

## TRANSCRIPT

### Environmental Insights

**Guest:** Jonathan Wiener

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Jonathan Wiener: The challenge of achieving and enacting [a] coalition in the Congress is also a challenge for scholars, researchers, to figure out a policy design that will be successful, both not only environmentally and economically, but in the political economy.

Rob Stavins: Welcome to [Environmental Insights](#), a podcast from the [Harvard Environmental Economics Program](#). I'm your host, Rob Stavins, a professor here at the [Harvard Kennedy School](#) and director of the Harvard Environmental Economics Program. Today we're fortunate to have with us, [Jonathan Wiener](#), who is the William and Thomas Perkins Professor of Law at [Duke Law School](#). With appointments also in the [Nicholas School of the Environment](#) and the [Sanford School of Public Policy](#). He's also a University Fellow of [Resources for the Future](#). We'll talk about his government experience in a moment. But during his scholarly career, he's been the author, co-author, editor of a half dozen books and has written a hundred scholarly and other articles in various periodicals. Welcome, Jonathan.

Jonathan Wiener: Thank you, Rob. It's terrific to be with you.

Rob Stavins: So, before we talk about some of your research and your current thinking about environmental and climate change policy, let's go back to how you came to be where you are. Where did you grow up?

Jonathan Wiener: I grew up in Croton-on-Hudson, New York, about an hour north of New York City. I went to the public schools there.

Rob Stavins: To both primary and high school?

Jonathan Wiener: Yes. Carrie E. Tompkins Elementary School, Pierre Van Cortlandt Middle School, and Croton Harmon High School.

Rob Stavins: Then from there you went on to Harvard College, is that correct?

Jonathan Wiener: Yes. Harvard College and Law School.

Rob Stavins: So, you graduated from Harvard College in '84. In '87, just three years later, you finished a up your law degree at Harvard Law School. Do I have those numbers correct?

Jonathan Wiener: Yes.

Rob Stavins: What was your first job out of law school?

Jonathan Wiener: My first job out of law school was a judicial clerkship for Judge Jack Weinstein, who is a federal trial judge in New York, in Brooklyn. Among many other things in his illustrious career – he just died last year at age 99 – he was the judge in charge of the Agent Orange mass tort litigation, which I had the opportunity and responsibility to help work on.

Rob Stavins: Then your second clerkship at the U.S. Court of Appeals is particularly striking.

Jonathan Wiener: Then I clerked on the U.S. Court of Appeals in Boston for Stephen Breyer.

Rob Stavins: How was that?

Jonathan Wiener: Both of those clerkships were marvelous and intense experiences, but very different. The trial court is very busy, in and out of the courtroom all day. Whereas the appeals court, clerking for then Judge Breyer, before he was appointed to the Supreme Court a few years later, that's a much more solitary and contemplative life of studying legal questions, and only seeing the lawyers in court about once a month when there are oral arguments.

Rob Stavins: Now that sounds like that's a good transition to scholarship. What was actually your next job after you finished up that clerkship?

Jonathan Wiener: Even before clerking for those two judges, I had worked on environmental and risk management projects for professors in law school and even when I was in college. So, after the clerkships with Judge Weinstein and Judge Breyer, I then went to work at the U.S. Department of Justice for one of the professors from law school, for whom I had worked, Richard Stewart. Dick Stewart hired me as his special assistant when he was appointed the head of the environment division of the Justice Department in 1989.

Rob Stavins: Now is it fair to say that Dick Stewart could be identified as one of the founders of what eventually came to be known as the area of environmental law scholarship?

Jonathan Wiener: He's certainly one of the early and major figures in that field. A lot of his work in the 1970s was on administrative law, still viewed as pathbreaking and landmark articles. Starting in about the late 1970s, early 80s, Dick Stewart, with Bruce Ackerman and others began writing series of articles about economic incentive instruments for environmental policy. So, I was working for Judge Weinstein, Judge Breyer, and then Dick Stewart, I was really steeped in that arena.

Rob Stavins: Then from there, is that when you went on to Duke Law School, joining the faculty?

Jonathan Wiener: Not immediately. So, I worked for Dick Stewart at the Justice Department for two years and there we worked a lot on the formulation of U.S. Climate Change Policy in 1989 to '92, including the [Framework Convention on Climate Change](#), which I helped negotiate. But then I also worked at the Office of Science and Technology Policy, the president's science advisor and then at the Council of Economic Advisors in 1992 and all of 1993 pretty much. So, the first year of the Clinton administration I was at CEA and there I worked, among other things, on something called [Executive Order 12866](#), which is an arcane name for the order President Clinton issued that's still enforced today that provides the guidelines for cost benefit analysis of regulation.

Rob Stavins: Not arcane to listeners to this podcast, I can tell you. So, in bipartisan fashion, then you served in both the Bush 41 and the Clinton Administrations, if I have that right?

Jonathan Wiener: Yes. There was a lot of continuity there, I would say. That was an era when the [Clean Air Act Amendments of 1990](#) were a very bipartisan issue and the climate change negotiations as well. Of course, there were disagreements, but in my work, for example, at Council of Economic Advisors, I worked for David Bradford in the last year of the Bush Administration and then for...

Rob Stavins: A wonderful man who died tragically.

Jonathan Wiener: Yes. Exactly. I really miss him. He was a wonderful gentleman. Then I worked in the Clinton Administration for Laura Tyson, was the chair of CEA and for Alan Blinder and Joe Stiglitz. On the issue, for example, of designing an economic incentive-based policy to reduce greenhouse gas emissions, there was I would say substantial agreement among all of those involved. So, there was a lot of continuity in that transition.

Rob Stavins: Yeah. It's a remarkable contrast with today, which we've talked about with Dick Schmalensee and others in previous of these podcasts. So, tell me now, at this point you go to Duke Law School to join the faculty, is that right?

Jonathan Wiener: Yes. By the way, Dick Schmalensee was at CEA, and I had worked with him and Howard Gruenspecht when I was at the Justice Department. I'm grateful to them for engaging me in the work at CEA too. Yes. Then I went to Duke Law School in 1994. I was then seven years out of law school and so I was getting past the point where I could still be eligible for an entry level appointment. Although I loved my work in government and have enormous admiration for public service, I needed to go on the job market for academia at that point. So [I] joined the faculty at the law school and the School of the Environment at Duke in 1994.

Rob Stavins: Then eventually received tenure at the law school and you've been there ever since?

- Jonathan Wiener: Yes, I think I got tenure in 1998 and then the chair that you mentioned, the Perkins professorship in 2004.
- Rob Stavins: Now, let's turn then to your work in environmental law, starting with your work and scholarship. I assume that there have been some significant changes in the scholarly world of environmental law, certainly since your 1987 degree. What are some of the changes or one of the changes in the scholarly world of environmental law that stand out to you, that are prominent or important?
- Jonathan Wiener: Well, there are so many, but here are three that occur to me right now. One is that the issue of economic incentive instruments, which as we said, Dick Stewart and others had pioneered, has become much more mainstream now. So, it was often controversial in the 1980s and partly through the practical success of programs like the Acid Rain Trading Program. I know that your [Project 88](#) was quite important and influential in getting that established as well. That's become much more mainstream, although there's a kind of new frontier of debate about economic incentive instruments, which has to do with the local distributional impacts.
- Jonathan Wiener: A second major change is that the use of economic analysis to evaluate the cost and benefits of regulation which was also quite controversial in the 70s and 80s, even though it was endorsed by presidents of both parties – Jimmy Carter, Ronald Reagan, Bush father, and Bill Clinton – the executive order that I worked on remained quite controversial. One thing that's interesting is that the advocacy of cost benefit analysis has shifted over time so that now one sees a lot more advocacy from the pro environmental or economic analysis and cost benefit analysis, to demonstrate the large social gains from environmental policy. I'm thinking of the work of people like Ricky Revesz and Michael Livermore, and of course, Cass Sunstein, and my colleague, Matt Adler, and many others.
- Jonathan Wiener: So, the third thing is the much more interest in work now on distributional impact, on environmental justice and the distributional consequences of environmental policy. Also, I think the community of environmental law scholars has become more diverse over time as well.
- Rob Stavins: So, of one of those you mentioned, it's interesting to take note, particularly because of your bipartisan record that if it was the Bush 41 Administration that really launched the first tremendous attention to so-called market-based approaches, or economic incentive approaches to environmental protection. We saw it also in the prior Reagan Administration with the lead gasoline phase down. But it was certainly picked up by the subsequent Clinton Administration, somewhat by the subsequent Bush Administration, certainly by the Obama Administration and then little attention from the Trump Administration. And sadly, diminished attention from the current administration, which seems to have moved left on environmental issues, such that economists from everyone I talk with in the administration and everyone on the outside, economists are less influential and less involved on environmental policy developments in the

Executive Office of the President, and within the executive branch more broadly, than they have been in some of those previous administrations. I don't know if you've seen that as well.

Jonathan Wiener: I can't comment on what's happening inside the administration. I think one point you made with which I certainly agree, is that the Trump Administration was a kind of discontinuous or attempted to be moving in a very different direction of deregulation and diminished use of economic valuations of environmental impacts, such as the social cost of carbon. At least at the beginning of the Biden Administration, they were reaffirmed and returned to the bipartisan consensus that you described from the 1970s up to 2016. For example, Present Biden issued a memorandum on modernizing regulatory review on his first day in office, which reaffirmed the executive orders from the Clinton and Obama Administrations.

Rob Stavins: Quite right. Although, a year in three months later, we're still waiting for the revised update of social cost of carbon which was promised from the administration shortly after Inauguration Day, when the social cost of carbon was put back in place using the Obama number essentially.

Jonathan Wiener: Yes. I've been waiting with curiosity to see those as well.

Rob Stavins: So, before I turn finally to environmental policy, when I really do want to get into that with you. On scholarship, one last question and I apologize for this, Jonathan, because I know it's asking you, for which of your children is your favorite, but what's the one research publication, not policy writing, but of your scholarly work, what's the one scholarly publication you are most proud of?

Jonathan Wiener: Well, that is an impossible question. Also, for someone whose career is very much, I always feel like I'm still a student, that I'm still learning.

Rob Stavins: That's good.

Jonathan Wiener: It's one of the joys of being a scholar. I think the work that I've done on risk trade-offs and really on the multi-risk world. Which goes back to the first book I published with John Graham, called "[Risk Versus Risk](#)," with the forward by Cass Sunstein, and then through more recent articles too, on learning to manage the multi-risk world. That's really been about the need for decision makers to think about the multiple impacts of their policies and not only the intended or target impact, but the side effects. The side effects might be adverse, might be bad, what we called countervailing risks, but that might also be beneficial, co-benefits. To really broaden the scope of thinking and analysis, so that decisions really take into account the full scope of important impacts. I think that's one area of work that I feel very proud of, if one can say that.

Rob Stavins: Sure.

Jonathan Wiener: I'm hesitant to use that word, but also that I hope really has real benefits for society.

Rob Stavins: No. I think it's important that you raise that and let me alert listeners, that if you'd like to hear more on that topic and from Jonathan's former co-author John Graham. Whether you're coming to this podcast through Spotify, or one of the other many platforms on which we are available. If you go back in the list, you'll find that John Graham was in fact [a guest of ours](#) early on, and in fact talks about some of the same issues. I suspect he probably refers to Jonathan Wiener in that. Now with that, let me actually now turn to your views on environmental policy, broadly or with examples, however you like. What's your assessment of the current US administration's environmental policy? But putting aside climate change, if we can for the moment, because there's a lot else obviously.

Jonathan Wiener: One thing that's interesting, that seems like a significant change or evolution, is moving towards more use of fiscal policy, of the government's spending power to address a lot of environmental issues. Through the infrastructure bill, the proposal for the [Build Back Better Bill](#) that's still pending or stuck in Congress and things like that, as opposed to the regulatory power. On the regulatory side, I think as you said a minute ago, it's notable that the Biden Administration has promised some new guidance on regulation, revisions to something called OMB Circular A4. Those are still pending.

Jonathan Wiener: Then there have been some regulations promulgated, for example, a proposed rule on methane emissions from existing oil and gas facilities, but there's also been some court challenges which have delayed some of the regulations; for instance, the pending case in the U.S. Supreme Court, called West Virginia versus EPA. About whether EPA or how EPA can regulate greenhouse gases from power plants, electric power plants. There's been a court challenge to the use of the social cost of carbon, although that's currently on hold.

Rob Stavins: Can I ask you about that, Jonathan, since you bring up the court challenges and which exist obviously in any administration. Many of those court challenges, as Ricky Revesz emphasized when [he was a guest with us](#), during the Trump Administration were quite successful because of, I guess the lack of thought or quality that went into the writing of the Trump era regulations. But in any administration, this happens, but I do wonder whether or not we would anticipate that court challenges during the Biden Administration are likely to be more successful than they were during the Obama Administration because of Mr. Trump's 243 appointments to the federal judiciary, which is more than 25% of the total. Plus of course, perhaps more importantly, the three justices appointed to the Supreme Court, the 6-3 majority that now exists for the conservative side, indeed sort of an originalist conservative side. What's your expectation in terms of the likelihood of regulations from this administration, in the environmental realm, surviving court challenges?

Jonathan Wiener: One point is that the Trump Administration seemed to have a much higher losing rate in court than prior administrations. The tracker kept by Ricky Revesz

group at NYU, the [Institute for Policy Integrity](#), which I'm on the advisory board of and Bethany Davis Noll and others there, suggest a much higher loss rate that could portend continued judicial scrutiny in future administrations as well. So, it would behoove the Biden Administration and later administrations to be extra careful about following the administrative procedures.

Jonathan Wiener: In the last year, as you noted, the Supreme Court has issued some opinions about regulations – some environmental, some public health – but in which several of the justices and majority of the Supreme Court, especially concurring opinions by Justice Neil Gorsuch, and Justice Alito, and Justice Thomas have suggested a more robust approach to requiring that congress has to speak, especially clearly if the federal government, the executive branch is going to try to address major questions or questions of vast importance.

Jonathan Wiener: That doctrine, which was cited by the court majority in holding that the Centers for Disease Control could not put a moratorium on evictions in August 2021 and in January 2022, holding that OSHA, the Occupational Safety and Health Administration, could not mandate vaccination or testing rule at private employers. That doctrine of major questions is getting a lot more attention than it used to. So that may be change from the last several decades.

Rob Stavins: So that's a fundamental change potentially. Would you also anticipate, Jonathan, that the [Chevron Doctrine](#), which our listeners are well acquainted with from previous podcasts, that this court might actually, if not overrule it, at least revise it in ways which would substantially reduce the authority that executive branch agencies currently enjoy within the environmental or the regulatory area more broadly?

Jonathan Wiener: That's possible, the Chevron Doctrine, which says that if a statute is ambiguous, then the court will look to the agency's interpretation of the ambiguity and comes from a decision back in 1984 about EPA regulating air pollution and interpreting the word "source" in the Clean Air Act. The court back in 1984 said, "Yes. EPA, your interpretation is acceptable." Well, at least some of the current sitting supreme court justices have been critical of the Chevron Doctrine. Justice Neil Gorsuch, back when he was an appeals court judge on the 10th Circuit, had written opinions sharply criticizing the Chevron Doctrine.

Jonathan Wiener: The major questions doctrine or concept was earlier thought to be a kind of exception to the Chevron Doctrine. It was that, well, if the statute's ambiguous, but it's a really important question, then we would expect that congress would not delegate such an important question to the agency. But the next move is, well, then who does interpret the ambiguity? It's the court; it's the judges. So, in the OSHA vaccination or testing case in January of this year, you see that sharply debated between the majority in Justice Gorsuch's concurring opinion and the dissenting opinion written by Justice Breyer.

Rob Stavins: To outsiders like myself, I mean, I'm not a legal scholar, I'm not even a political scientist, but an economist, what it seems that this supreme court might itself

picture as returning some of the power from the executive branch to quote-unquote where it belongs, the Congress, it actually may be moving some of that power from the executive branch to the judicial branch.

Jonathan Wiener: As you hinted, in the OSHA vaccination or testing rule case from January, the Chevron case was not even cited. Then in the EPA climate change case about the [Clean Power Plan](#), from the Obama Administration and the Trump Administration's attempt to replace that with the affordable, clean energy rule, under Clean Air Act Section 111. So, there was an oral argument before the Supreme Court on February 28th and the Chevron case was not mentioned, it was kind of striking. If the Supreme Court is saying, "Well, if the statute doesn't speak clearly, then it goes back to congress." It could go back to congress and occasionally congress does enact a statute that clarifies, fills in a gap. For example, 20 years ago, the Supreme Court held that the Food and Drug Administration does not have the authority to regulate tobacco under the law at the time. And congress did enact a statute that then gave FDA that authority, but it took nine years.

Rob Stavins: I see, interesting.

Jonathan Wiener: It took nine years. One other example, that's in the environmental arena more recently is, there was a decision by the DC Circuit, U.S. Court of Appeals in Washington DC, saying that EPA did not have the authority to regulate HFCs, hydrofluorocarbons, under the then language of the Clean Air Act. Just about two, maybe three years later, congress enacted a new statute in late 2020, that gave EPA renewed authority. So that can happen, but it could be stuck in gridlock. So that may mean that it's the court that ends up interpreting the statute or holding that the statute does not provide the authority and then the agency is stuck.

Rob Stavins: What may be an interesting footnote on what you mentioned about late 2020 and HFCs is that was a small part of a very large bit of COVID legislation and was signed into law by former President Trump. This was during what we would call the transition period normally, but there wasn't much of a transition. Now some listeners could take much of what we said and what you've been saying I think quite correctly to be somewhat pessimistic, in terms of what might be happening on the regulatory front. Obviously, you started with thinking about legislation and given the prominence of what I'll refer to with a single name, Senators Manchin and Sinema, that those two senators combined may make it very difficult for the Build Back Better Bill, even if in a shrunk and greatly limited form, to succeed. That all sounds pessimistic.

Rob Stavins: So, I am determined to give you an opportunity to conclude with something that might allow you to be more optimistic, if you wish to be, Jonathan, but otherwise don't. That is, I want to ask you about the youth movements of climate activism, which are such a change from, as you well know from even five years ago, let alone 10 or 15 or 20 years ago. Most prominently in 2019 and then again in 2020 and the lead up and in Glasgow. I'm not just referring to



Greta Thunberg, but to many students, probably your students at Duke and certainly my students at Harvard. I'd like to know, what's your reaction to these youth movements regarding climate activism?

Jonathan Wiener: I agree that is a cause for optimism and I think on campuses across the country and around the world, one sees enthusiasm, energy, some sense of impatience and indignation, that the earlier generations didn't address these problems adequately. I think we anticipated, when you and I and Dick Stewart and others were working on climate change policy design back 30 years ago, that we needed to design the institutions well so that we would not face a crunch time later of trying to address climate change in a big hurry.

Jonathan Wiener: Unfortunately, to some extent, we are in that crunch time right now and I would add to the examples you gave about youth involvement in international negotiations. Also, the youth involvement in domestic climate litigation, the [Juliana case](#) that's still percolating in the 9th Circuit in Oregon. But there have been a number of other lawsuits like that, and those lawsuits may not each individually hit a home run, but the persistence can pay off as we've seen in some past litigation, like on tobacco and other broad social, public health and environmental issues.

Jonathan Wiener: The other thing I'd just add is, you mentioned Senator Sinema and Senator Manchin. The challenge of achieving an enacting coalition in the congress, is also a challenge for scholars, researchers to figure out a policy design that will be successful. Both not only environmentally and economically, but in the political economy be successful. I think in the 1990 Clean Air Act Amendments, there were sharp regional differences of impact and of opinion. Some of that was solved through the design of the cap-and-trade system. I know you've written about how a cap-and-trade system can decouple efficiency and equity in a way that enables solving both of those or addressing and improving both efficiency and equity. So, I think there are prospects, whether it's cap-and trade, or a carbon tax, or some other approach to their prospects for a well-designed policy to find its way to an enacting coalition.

Rob Stavins: So, I'll take that as definitely a positive and optimistic way to conclude. So that our listeners, as well as you and I can finish with a smile on our face. So, thank you very much, Jonathan, for taking time to join us today.

Jonathan Wiener: Thank you, Rob. It's been such a pleasure talking with you.

Rob Stavins: Our guest today has been [Jonathan Wiener](#), the William and Thomas Perkins Professor of Law at [Duke Law School](#). Please join us again for the next episode of [Environmental Insights: Conversations on Policy and Practice](#) from the [Harvard Environmental Economics Program](#). I'm your host, [Rob Stavins](#). Thanks for listening.

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