

Defending the Planet: A Columbia Law Podcast **Episode 2: “The Power of the States”**

[00:00:05] **Gov. Steve Bullock:** We can talk about the climate crisis, and it is a crisis, but let’s talk about it as a climate opportunity.

[00:00:12] **Jessica Bulman-Pozen:** Having federal policies that make sure the states have an incentive to continue those policies, regardless of what happens at the federal level, is a good way to ensure some kind of durability.

[00:00:23] **Bullock:** A state can often shape things much more significantly, and I think that’s a good thing. The local levels will be actually driving policy that will impact our entire nation.

[00:00:34] **Michael B. Gerrard:** This is *Defending the Planet* from Columbia Law School. I’m your host, Michael Gerrard. I’m a professor at Columbia Law School, where I teach courses on environmental and energy law and serve as faculty director of the Sabin Center for Climate Change Law. Each week, I’ll be joined by guests who are experts in the field, including several of my colleagues at Columbia. In this series, we’ll be talking about combating the climate crisis through one of the most important and effective sets of tools at our disposal: the law.

[00:01:14] **Gerrard:** Congress has not passed a major new environmental law in more than 30 years. It’s been the states acting individually and in regional alliances that have driven forward much action on climate change. This question of who prevails in environmental policy when the federal and state governments have different ideas is one that permeates America’s modern regulatory landscape. In the absence of federal action, states and cities are making policy—in every area from guns to civil rights to power generation—and those policies have implications well beyond local borders. Many of these efforts wind up in court. Today, we talk about the role of states and localities and how they’re pulling the country toward more direct action in the fight against climate change. My guests today are Columbia Law professor Jessica Bulman-Pozen and our distinguished alumnus Governor Steve Bullock. Jessica Bulman-Pozen is Betts Professor of Law and the director of the Center for Constitutional Governance at Columbia Law School. She’s an expert on administrative law and constitutional law and has written extensively about federalism. Steve Bullock served as Montana’s 24th governor from 2013 to 2021 and was the state’s attorney general from 2009 to 2013. He was previously an assistant attorney general in Montana, an attorney in private practice, and an adjunct professor at George Washington University Law

School. He received his J.D. from Columbia Law School in 1994, and I had the pleasure of having him in one of my classes. Welcome, Jessica and Governor Bullock.

[00:02:59] **Bulman-Pozen:** Great to be here.

[00:03:00] **Bullock:** Thanks so much, Professor Gerrard. Yeah, I am having flashbacks of about 25 years ago, so I hope you'll grade me nicer on this podcast than you did when I was one of your students.

[00:03:12] **Gerrard:** I promise not to be as mean this time as I was back then. So, Governor, let me start with this question: As governor, how did you view Montana's role in the fight against climate change? Did you think you had the legal and political tools to achieve what you wanted to?

[00:03:31] **Bullock:** Well, I think, look, as governor, you look at things you can do locally, regionally, and nationally. An example would be, I went all across the state and put together an energy blueprint for the state of Montana. Saying, what is it that we can do to make a difference? We ended up doubling our installed wind capacity, quadrupling the solar, is but just one example. But I think what we've seen, certainly, no state individually can handle or solve, if you will, climate change. Indeed, no country can. So while as an individual state, I could take some actions, and I could work in concert with other states. That still didn't necessarily mean that you were going to have all the tools we would need to truly address climate change.

[00:04:25] **Gerrard:** Well, let me ask you, it's interesting, your comment about wind and solar. The state in the United States that is by far the leader in wind is Texas, which is obviously not doing it for ideological reasons. Why did Montana take such action in wind and solar? I assume there, too, it wasn't for ideological reasons.

[00:04:47] **Bullock:** One of the challenges, which I think this administration is starting to address, is probably the most antiquated piece of machinery throughout the Western states is the electrical grid. It's just been cobbled together over the years. So, in addressing that, I think it'll open up all kinds of avenues in states. But I think Montana looked at it as that we did want to have a balanced energy portfolio. We had individuals that wanted to invest in our state because of our wind capacity. You know, I mean, some of the clients came from areas like San Diego, meaning that your installed wind generation, the electricity generation, would ultimately end up in Southern California because of great needs and demand there as well.

[00:05:32] **Gerrard:** And that's an interesting example of how one state can really influence what happens in other states. So, Governor, you're a Democrat. And as I understand it, throughout your time as governor, the Democrats never controlled either house of your state legislature, is that right?

[00:05:47] **Bullock:** Yeah, I was about a two-thirds Republican legislature throughout just about my whole eight years.

[00:05:53] **Gerrard:** So that must have been a major challenge in getting things done on climate change and a number of other things.

[00:05:58] **Bullock:** Yeah, there were, look, like I mean, Montana had a renewable portfolio standard. Montana, when you talk about joint action among states, as governor, I joined the states' Climate Alliance. We took some steps from the executive branch side that, certainly, and I think that's one of the challenges of addressing climate from a state by state basis, is, certainly, the inclinations were, of my legislature, the same as some other states' legislatures to say, even in the absence of federal action, we're going to be one of the leaders.

[00:06:37] **Bulman-Pozen:** Yeah, and, you know, I think what Governor Bullock is pointing out too is really a trend in federalism more generally and in the environmental realm, where if a state has a legislature and a governor who are committed to the same kind of project, then, of course, that's particularly forceful in adopting new laws. But actually, we've seen the rise of governors as independent actors in quite a substantial way, I think in the latter part of the 20th century and early part of the 21st century, as Governor Bullock mentioned, joining another coalition of states in the U.S. Climate Alliance just as governor by executive order, working together with other states when maybe the own state legislature is not available, or working together in a sympathetic administration with the federal government. There's all these different configurations we see of states and the federal government, states with each other, states with certain parts of the federal executive branch, that actually allow for certain kinds of innovation and capacity that maybe can allow circumvention of the normal sort of lawmaking routes, if you will.

[00:07:28] **Bullock:** And there is significant power and opportunity when states actually band together. You know, we were talking about the challenges with the grid. Well, we worked on, in the Western states under the Bonneville Power Administration, ways to actually get more renewables on our grid. Or it was even red states and blue states—I think there were six of us throughout the West—that started working on an overall plan for electric vehicle charging stations. We took money from a settlement with Volkswagen to start mapping that out. Even in the face of federal inaction, often it will be the states by executive power or in conjunction with their legislature that can take some of what, unfortunately, seemed like partisan challenges and deescalate that. Where I'll give credit to many states, and states that were run by Republican governors, is that they didn't have to come together as an association or a consortium of states and dedicate some of that money to trying to address this. So that, certainly, if I were asking our state legislature for significant amounts of money to address charging stations, I may well not have gotten it. You know, we did try to time and time again underscore both the importance of climate and the importance of making sure that Montana is viewed as open for business. I mean, underscoring the outdoor recreation economy, which depends on clean air and clean water, and underscoring that we want to have people visit our state, which was a piece of the whole EV discussion.

[00:09:14] **Bulman-Pozen:** Let me ask Jessica, you've written extensively about the administrative state. We've just gone through a four-year period where the president was working to systematically dismantle aspects of the administrative state, including in the realm of environmental and climate regulation. But many states fought back. Can you talk a little bit about the role of the states in a time when many of them are opposed to the actions of the president?

[00:09:42] **Bulman-Pozen:** Sure. So I think in our federal system, states do have a really unique ability to oppose the president, to resist certain executive branch policies. But I would say they do so in a variety of different ways, some of which we've been, we've been touching on already and are more affirmative and not just in the form of trying to stop the federal government. So we have on the one hand, I think, states trying to stop certain federal executive actions during the Trump administration, the deregulatory efforts to roll back environmental protections of all kinds. We had states as litigants and especially states in multistate litigation were quite successful at challenging and stopping some of the actions of the Trump administration, from methane to ozone to clean water, endangered species, more. And that was a very high-profile way that I think states were involved in trying to resist and trying to oppose the Trump administration's policies. And I do think it's important. But I actually think some of the comments that Governor Bullock has been making about what his state did and what other states were doing show that the ways states can fight back against a president or fight back against administrative action they oppose are more affirmative in nature, also. So we saw states not just litigating, not just suing and saying stop, but saying, OK, we have an obligation to take up the mantle of fighting climate change ourselves. We're going to adopt our own laws. We're going to adopt, if we don't necessarily have legislative capacity, we'll adopt executive orders, we'll adopt regulations, we'll try to take up some of that slack, take up that mantle. And so we saw in a number of states, including maybe some states that are more surprising, as well as the usual suspects like California, states adopting various kinds of clean energy laws, states using the administrative power that they've been granted over time under the Clean Air Act, the Clean Water Act, to try to chart a different course from the federal government. And so I think these ways in which states can oppose or can resist, to use the sort of parlance of the day, the federal government not just through saying no to the federal government and trying to stop its actions but trying to do it themselves are really a critical part of contemporary federalism.

[00:11:43] **Gerrard:** To what extent do you think that the success of the states in challenging a lot of Trump administration actions were because the Trump administration was fairly incompetent in following the Administrative Procedure Act and the National Environmental Policy Act and other procedural issues. Do you think that had Trump gotten a second term that he would have been able to go back and fix that, and the states wouldn't have had as much success?

[00:12:09] **Bulman-Pozen:** I certainly think some of the state success, the incredibly high success rate, well over, I think, 80% in these challenges, was due to the sort of cavalier treatment of our governing statutes like the Administrative Procedure Act and just the sloppiness. There was a lot of low-hanging fruit for competent state litigators to go after. But, I think states also generally have a pretty high success rate in litigation against the federal government for, you know, for better and worse, in my opinion. And so states have a sort of unique ability to get into court. States have certain kinds of capacity to bring these lawsuits, certain kinds of expertise, and certain kinds of authority in, sort of, colloquial standing, I think, as well. And so I think states are successful even when administrations are doing a good job of complying with the Administrative Procedure Act. So I do think if there had been a second Trump administration term, then, you know, we probably would have seen a little more compliance. But my guess

would have been that the states would still have been quite successful in their litigation. But again, you know, the litigation doesn't get you the affirmative policies, it only says stop. So I think it's that other piece of states then saying, well, how do we want to chart a path forward? What can we do in this space that could both stand in for the federal government and potentially pave a way that the federal government could then pick up?

[00:13:25] **Gerrard:** You've written about the California effect. Can you tell us what that is and what its relevance is to climate change?

[00:13:32] **Bulman-Pozen:** Sure. So, the California effect refers to the ratcheting up of regulatory standards to meet the jurisdiction that has higher regulatory standards. And so, I think, in the climate context probably the best example of this is vehicle emissions, where both through the fact that California suffers unique problems from pollution because of some of the basins in the L.A. area and otherwise, and because of the environmental commitments of the state more broadly, over time, it's tried to set higher or stricter vehicle emission standards, and the federal government has often followed suit. California has a carve-out in the Clean Air Act where it is the only state that is allowed to set its own standards for vehicle emissions pursuant to a waiver for the federal government. Then, when it does so, other states can choose between those standards and the federal standards. But often over time, California will adopt a standard and then eventually the federal government will follow suit.

[00:14:27] **Bullock:** And I think the power of the states in shaping the marketplace can be significant, and that's what the California effect demonstrates. Under the system of federalism, a state just because of its market influence can often shape things much more significantly, and I think that's a good thing because whether the states ban together or whether a state has as much of a market share influence as California, then the local levels will be actually driving policy that will impact our entire nation.

[00:14:59] **Bulman-Pozen:** Yeah, and again, it's, I think it's a question of, sort of, interplay of states and federal because often when states try to go out and set a higher standard, they end up being preempted by a federal law or a federal regulation, and they can't do it. So often, in fact, to enable the states to do this sort of path-setting work, they actually need the permission of the federal government.

[00:15:18] **Gerrard:** Well, let me ask Governor Bullock a question here about the relationship between the states and the federal government. Your time as governor straddled two vastly different administrations. First, you had Obama, then you had Trump. And, obviously, they were diametrically opposed on environmental policy and on many other things. So during these respective presidencies, how would you say that Montana fared with respect to federal environmental regulations and climate change?

[00:15:51] **Bullock:** There were, I would say candidly, some challenges under the Obama administration. I mean, the Clean Power Plan wasn't necessarily a one-size-fits-all. But there was, from a conservation or environmental perspective, at least from my view, a little bit more of the notion that we were all working in the same direction, and we weren't necessarily spending time resisting actions. We were actually trying to start finding some of the solutions.

[00:16:19] **Gerrard:** On the day that Donald Trump was inaugurated, the Sabin Center launched a website called the Climate Deregulation Tracker, and we ended up posting about 150 items just on climate change. On the day that Joe Biden was inaugurated, we rebranded it the Climate Reregulation Tracker and have been scrambling to keep up with that. We've seen that every time there's a change in party control in the White House, there is a sharp turn in climate policy, as well as lots of other policies. This lack of stability makes other countries wary of the U.S. as a negotiating partner and as a leader in the fight against climate change. After President Trump moved to withdraw the U.S. from the Paris climate agreement, several states and cities and corporations and others banded together to form, what they called, the We Are Still In coalition. So can the states add a measure of stability to national policy in the context of this shifting leadership in Washington?

[00:17:26] **Bulman-Pozen:** Yes, I think they can. I mean, I don't think it makes the United States itself necessarily a credible negotiating partner simply based on state action, I think that does require commitments from the federal government. But I think we've seen across administrations that states, to some extent, can temper this sort of regulatory whiplash of one administration to the next at the federal level, where we have policies being rescinded, being immediately wiped out, and we have this real whiplash, I think. And the states, I do think, can temper that to some extent with, for example, the Clean Power Plan that Governor Bullock was mentioning a moment ago. I think President Obama didn't get as far with that plan as he wanted, even though I think he did make an effort and the EPA made a real effort to try to build in the states. But both to diversify the plan to account for different state interests and then because of resistance by the states, that plan never got as far as I think he and the administration would have liked. On the flip side, when President Trump came into office and immediately sought to undo that work, I think he didn't get as far as he would have liked either because a number of states not only had already started to comply with the plan's targets but also then started to adopt their own legislation, their own regulation, to try to keep some momentum going forward, to try to keep those policies in place in at least some jurisdictions in the country. So I think that adds a degree of stability, and also, I think critically, it adds the degree of expertise and experience building, so when now that Biden is in office, he doesn't have to start from ground zero. He can start from the experiments that the states have been undertaking.

[00:19:00] **Gerrard:** Are there ways that presidents can make their policies stickier even in the absence of Congress?

[00:19:06] **Bulman-Pozen:** Well, I do think involving the states is a great way. And so, I think, having federal policies, for example, adopted by the EPA that give states a role, that build in the states, and that then make sure the states may have an incentive and a sort of governing apparatus to continue those policies, regardless of what happens at the federal level, is a good way for presidents to try to ensure some kind of continuity and durability.

[00:19:33] **Bullock:** Professor Gerard, I think if not necessarily in the direct climate, but I think of the work that Western states did with the Obama administration when it came to preserving the sage grouse, which is this iconic bird in the West that was potentially going to be listed as an endangered species, which would have real implications for

land use all throughout the West. Well, it was states working with the administration—Democratic and Republican states—to say, let's find a path to go forward that will preserve the bird and preserve our way of life in a lot of these areas when it comes to how land is used and how land is conserved. Anytime that you can actually get some of either the diverse stakeholders together or bring in state actors to work in conjunction with the federal executive agencies, I think you have a much, hopefully, better chance of having what will be durable change or durable regulation, which is what I think we really need.

[00:20:40] **Gerrard:** I think that the red side and the blue side are just going to continue to butt heads and have continued paralysis. Do you see any pathway here?

[00:20:49] **Bullock:** You know, I'm seeing more of a pathway than I did. I think that the need to address climate is becoming less a partisan issue and more an issue where we all know that we have to take action. It's going to take collective action. And I think that this administration right now is framing how I think that we should. We can talk about the climate crisis, and it is a crisis, but to get more support, let's talk about as a climate opportunity: an opportunity to create good jobs, an opportunity to save our planet, an opportunity not to leave communities behind. And as we do that and look at what the opportunities can be, I hope some of the partisan rhetoric, inaction around addressing climate is going to continue to diminish.

[00:21:39] **Gerrard:** There are some bipartisan groups that have been pushing for a carbon tax, and they've indicated that there are a number of Republican members of Congress who privately favor it. But so far, almost none have spoken out in public in favor of it. And a couple of those who have have lost their seats. Do you see a prospect for bipartisan agreement on something like a carbon tax?

[00:22:09] **Bullock:** Well, even when it came to base infrastructure, I think over the last six years, 35 states increased their gas tax. I did it. It wasn't fun. We needed it to fund our highways. Yet you do have, and I think this goes beyond this podcast, in some respects, I think the influence of outside money in our political system is, kind of, what drove some of the reversal from Republicans over the years in acknowledging climate. Revenue increases, be it a fee on carbon or increasing gas tax fees, when you have so many members that are pledging there will be no tax increases no matter what, it makes it that much more difficult. Now, in any of these areas, because it's actually been some of the energy companies that have been saying there should be an assessment on carbon. No matter what the areas, the larger the coalition that you can build out, I think the more likely there's going to be some bipartisan action.

[00:23:09] **Bulman-Pozen:** I agree with that, entirely. The pressure is going to have to come from the outside. But if it does, and if companies, in particular, see the writing on the wall with respect to some of these issues, then that could change the politics. But I think it's going to have to go in that direction rather than the other.

[00:23:23] **Gerrard:** Yeah, in 2009, we seemed to be on the verge of climate legislation and there was a large group of big corporations that banded together to support it. It narrowly passed the House—this was the Waxman-Markey Bill—but it died in the Senate. And that big corporate coalition wasn't effective and then seemed to dissolve.

[00:23:46] **Bullock:** But I think even from 2009 to 2021, we at least have more members acknowledging that our climate is changing and that we have to do something about it. And that wasn't necessarily, I think, driven by the corporate interests or the outside interests. In some respects, it's your students and, I think, this next generation that has really been helpful in raising both awareness and the need to start taking action. So, I mean, I am much more optimistic today than I was a decade ago about bipartisan actions to address climate. Now, we're a decade further down the pike, but I think that the urgency and the need really is becoming much more front and center than it was a decade past.

[00:24:39] **Gerrard:** And the urgency is highlighted by visible events like worsening hurricanes and heat waves. We may be on the verge of another horrible wildfire season in the West. All these things add up to much more consciousness of the difficulty, and it doesn't afflict blue states alone.

[00:24:58] **Bullock:** I had, during my time as governor, the most expensive and the worst fire season in our state's history. And, I mean, I would often frame that Montanans are outdoors people. We see the impact of climate. You don't have to just go to Glacier Park and see the glaciers diminishing. Our farmers see our planting seasons changing. Our communities are impacted in the summer due to wildfire. And that isn't a partisan issue. We know that we have to take action because as outdoors folks, we see it each and every day. So, I mean, it's important to have these discussions, both how we're going to address climate but also a discussion of federalism because we all have a role to play in this. And while not every state, certainly, views the challenges, or every state leader, the same, I think we are getting to that point where at least every, almost every state leader is acknowledging that the price of inaction now is significant.

[00:26:02] **Gerrard:** Let's say you were president for a day and both houses of Congress were at your beck and call. Is there one thing you would do that would have the greatest positive impact on the fight against climate change?

[00:26:14] **Bulman-Pozen:** I, you know, I would certainly enact a deep decarbonization bill, you know, with an environmental justice component. I would do the kind of work that's already being talked about that seems aspirational. But I think, in keeping with this conversation and maybe also with the critical for a day reminder, I would make sure not to make it a purely federal law, not to cut out the states, which I think there is a great temptation to do in this space given the urgency of the problem and the need for strong federal action. So I think I would make sure to include in any such legislation—however ambitious, with respect to the federal government's role—also clear provisions showing that states wouldn't be preempted if they wanted to go further than the federal government, right, that the federal government is setting a floor but not a ceiling with respect to preempting state laws. Likewise, to allow for the kinds of state collaboration we've been discussing a little bit to make sure that there was congressional blessing of state collaboration to further new solutions.

[00:27:12] **Bullock:** Part of what we've spoken about is even at the executive, how we've been whipsawed administration to administration. And we've got to figure out ways to make durable change because let's say that you're president and have both

houses for that day and can take action, the last thing you want is steps that, our country's been behind for now years or decades, but that being reversed four years later. So I do think, in part, some of the things that the current administration is looking at, long-term investments in changing things like the electrical grid, changing the opportunities for investing in what could be good jobs in climate, basic things like energy conservation, can make a big difference and then can't and won't be reversed. So I try to find those things that are immediately pressing to address climate now. But we know once it's in there will have longer-term effects and less likely to be repealed by a subsequent federal administration. And to Professor Bulman-Pozen's point, ensuring ways to include in the system of federalism our state leaders and state actors because absent doing so, I think that durable change that we all need is that much more difficult.

[00:28:52] **Gerrard:** Jessica and Governor Bullock, thank you so much for joining us.

[00:28:55] **Bullock:** No, I appreciate the conversation, and I appreciate the Law School doing this.

[00:28:59] **Bulman-Pozen:** Yeah, thank you both.

[00:29:02] **Gerrard:** My guests today have been Jessica Bulman-Pozen and Governor Steve Bullock. I hope that you'll join us for the next episode of *Defending the Planet*. Make sure to follow us wherever you get your podcasts. Thanks so much for listening.

[00:29:15] **Gerrard:** *Defending the Planet* is brought to you by Columbia Law School and is produced by the Office of Communications, Marketing, and Public Affairs at Columbia Law School. Our executive producer is Michael Patullo. Julie Godsoe, Nancy Goldfarb, and Cary Midland, producers. Editing and engineering by Jake Rosati. Writing by Martha Moore and Dan Shaw. Production coordination by Zoe Attridge. Special thanks to Michael Burger and the Sabin Center for Climate Change Law. If you like what you hear, please leave us a review on your podcast platform. The more reviews we have, the more people who get to listen. If you're interested in learning more about the law and climate change, visit us at law.columbia.edu or follow us on [Facebook](#), [Twitter](#), and [Instagram](#). You can also follow the Sabin Center on Twitter, [@SabinCenter](#).