

Speaking Truth About Power

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Howard A. Latin, [Climate Change Regulation and EPA Disincentives](#), 45 **Envtl. L.** 19 (2015).

In a four-decade scholarly career, my former colleague [Howard Latin](#) has never shied away from speaking truth to power. His writings have taken on all three branches of government, wealthy private interests like the auto industry, and entrenched academic orthodoxies (notably economic theories of environmental and tort law). More recently, he published an important book arguing that even the most ambitious conventional proposals to respond to anthropogenic climate disruption will not do enough, quickly enough, to mitigate the long-term harm that will result from high concentrations of greenhouse gases in earth's atmosphere.

In *Climate Change Regulation and EPA Disincentives*, Latin casts a disappointed eye on the Environmental Protection Agency's efforts to address greenhouse gas emissions using its authority under the Clean Air Act in the aftermath of *Massachusetts v. EPA*. Given the ineffable magnitude of the danger, the Supreme Court's acquiescence, and a comprehending President, Latin asks: Why so timid, EPA? Drawing on many themes from his earlier work, he answers by speaking truth *about* power: the fossil-fuel-burning generation of electric power, the pressures that exert psychological and bureaucratic power within agencies, and the limited exercise of regulatory power seemingly conferred by statute.

Latin focuses on EPA's failure to require swift, significant reductions in greenhouse gas emissions from existing and new fossil-fuel-fired power plants and their associated fuel cycles. With respect to existing plants, Latin argues that EPA's proposed Clean Power Plan requires emissions reductions that are too little too far in the future. With respect to new plants, Latin ridicules as meaningless EPA's proposed New Source Performance Standard, quoting from the agency's own analysis of the proposed rule's effects: it "will result in negligible CO₂ emission changes, energy impacts, benefits or costs for new units constructed by 2020" because the rule would require nothing beyond what EPA believes the market would have produced absent regulation.

To explain EPA's cautious approach, Latin invokes the eight "laws" of administrative behavior that he articulated twenty-five years ago in criticizing the 1990 Clean Air Act amendments. Thus the patterns of agency behavior that Latin observes at work in EPA's attempts at CO₂ emissions regulation are neither new in practice nor newly understood in theory. Latin shows persuasively that these patterns are active by marshaling facts that will also mostly be familiar to those who follow climate policy issues.

It is no surprise, for example, to learn that politics usually trumps technocracy, and therefore EPA responds to political opposition to meaningful CO₂ emissions reductions—which comes from officeholders of both political parties for reasons ranging from anti-regulatory ideology to parochial concern about short-term local employment effects to the need for (or fear of) massive campaign spending by those whose wealth derives from fossil fuels. Nor, unfortunately, is it news that Congressionally-imposed resource limitations, continuous criticism from all sides, and manipulation by regulated industries can debilitate the will of even committed career agency staff and well-intentioned agency leadership. Or that EPA is prone to avoiding regulatory steps that would cause severe social and economic dislocation,

even if (as Latin contends is true for greenhouse gas emission reductions) regulation would have net social benefits. History amply demonstrates the truth of this group of Latin's laws.

Two more of Latin's laws describe other factors constraining EPA's behavior that, although they have been observed before, are discussed less often in climate policy debates. Latin explains how EPA's science-driven agenda can discourage necessary, but aggressive and risky, policy-making. Disciplinary norms push most scientists toward basic research and away from policy prescriptions derived from incomplete data, Latin observes, yet at the same time bureaucratic norms channel agency research toward reinforcing already well-supported conclusions rather than assessing phenomena that are only vaguely understood. As a result, Latin argues, reliability norms inhibit strong policy prescriptions while weaker, easier policies are not closely examined. For example, EPA has yet to analyze the effects on greenhouse gas emissions, over the entire fuel cycle, of the market-driven shift from coal-burning to natural-gas-burning electricity generation.

Latin applies his eighth law—that administrators of multiple-purpose statutes tend to emphasize only one or two statutory goals—less to EPA than to the myriad other federal agencies whose actions contribute to the overall effect of government policy on climate disruption. Despite Presidential directives to develop cooperative climate change policies and practices, Latin notes, these agencies continue to pursue specialized agendas that make attacking climate change harder rather than easier. He cites, among other examples, support within the State Department for the Keystone XL pipeline.

The contribution of *Climate Change Regulation and EPA Disincentives* is not so much in telling us things we did not know but in showing us how they combine to stymie bold regulatory action. The commons problem that has so frustrated global action on greenhouse gas emissions, for instance, underlies much of the political opposition Latin describes but also much of the reluctance to impose social and economic costs in the name of emission reduction: the benefits of individual action at the regional or even national level are perceived not to justify its costs absent effective collective action on a global scale. Internal scientific and bureaucratic norms insidiously enhance the effectiveness of external criticism.

Climate Change Regulation and EPA Disincentives also makes a more subtle contribution to the environmental law professoriate. We all know that the 1970, 1977 and even 1990 Clean Air Act Amendments were not really designed to address emissions of pollutants like greenhouse gases, even though the statute's language is broad enough to encompass those pollutants. We teach our students—who, after all, will be tasked with making mitigation and adaptation policy choices more difficult than even those we currently face—that what is really needed is legislation designed to attack the climate disruption problem head-on and effectively. Yet we despair of any prospect that such legislation will be enacted in the foreseeable future: certainly not until 2017 or later, and then only if the stars align. By showing us how and why EPA has failed to embrace the power it already has, Latin inspires us to envision a world in which effective national action does not depend on endlessly, fruitlessly waiting for Congress. By explaining agency timidity, he implicitly reminds us—and EPA—of the possibility of daring.

Ordinarily I would have been reluctant to write a Jot praising the work of a colleague at my own law school. I feel justified, however, because Howard Latin has just retired from our faculty. In what may be his last law review article, he again provides signal service to environmental law scholars and environmental policy makers. So I happily thank him for the mentorship he provided to me and for the scholarship he provided to the world.

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