

## CLEAN POWER POLITICS: THE DEMOCRATIZATION OF ENERGY

By Joseph P. Tomain

Reviewed by Uma Outka\*

Those of us who follow the energy sector closely will agree: there are many moving parts in clean energy policy, and for newcomers to the field, there is a significant learning curve. When I teach Energy Law to second- and third-year law students, most of whom come in knowing very little about energy systems, much less energy industries and their legal frameworks, there is no obvious best entry point for their learning. We accept this and jump in, with a focus on what's happening now and what's around the bend, and then track back in detail to fill in their knowledge of energy law's development over time – the foundation for understanding the dynamic legal environment of the energy field today.

One of the best at helping newcomers get their bearings is Joseph Tomain.<sup>1</sup> He has long been an astute analyst of the energy sector, with an especially keen ability to convey complex aspects of energy law and the modern grid in ways that are substantive yet accessible. He is co-author of a leading Energy Law textbook and numerous other works that I have relied upon over the years.<sup>2</sup> His latest book, *Clean Power Politics: The Democratization of Energy*, explores the shift toward cleaner energy resources within the context of the political dynamics framing this transitional moment for the field.<sup>3</sup> With this approach, the book engages the future of energy law in the United States and the forces converging to shape its trajectory. It is a thoughtful account that grounds readers in energy's modern context and argues that a new political narrative for energy is emerging, the “democratization of energy,” based on increasing numbers of energy actors on the grid.<sup>4</sup>

### I. A POLITICS OF CLEAN POWER

*Clean Power Politics* traces what Tomain sees as broad implications for energy law in the federal reorientation following the 2017 presidential transition. Acknowledging but not stopping at partisan politics, the book articulates a “politics of clean power” that is “three dimensional” – linking energy policy discourse

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1. Joseph P. Tomain is the Dean Emeritus and Wilbert and Helen Ziegler Professor of Law, Cincinnati College of Law.

2. See, e.g., JOSEPH P. TOMAIN & RICHARD D. CUDAHY, *ENERGY LAW IN A NUTSHELL* (2d ed. 2011) (also reviewed in this journal (Jonathan P. Trotta, *Review: Energy Law in a Nutshell*, 32 *ENERGY L.J.* 631 (2011))); LINCOLN DAVIES ET AL., *ENERGY LAW & POLICY* (2d ed. 2018); JOSEPH P. TOMAIN, *ENDING DIRTY ENERGY POLICY: PRELUDE TO CLIMATE CHANGE* (2011).

3. JOSEPH P. TOMAIN, *CLEAN POWER POLITICS: THE DEMOCRATIZATION OF ENERGY* (2017).

4. Tomain, *supra* note 3, at 6.

at the federal level, the state and local political economy of energy, and the diversification of influences on the sector, which he interprets through the lens of democratic theory.<sup>5</sup> He envisions a politics of clean power that integrates energy and environmental concerns, observing how these fields developed in separate spheres, “speaking in different languages, using different vocabularies.”<sup>6</sup> A clean power politics, he argues, is needed, and emerging, to facilitate an energy-environment convergence that meets our collective modern needs.<sup>7</sup>

In Chapter 1, Tomain offers the example of the Clean Power Plan as demonstrating the potential of this kind of integrated approach for energy and environmental law. The Clean Power Plan is the Obama Administration’s major Clean Air Act rulemaking designed to cut carbon from existing power plants.<sup>8</sup> Some readers may be tempted to disregard this chapter due to the Trump Administration’s ongoing efforts to repeal the rule.<sup>9</sup> Indeed, Tomain himself predicts it will go the way of a “noble, but failed, experiment.”<sup>10</sup> Nonetheless, he argues the rule and the work that went into crafting it, offer lessons for the future – I agree. The Clean Power Plan was significant, ambitious, and new, a hybrid energy-environmental regulation, and understanding how it was different from prior regulatory approaches, and why it was so controversial, is critical for any newcomer to the field to be conversant in modern energy law. Importantly, the chapter explains how the rulemaking brought the issue of reliability to the fore; pinpointing key concerns that continue to be the center of boundary debates over how much and how fast clean power can grow – foregrounding, perhaps, the Department of Energy’s recently rejected Proposed Rule on Grid Reliability and Resilience Pricing.<sup>11</sup>

Chapter 2 provides a broad-lens overview of efforts to date, at the state and federal levels, to promote clean energy. This compact history will be helpful to energy law newcomers, tracing origins of the major policies that are most prominent in the field today. He explains the reasoning behind his preference for limiting “clean power” to energy from renewable sources, energy conservation, and energy efficiency, cautioning against too ready endorsements of “clean” coal, bio-fuels, nuclear power, and natural gas.<sup>12</sup>

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5. *Id.* at 2.

6. *Id.* at 33.

7. For a counterpoint to this argument, see Jody Freeman, *The Uncomfortable Convergence of Energy and Environmental Law*, 41 HARV. ENVTL. L. REV. 339-421 (2017).

8. Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,661 (Oct. 23, 2015).

9. As of this writing, the EPA has set in motion its repeal (Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 82 Fed. Reg. 48,035 (Oct. 16, 2017)), and an alternative proposed rule has been published (Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations; Revisions to New Source Review Program, 83 Fed. Reg. 44,746 (Aug. 31 2018)).

10. Tomain, *supra* note 3, at 11.

11. *See generally* U.S. Dep’t of Energy, Grid Reliability and Resilience Pricing, 82 Fed. Reg. 46,940 (Oct. 10, 2017). The Federal Energy Regulatory Commission terminated the rulemaking in January 2018. Order Terminating Rulemaking Proceedings, Initiating New Proceeding, and Establishing Additional Procedures, 162 F.E.R.C. ¶ 61,012 (2018).

12. Tomain, *supra* note 3, at 50-66.

Tomain's discussion of the political economy of clean power in Chapter 3 contrasts three economic growth scenarios that project varying degrees of ambition toward decarbonizing the energy sector – business as usual, a slow-growth/no growth scenario, and a clean power economy, which he presents as charting a middle path.<sup>13</sup> He takes a pragmatic stance between what might be caricatured as pro-market or pro-regulation positions – “[g]overnments and markets exist in a dynamic, not static relationship,” he argues, and any assertion of an either-or dichotomy makes “a fatal category mistake.”<sup>14</sup> In this way, he seems to want to bridge the differences that have fueled partisan politics in the energy sphere, offering space for common ground: “We can generate energy, enjoy economic growth, *and* reduce environmental harms” (emphasis added).<sup>15</sup> Recalling President Carter’s ‘70s fireside chat encouraging energy conservation, he sees clean energy policies that do “not threaten the quality of life or our existing lifestyles” as key to accomplishing a “clean power transition.”<sup>16</sup> As a reader, I found this assumption discouraging in light of the dramatically high per capita energy consumption in the United States compared with most of the rest of the world – certainly, it is a position that is open to international critique. I imagine Tomain would agree. He is focused here, though, on key elements of a political economy that will support a clean energy transition, consistent with his pragmatic approach. He sees individual willingness to make lifestyle changes as weak, or at minimum, too slow to match the need for consensus building behind clean energy.<sup>17</sup> And in this he may very well be right.

Tomain then expands on the regulatory/markets interface in Chapter 4, in the specific context of clean energy innovation policy. He makes the case for more than just governmental support for research and development to support market innovation, but also regulatory instruments advancing “intellectual property protection, training and education, public-private sector collaborations, and trade and competition policies, as well as financial incentives” aimed at transforming the energy sector.<sup>18</sup> In this respect, he argues, a clear federal clean power policy would most effectively signal pathways for commercialization of energy innovations, at which point private actors and market forces are dominant drivers.<sup>19</sup> Tomain turns in Chapter 5 to the industry context for the shift to clean power, focusing on electricity sector politics and the utility perspective on modern trends to decentralize the grid, including distributed generation and increased consumer influence on energy policy.<sup>20</sup> An especially helpful part of this chapter is the discussion of how the traditional utility business model could evolve to better meet modern needs. For utilities that successfully adapt to evolving demands, Tomain anticipates a new business landscape in

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13. *Id.* at 75-97.

14. *Id.* at 72.

15. *Id.* at 85.

16. *Id.* at 91.

17. Tomain, *supra* note 3, at 91.

18. *Id.* at 103-04.

19. *Id.* at 108.

20. *Id.* at 131-46.

which utilities create value in energy services, integrated energy planning, distributed services operation, and through support of responsive consumer behavior that reduces power consumption.<sup>21</sup>

To facilitate this kind of structural change for the traditional utility model, regulatory innovation will be required – the focus of Chapter 6. I recommend this chapter to readers seeking to understand the key issues that will be in debate at the state level, in public utility commissions and legislatures, as most of this regulatory work will need to occur in states. Tomain lends his keen analytical perspective to how the clean energy transition strains the traditional regulatory compact and the issues that will need to be addressed as it is reconceived, including in the ratemaking context.<sup>22</sup> Here, he offers three examples from Minnesota, Maryland, and New York that give readers a sense of how regulatory transformation is proceeding (and still underway) in leading states.<sup>23</sup> These are, indeed, great examples that energy lawyers and policymakers in other states should be tracking, though there are innovations occurring to varying degrees across many states.<sup>24</sup>

It adds nuance to his discussion of politics in the energy context here to underscore that at the state level, renewable energy has often been a bipartisan issue, sidestepping some of the political partisanship that commonly mires other environmental issues. Although consensus over the need for regulatory reform does not necessarily follow, state level support for renewable energy is likely to continue where renewable energy solidifies its importance to state economies, such as in my state of Kansas, and in Iowa, Texas, and other major renewable energy producing states.<sup>25</sup>

## II. DEMOCRATIZATION OF ENERGY

The final section of the book advances Tomain's thesis that a clean power politics is emerging with a newly democratic tenor – decentralization of the electricity system, he argues, “will democratize energy through increased competition and greater consumer participation.”<sup>26</sup> The existing structure – fossil-based generation, traditional utilities, dated regulatory regimes – has “outlived its useful life.”<sup>27</sup> The discussion is part thought experiment – envisioning away the investor-

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21. *Id.* at 146-56.

22. Tomain, *supra* note 3, at 164-72.

23. *Id.* at 173-89.

24. Readers interested in tracking state level energy developments will find the following resource helpful: *Advanced Energy Legislation Tracker*, Advanced Energy Economy, <https://www.aeltracker.org> (last visited Sept. 1, 2018).

25. See, e.g., Joshua Rhodes, *Why Republican Leaders Love Renewable Energy*, FORBES (Sept. 25, 2018), <https://www.forbes.com/sites/joshuarhodes/2018/09/25/why-republican-leaders-love-renewable-energy/#71d7f8aa3da7>; *Yale Climate Opinion Maps 2018*, YALE PROGRAM ON CLIMATE CHANGE COMMUNICATION (Aug. 7, 2018), <http://climatecommunication.yale.edu/visualizations-data/ycom-us-2018/?est=happening&type=value&geo=county> (showing 85 percent of surveyed adults favoring research funding for renewable energy and 63 percent favoring a requirement on utilities to produce 20 percent electricity from renewable sources).

26. Tomain, *supra* note 3, at 193.

27. *Id.* at 202.

owned utility of today in a truly distributed and localized model of power generation – and part pragmatic mapping of an evolving industry realigning to emphasize the electricity end user. If, as he asserts, “the central democratic principle is to promote greater participation and voice in political and economic institutions,” then in the energy sector, this means extending energy decision-making to more actively include consumers.<sup>28</sup> Tomain is not alone in aligning “energy democracy” in these ways. The Center for Social Inclusion and the Climate Justice Alliance are among a number of non-profit organizations working to advance a concept of “energy democracy” centered on energy generation that is local, clean, and available to all.<sup>29</sup>

The values represented by these initiatives, and the “energy democracy” concept, are an important piece of the transition discourse, and Tomain attempts to give it some policy grounding.

I appreciate that he spends time here discussing, if briefly, the challenges presented by a decentralized electricity industry for planning and governance.<sup>30</sup> This is a genuine area of tension for the low-carbon shift as distributed resources and the role of consumers grow, and it is rarely addressed. Although many states engage in some kind of integrated resource planning for electricity, the process states and utilities use will need to adapt to account for an increasing number of grid elements they do not directly control. Efficiency across increasingly less centralized electricity systems will depend on new information and new analytical approaches. This need is beginning to be recognized, such as in California, where distributed solar has grown most rapidly, and policy experiments with aggregating distributed energy resources have begun.<sup>31</sup>

Other legal scholars have also recently explored this idea of widespread decentralization of the electricity system and greater consumer engagement, and readers interested directly or indirectly in this concept of “energy democracy” would do well to consider Tomain’s account in conjunction with these other works.<sup>32</sup> Perhaps most on point is Shelley Welton’s *Grasping at Energy Democracy*, an article that thoughtfully questions the hypothesis that democratic values will necessarily be advanced

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28. *Id.* at 204.

29. See generally *Energy Democracy*, CENTER FOR SOCIAL INCLUSION, <https://www.centerforsocialinclusion.org/our-work/our-programs/energy-democracy/> (last visited Sept. 1, 2018) (“Energy democracy means that community residents are innovators, planners, and decision-makers on how to use and create energy that is local and renewable”); *Energy Democracy*, CLIMATE JUSTICE ALLIANCE, <https://climatejusticealliance.org/workgroup/energy-democracy/> (last visited Sept. 1, 2018) (“Energy Democracy represents a shift from the corporate, centralized fossil fuel economy to one that is governed by communities, is designed on the principle of no harm to the environment, supports local economies, and contributes to the health and well-being for all peoples”).

30. Tomain, *supra* note 3, at 209-13.

31. See, e.g., Krysti Shallenberger, *DER aggregation: Sector experts identify emerging trends in a nascent market*, UTILITY DIVE (July 24, 2017), <https://www.utilitydive.com/news/der-aggregation-sector-experts-identify-emerging-trends-in-a-nascent-market/447670/>.

32. See, e.g., Shelley Welton, *Grasping for Energy Democracy*, 116 MICH. L. REV. 581 (2018). For others addressing local and consumer-driven trends in the energy sector, without the specific “energy democracy” focus, see, e.g., Sharon B. Jacobs, *The Energy Prosumer*, 43 ECOLOGY L.Q. 519 (2017); Uma Outka, *Cities and the Low-Carbon Grid*, 46 ENVTL. L. 101-54 (2016); Garrick B. Pursley & Hannah J. Wiseman, *Local Energy*, 60 EMORY L.J. 877 (2011).

by transforming the power system for localism and individual demand.<sup>33</sup> Read together, Tomain and Welton's work provides an excellent foundation for those interested in understanding the ideals and challenges that the energy democracy concept presents.

### III. CONCLUSION

At a time when the politics of energy and environmental protection in the United States is unnecessarily divisive, *Clean Power Politics* offers a grounded and in-depth account of the legal and policy dynamics shaping renewable energy today. The book effectively bridges the Obama Administration's second-term agenda with the federal reorientation of energy and environmental policy under the Trump Administration, conveying a sense of steady multi-decade progress that continues to scale back fossil energy's role. In this way, it offers a current, substantive introduction to the modern energy transition for newcomers, as well as a framework for those active in the energy sector to make sense of this moment on the electricity industry's low-carbon trajectory.

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33. See generally Welton, *supra* note 32.