emissions, making it more difficult for other sectors of the economy such as cement, construction, automobiles, and agriculture to stay under the national emissions cap.[125] The overall effect is to push up the demand—and, thereby, the price—of the remaining permits, resulting in higher costs of goods and services from those sectors of the economy.[126]

The Senate expects to consider the ACESA in early 2010.[127] A June 2009 survey showed fifty-six percent of Americans were unwilling to pay more in taxes to combat global warming, with sixty-three percent citing job creation as more important.[128] With declining public support and

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121. CONG. BUDGET OFFICE, COST ESTIMATE, H.R. 2454 AMERICAN CLEAN ENERGY AND SECURITY ACT OF 2009, at 20 (2009), http://www.cbo.gov/ftpdocs/102xx/doc10262/hr2454.pdf. "In 2012, CBO estimates that single people with no children would be ineligible if their income exceeded $23,000, while families with at least two children would be ineligible if their income exceeded $42,000." *Id.* at 20–21. Families who participate in other federal energy rebate programs may not be eligible for the credit. *Id.* at 21.

122. *Id.*

123. Ronald Bailey, *Congress Is Hiding Cap-and-Trade Energy Price Increases*, REASON FOUND., June 10, 2009, http://reason.org/news/show/congress-is-hiding-cap-and-tra.

124. *Id.*

125. *Id.*

126. *Id.*

127. Mike Allen & Jim VandeHei, *Green Groups Open 'Climate War Room,'* POLITICO, Sept. 21, 2009, http://www.politico.com/news/stories/0909/27369.html.

128. *56% Don't Want to Pay More to Fight Global Warming*, RASMUSSEN REPORTS, July 1, 2009, http://www.rasmussenreports.com/public_content/politics/current_events/environment_energy/56_don_t_want_to_pay_more_to_fight_global_warming (providing polling data about public perception and interest in increased taxes to battle global warming). Polling data from July 2009 shows that support for energy legislation continues to be tepid, especially when such legislation negatively impacts the income of middle-class Americans. *Id.* A majority of Americans in the survey were not willing to pay higher utility costs and taxes in order to pay for cleaner energy to combat global warming. *Id.*; *see also* Editorial, *Who Pays for Cap and Trade?*, WALL ST. J., Mar. 9, 2009, at A18, *available at* http://online.wsj.com/article/SB123655590609066021.html ("Cap and trade, in other words, is a scheme to redistribute income and wealth—but in a very curious way. It takes from the working class and gives to the affluent . . . ."). The *Wall Street Journal* argues that putting a tax on carbon is regressive because poor and middle-income Americans spend a greater portion of their wages on fuel for transportation, food, and heating costs. Editorial, *Who*

grassroots discontent with President Obama's other agenda items throughout the summer and fall, the ACESA faces a difficult road ahead due to uneasiness over the cost.[129] Supporters have even organized a "war room" to coordinate a massive public campaign for the ACESA's passage in the Senate, where sixty votes are needed for cloture.[130] The economic impact of the ACESA on the poor will continue to be debated as it moves through Congress[131] and becomes especially relevant in light of the United Nations Climate Change Conference in Copenhagen, Denmark.[132] Win or lose, cap-and-trade promises to remain a top agenda item for environmental advocates who seek a greater role for government intervention in the economy.

The ACESA legislation takes a peculiar approach to fundamental economic rules—on one hand, it seeks to harness market principles to steer consumers toward cleaner fuels through increases in the cost of carbon-based energy, creating scarcity of emission allowances, and encouraging emitters to trade those scarce allowances among themselves. On the other hand, it ignores the inevitability of reduced production and increased unemployment due to those misguided policies. As much as it vexes environmental advocates, carbon-based energy fuels the American economy, but Congress ignores that reality at the expense of our economic health. The ACESA reads less like a sensible and thorough piece of federal legislation and more like a utopian manifesto of the environmental movement.

The chief casualties of this imprudent approach are America's poor. How to meet our nation's future energy needs is a debate we must have. We will do well, however, to move forward with a sound understanding of fundamental market principles and how they affect real people—especially the most vulnerable among us.

Pays for Cap and Trade?, WALL ST. J., Mar. 9, 2009, at A18, *available at* http://online.wsj.com/article/SB123655590609066021.html. Politicians "love" the idea of cap-and-trade because it allows them to assert that only polluters will be taxed, but private ratepayers in states that use the most coal, such as Indiana, Missouri, New Mexico, Pennsylvania, West Virginia, and Wyoming, will be severely affected by the cap-and-trade legislation and the resulting increase in energy prices. *Id.*

129. Robert Schroeder, *'Cap and Trade' Faces Uphill Climb in Senate*, MARKETWATCH, June 30, 2009, http://www.marketwatch.com/story/cap-and-trade-faces-uphill-climb-in-senate (analyzing the difficulties facing the Senate in passing a climate bill).

130. Mike Allen & Jim VandeHei, *Green Groups Open 'Climate War Room,'* POLITICO, Sept. 21, 2009, http://www.politico.com/news/stories/0909/27369.html.

131. *Id.*

132. United Nations Climate Change Conference, http://en.cop15.dk/ (last visited Nov. 11, 2009); Julian Kossof, *Q&A: Copenhagen Climate Change Conference*, UK TELEGRAPH, Nov. 19, 2009, http://www.telegraph.co.uk/earth/copenhagen-climate-change-confe/6589627/QandA-Copenhagen-climate-change-conference-2009.html.