

TESTIMONY  
OF  
LISA HEINZERLING

JUSTICE WILLIAM J. BRENNAN, JR., PROFESSOR OF LAW,  
GEORGETOWN UNIVERSITY LAW CENTER

BEFORE THE SUBCOMMITTEE ON CLEAN AIR AND NUCLEAR SAFETY OF THE  
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,  
UNITED STATES SENATE

HEARING ON  
LEGAL IMPLICATIONS OF THE CLEAN POWER PLAN

MAY 5, 2015

Lisa Heinzerling  
Justice William J. Brennan, Jr., Professor of Law  
Georgetown University Law Center  
Testimony before the Subcommittee on Clean Air and Nuclear Safety of the  
Committee on Environment and Public Works  
United States Senate  
May 5, 2015

Thank you for giving me the opportunity to testify before you today on the legal implications of the Environmental Protection Agency's proposed rule to regulate carbon dioxide from power plants, known as the "Clean Power Plan."

I am the Justice William J. Brennan, Jr., Professor of Law at the Georgetown University Law Center. My primary expertise is in environmental law and administrative law. My work in these areas includes four books and dozens of law review articles and book chapters. I was the lead author of the briefs for the petitioners in *Massachusetts v. EPA*, 549 U.S. 497 (2007), in which the Supreme Court held that the Clean Air Act authorizes the Environmental Protection Agency to regulate greenhouse gases and that EPA had erred in refusing to regulate these pollutants for policy reasons unconnected to the statute. I was counsel of record for petitioners Massachusetts and New Jersey in *Whitman v. American Trucking Associations*, 531 U.S. 457 (2001), in which the Court upheld a central program of the Clean Air Act against a constitutional challenge based on the nondelegation doctrine. From January 2009 to December 2010, I took a leave of absence from Georgetown to serve first as Senior Climate Policy Counsel and then as head of the Office of Policy at the U.S. EPA.

In this testimony, I will discuss three sets of legal claims that critics of EPA's proposed Clean Power Plan have asserted against it and explain why they lack merit.

These claims are that the Clean Power Plan violates the Constitution by taking property without just compensation and without due process, usurping States' authority, and disrespecting constraints on the delegation of authority from Congress to the executive; violates the Clean Air Act by regulating, under section 111(d) of the Act, sources that are regulated under section 112 of the Act; and violates the Clean Air Act by considering carbon-reducing measures "beyond the fence line" of individual power plants. As I will explain, the constitutional claims have no basis in current doctrine, and the statutory claims misunderstand the Clean Air Act and EPA's authority under it.

### **I. The Clear Constitutionality of the Clean Power Plan**

Critics of the Clean Power Plan – most notably, renowned constitutional law scholar Laurence Tribe of Harvard Law School – have asserted that the rule violates several constitutional doctrines: doctrines on takings and due process, federalism, and nondelegation. These claims are fundamentally inconsistent with current law.

Much of the argumentation on these constitutional theories proceeds from two deeply misguided premises. The first is that, once the government has favored a particular industry, over a period of time, with financial subsidies and regulatory forbearance, it may not – even in response to new information about the harms caused by that industry – cease lavishing favorable treatment on the industry without paying for its decision. The second is that the harm caused by carbon dioxide is not the kind of harm that counts for constitutional purposes. Nowhere is

this mode of argumentation more prominent than in the critics' theory that the Clean Power Plan violates the takings and due process clauses because it upsets the "reasonable investment-backed expectations" of the coal industry and targets a subset of polluting sources.

This theory is long on rhetoric but short on law. It is not true that *any* interference with "reasonable investment-backed expectations" violates the takings clause. In order to run afoul of the takings clause, a regulation must deprive a property owner of all or substantially of the value of her property.<sup>1</sup> The Clean Power Plan does not do this. Moreover, the plan does not even interfere with *reasonable* investment-backed expectations. The federal government has never promised the coal industry that its gargantuan carbon load will be allowed to continue indefinitely. The coal industry, like all other property owners, has no constitutional right to immunity from new regulations designed to protect the public from harm. As Justice Antonin Scalia affirmed in *Lucas v. South Carolina Coastal Council*, a "property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police power."<sup>2</sup>

Professor Tribe has conceded that the government may, without violating the takings or due process clause, "phas[e] out intrinsically harmful activity that injures

---

<sup>1</sup> *Lingle v. Chevron USA Inc.*, 544 U.S. 528, 539 (2005) (regulatory restrictions rise to the level of a taking only if their economic impacts are so severe that they are "functionally equivalent" to a direct appropriation or physical occupation of private property).

<sup>2</sup> 505 U.S. 1003, 1027 (1992).

identifiable individuals or businesses."<sup>3</sup> With the novel criteria of intrinsicity and identifiability in hand, Professor Tribe aims to distinguish carbon dioxide from other air pollutants that, he tacitly admits, may be regulated without compensation. Carbon dioxide, he posits, "simply is not a pollutant in the conventional sense"; rather, "it is a benign gas essential for life."<sup>4</sup> "No cause-and-effect relationship" exists, Tribe continues, "between the actions of any individual and any specific harm."<sup>5</sup>

The trouble with this argument is that parroting the Competitive Enterprise Institute's "they call it pollution; we call it life" television advertising campaign is not a constitutional theory.<sup>6</sup> There is no constitutional doctrine that embraces Professor Tribe's eccentric view of "intrinsic" harm, which ignores both the lethal potential of carbon dioxide in high concentrations and the catastrophic potential of carbon dioxide for the world's climate. And there is no constitutional doctrine that adopts Professor Tribe's novel condition that victims of harm be individually identifiable before the government may regulate the harmful activity without compensating those doing the harm. If this condition held, much of the Clean Air Act would be unconstitutional in the absence of a massive compensation scheme for the industries regulated by it. We do not know exactly who dies when concentrations of particulate matter reach a deadly level, who suffers neurological damage when mercury concentrations are too high, or who gets skin cancer as a consequence of

---

<sup>3</sup> Testimony of Laurence H. Tribe, Before the Subcommittee on Energy and Power of the Committee on Energy and Commerce, U.S. House of Representatives, at 28 (March 17, 2015) ("Tribe Testimony").

<sup>4</sup> Id., at 28-29.

<sup>5</sup> Id., at 29.

<sup>6</sup> The ad is available here: <https://www.youtube.com/watch?v=7sGKvDNdJNA>.

the thinning of the ozone layer. Laws like the Clean Air Act reflect a conscious rejection of the notion that injury must take a particular, pre-twentieth-century-common-law-type form before it may be addressed by law. Professor Tribe's theory would do radical damage to such laws.

Equally strange is Professor Tribe's claim that the government must pay compensation when it aims regulation at a subset of harm-producing activity – "a fraction of emitters," in Professor Tribe's formulation – that affects that public as a whole.<sup>7</sup> Taken to its extreme – and nothing in this already extreme argument counsels against such an extension – this argument would require compensation whenever the government moves one step at a time. The government could not target, say, the sulfur dioxide emissions from oil refineries without triggering the obligation to pay compensation, because oil refineries represent "a fraction of emitters" of sulfur dioxide. However, beyond quoting a general passage from the Supreme Court on "fairness and justice," Professor Tribe offers no precedent for the idea that the government must pay compensation when it regulates incrementally rather than across the board.

The application of this novel principle to coal-fired power plants is especially bizarre, and would set back rather than promote the cause of fairness and justice. In 2014, coal-fired power plants were responsible for 76 percent of the carbon dioxide emissions of the country's electric power sector and for some 38 percent of our total energy-related carbon dioxide emissions.<sup>8</sup> Professor Tribe can include the coal

---

<sup>7</sup> Tribe Testimony, at 29.

<sup>8</sup> These figures come from the U.S. Energy Information Administration. They are available at <http://www.eia.gov/tools/faqs/faq.cfm?id=77&t=11>.

industry in the "unlucky few,"<sup>9</sup> eligible for compensation from the broadly injured general public, only because the harm the industry inflicts is so vast compared to the number of facilities it operates. Professor Tribe's novel theory for protecting the "unlucky few" would trigger the obligation of compensation most readily when an industry manages a dubious efficiency, imposing harm across a whole population with only a "fraction" of actors.

Critics of the Clean Power Plan magnify their constitutional errors by arguing that the plan violates principles of federalism embodied in the Tenth Amendment. Specifically, Professor Tribe claims, the plan "commandeers" State governments by setting pollution reduction goals for the States, offering a menu of options for meeting those goals, and setting a timeline within which the States must act.<sup>10</sup>

Thus described, the Clean Power Plan is materially indistinguishable from the Clean Air Act's longstanding National Ambient Air Quality Standards (NAAQS) program. That program, too, sets air pollution goals for the States, provides a menu of options for meeting those goals, and sets a timeline for State action. If the Clean Power Plan is unconstitutional, so, too, is the 45-year-old NAAQS program – despite the fact that in its many trips to the Supreme Court on various issues, this program has never been questioned on the grounds raised by Professor Tribe. Furthermore, if Professor Tribe is correct, the constitutional error of the "cooperative federalism" framework of the Clean Air Act lies precisely in its "cooperative" aspect; he nowhere suggests that EPA's carbon rule would be constitutionally suspect, on federalism grounds, if the federal government acted alone in regulating pollution. Professor

---

<sup>9</sup> Tribe Testimony, at 28.

<sup>10</sup> Id., at 16.

Tribe supports this "no good deed goes unpunished" theory of constitutional law by arguing that a framework of cooperative federalism blurs accountability by splitting authority between the federal and state governments.<sup>11</sup> This argument, too, would apply equally to the decades-old NAAQS program.

Happily, however, neither the Clean Power Plan nor the NAAQS program usurps constitutionally protected State prerogatives. Both programs give States a choice: develop plans to meet the air pollution reduction goals set by the federal government, or let the federal government develop those plans itself. To the extent the Clean Power Plan guides the States in developing their own plans, it is a study in flexibility, offering States not only a broad menu of specific options in developing their plans but also accepting that they may want to strike out in a different direction. Moreover, on the question of accountability, especially given the unprecedentedly high profile of the Clean Power Plan, it is not realistic to fear that citizens will be unable to tell who is responsible for its contours in their States.

Nothing in the Supreme Court's jurisprudence on federalism suggests that the Clean Power Plan unlawfully interferes with State prerogatives. Two decisions from the 1990s, *New York v. United States*<sup>12</sup> and *Printz v. United States*,<sup>13</sup> concluded that federal statutes that required certain actions from the States' "legislative or administrative apparatus"<sup>14</sup> – in the form of either taking title to nuclear waste or imposing certain waste regulations, in *New York*, or performing background checks on handgun purchasers, in *Printz* – "commandeered" State governments in violation

---

<sup>11</sup> *Id.*, at 22.

<sup>12</sup> 505 U.S. 144 (1992).

<sup>13</sup> 521 U.S. 898 (1997).

<sup>14</sup> *NFIB v. Sebelius*, 132 S.Ct. 2566 (2012).



of the Tenth Amendment. The Clean Power Plan, in contrast, does not require the States to do anything. It merely gives them the opportunity to develop their own plans for reducing carbon dioxide. Giving States the option of finding their own way to solve a problem does not offend constitutional principles of federalism; it respects them.

Giving the States this choice, moreover, does not run afoul of the "coercion" principle applied in *National Federation of Independent Business v. Sebelius*.<sup>15</sup> The Clean Power Plan is nothing like the Affordable Care Act's charge to States that they either expand their Medicaid programs or lose all of their federal funding for Medicaid – amounting to an average of over 10 percent of their overall budgets.<sup>16</sup> The Court in *Sebelius* agreed with the States that "the Medicaid expansion is far from the typical case." "In the typical case," the Court said,

we look to the States to defend their prerogatives by adopting 'the simple expedient of not yielding' to federal blandishments when they do not want to embrace the federal policies as their own. The States are separate and independent sovereigns. Sometimes they have to act like it.<sup>17</sup>

Nothing in the Clean Power Plan prevents States from acting like the separate and independent sovereigns they are.

The final constitutional objection that critics have made against the Clean Power Plan is that it violates the constraint on delegations of the legislative power from Congress to the executive. Even more than the claims based on principles of takings, due process, and federalism – principles that have inspired at least some successful litigation in recent years – the argument based on the nondelegation

---

<sup>15</sup> 132 S.Ct. 2566, 2602 (2012).

<sup>16</sup> *Id.*, at 2605.

<sup>17</sup> *Id.*, at 2603 (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 482 (1923)).

doctrine is strikingly out of touch. As Professor Cass Sunstein, also of Harvard Law School, put it some years ago, the nondelegation doctrine has had “one good year”: that was 1935, the year in which the Supreme Court struck down two statutes on nondelegation grounds and the last time the Supreme Court did so.<sup>18</sup> After noting this history, Justice Scalia lamented in 1989: “What legislated standard, one must wonder, can possibly be too vague to survive judicial scrutiny, when we have repeatedly upheld, in various contexts, a ‘public interest’ standard?”<sup>19</sup> Notably, it was Justice Scalia himself who went on to write the unanimous opinion in *Whitman v. American Trucking Associations*, upholding the NAAQS provisions of the Clean Air Act against a challenge based on the nondelegation doctrine.

Given this jurisprudential arc, the critics of EPA's Clean Power Plan admit, as they must, that they cannot rest their argument on the settled understanding of the nondelegation doctrine. As Professor Tribe puts it, the “constitutional objection ... is not to a congressional decision to leave excessive authority to the agency (in violation of a non-delegation constraint).”<sup>20</sup> Such an argument would be a sure loser, given current law. Instead, Professor Tribe and his colleagues at Peabody Energy have developed the novel theory that the nondelegation doctrine is violated when an agency resolves the tension between two apparently incompatible statutory provisions by trying to give both provisions some legal significance. This argument boggles the legal mind.

Administrative agencies interpret ambiguous and even inconsistent statutory

---

<sup>18</sup> Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303, 330, 332 (1999).

<sup>19</sup> *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting).

<sup>20</sup> Tribe Testimony, at 49.

provisions every day in this country. They do so not only with the longstanding approval of the Supreme Court but also within the sanctuary of the Court's longstanding posture of deference to their interpretations.<sup>21</sup> To say that an agency oversteps constitutional bounds when it tries to reconcile confusing statutory language would be to upend much of modern administrative law.

Professor Tribe tries to mask the audacious and disruptive nature of this argument by pretending that the Clean Power Plan presents an interpretive dilemma never before encountered by an administrative agency. He claims that in interpreting the 1990 amendments to section 111(d) of the Clean Air Act, EPA is "choos[ing] for itself which statute Congress in fact enacted and which, therefore, the agency will enforce."<sup>22</sup> This is not a fair characterization of what EPA is doing. The fact of the matter is that Congress in 1990 passed, and President George H.W. Bush signed, two provisions amending section 111(d) of the Clean Air Act. One, the amendment offered by the Senate, appears to look to the kinds of pollutants to be regulated under section 111(d); the other, offered by the House, appears to look to the kinds of sources to be regulated under this provision. The correct way to describe EPA's task in applying these provisions is not that EPA is "choos[ing] for itself which statute Congress in fact enacted"; the agency is acutely aware that Congress enacted both of these amendments. Instead, the correct way to describe EPA's task is as an effort to reconcile two provisions that appear at first glance to

---

<sup>21</sup> The standard contemporary citation is to *Chevron v. NRDC*, 467 U.S. 837 (1984), but the Court's deferential stance to agencies' interpretations of the statutes they implement actually preceded *Chevron* by many years. See, e.g., *Gray v. Powell*, 314 U.S. 402, 411 (1941).

<sup>22</sup> Tribe Testimony, at 49.

point in different directions. This interpretive task is part of the quotidian work of an administrative agency in the modern era.

Professor Tribe's new theory of the nondelegation doctrine not only immeasurably enlarges the scope of that doctrine, but it also flouts the Supreme Court's teaching in its one case examining the Clean Air Act in light of the nondelegation doctrine. In *Whitman v. American Trucking Associations*,<sup>23</sup> the Supreme Court unanimously reversed the D.C. Circuit's ruling that EPA had, in setting revised NAAQS for particulate matter and ozone, construed the NAAQS provisions of the Clean Air Act "so loosely as to render them unconstitutional delegations of power."<sup>24</sup> The D.C. Circuit had concluded that EPA had unconstitutionally erred by not giving these provisions a narrowing interpretation that would cabin the agency's own authority, and had remanded the case to EPA with the instruction to come up with a "determinate standard" for setting the NAAQS.<sup>25</sup> The D.C. Circuit's deployment of the nondelegation doctrine in this way was utterly novel; never before had a court held that an agency's failure to interpret a statute in a particular way violated the nondelegation doctrine.

In *Whitman v. American Trucking Associations*, the Supreme Court, with Justice Scalia writing for a unanimous bench, easily dispatched the D.C. Circuit's new nondelegation doctrine. The Court wrote:

We have never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute.... The idea that an agency can cure an unconstitutionally standardless

---

<sup>23</sup> 531 U.S. 457 (2001).

<sup>24</sup> *American Trucking Associations v. EPA*, 175 F.3d 1027, 1034 (D.C. Cir. 1999) (per curiam).

<sup>25</sup> *Id.*, at 1038.

delegation of power by declining to exercise some of that power seems to us internally contradictory. The very choice of which portion of the power to exercise – that is to say, the prescription of the standard that Congress had omitted – would *itself* be an exercise of the forbidden legislative authority. Whether the statute delegates legislative power is a question for the courts, and an agency's voluntary self-denial has no bearing upon the answer.<sup>26</sup>

An unconstitutional delegation, in other words, cannot be fixed by the agency receiving the delegation; that would exacerbate, not solve, the nondelegation problem.

Yet having EPA "fix" the supposed nondelegation problem in the Clean Power Plan, by interpreting the Clean Air Act in a particular way, is exactly what Professor Tribe's theory demands. Granting for purposes of this argument that Congress did indeed pass two amendments on the scope of section 111(d), Professor Tribe and Peabody Energy claim that EPA may not "pick and choose which version it want[s] to enforce."<sup>27</sup> They believe, however, that EPA can avoid this problem altogether by picking the *correct* version of section 111(d) – that is, their preferred version. This is just the kind of novel understanding of the nondelegation doctrine that the Supreme Court rejected in *Whitman v. American Trucking Associations*. As that case teaches, an agency may not correct a statute's nondelegation problem by "choosing which portion of the power to exercise."<sup>28</sup> If interpreting two arguably inconsistent provisions of a statute poses an unconstitutional choice, it is a choice inherent in the statute that contains the provisions. If the theory offered by Professor Tribe and Peabody Energy is correct, the remedy is not for EPA to choose the interpretation

---

<sup>26</sup> 531 U.S. 457, 472-73 (2001).

<sup>27</sup> Comments of Laurence H. Tribe and Peabody Energy Corporation on EPA's Clean Power Plan, at 27 (Dec. 1, 2014), available at [http://www.masseygail.com/pdf/Tribe-Peabody\\_111\(d\)\\_Comments\\_\(filed\).pdf](http://www.masseygail.com/pdf/Tribe-Peabody_111(d)_Comments_(filed).pdf).

<sup>28</sup> 531 U.S. at 473.

they prefer; it is to strike the two statutory amendments that create the conflict they see. That would mean, of course, that section 111(d) would no longer contain the provision at the center of their legal argument against the Clean Power Plan. No wonder Professor Tribe and his colleagues at Peabody Energy do not ask for this remedy.

The constitutional arguments raised by critics of the Clean Power Plan all come to grief because they have no basis in today's constitutional law. The Clean Power Plan is not unconstitutional. Nor does it even raise the kind of "serious constitutional problems" that sometimes persuade a court to adopting a narrow interpretation of a statute in order to avoid the constitutional issues.<sup>29</sup> The "constitutional avoidance" doctrine – which Judge Richard Posner has rightly criticized for its creation of "a judge-made constitutional 'penumbra'"<sup>30</sup> – would grow grotesquely powerful if flimsy constitutional arguments were enough to justify its invocation.

## **II. The Legality of Regulating Power Plants Under Section 111(d)**

Once the distracting constitutional rhetoric of the critics of the Clean Power Plan is swept aside, as it should be, the critics' primary remaining legal argument is statutory: section 111(d) of the Clean Air Act does not, they claim, allow EPA to regulate carbon dioxide from power plants, because power plants are regulated

---

<sup>29</sup> Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988).

<sup>30</sup> Richard A. Posner, *Statutory Interpretation – In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 816 (1983).

under section 112 of the Act. They base this argument on the House-originated version of amendments to section 111(d) enacted in 1990, which directed EPA to set standards of performance for existing sources of an air pollutant "which is not ... emitted from a source category which is regulated under section [112] of this title."<sup>31</sup> In the course of their argument, the critics mostly ignore the Senate-originated version of the amended section 111(d), which directed EPA to set standards of performance for existing sources of an air pollutant so long as that pollutant was not listed as a hazardous air pollutant under section 112.<sup>32</sup> Both of these amendments were passed by Congress and signed into law by President George H.W. Bush. Although the Office of Law Revision Counsel included only the House-originated amendment in the U.S. Code, the Statutes at Large contain both amendments. Where Congress has not adopted the relevant provisions of the U.S. Code as legislation, the Statutes at Large prevail over the U.S. Code.<sup>33</sup>

While the history of these two arguably inconsistent amendments to section 111(d) may be unusual, the task these provisions present to EPA is not. EPA's task is to try to reconcile the provisions as best it can, using its best judgment as to how to do this. EPA has proposed this kind of reconciliation in the Clean Power Plan, aiming to give force to both amendments by interpreting them, together, to allow, under section 111(d), the regulation of air pollutants from sources also regulated under section 112, so long as those very air pollutants are not regulated under section 112.

---

<sup>31</sup> Pub. L. No. 101-549, § 108(g), 104 Stat. 2399, 2467.

<sup>32</sup> Pub. L. No. 101-549, § 302(a), 104 Stat. at 2574.

<sup>33</sup> See, e.g., *Stephan v. United States*, 319 U.S. 423, 426 (1943) ("[T]he Code cannot prevail over the Statutes at Large when the two are inconsistent"); *Darby v. Cisneros*, 509 U.S. 137, 139 n. 1 (1993) (same).

The agency has undertaken a painstaking, word-by-word analysis of the language of the House-originated amendment, demonstrating that the superficial clarity of this provision recedes upon close inspection.<sup>34</sup> I am not aware of a situation in which an administrative agency has explained its proposed interpretation of challenging statutory language more thoroughly or more forthrightly than EPA has done here. Based on the text of section 111(d) alone, EPA has persuasively defended its proposed view that the statute is ambiguous and that its interpretation is reasonable. These are the criteria for *Chevron* deference, and EPA has met them.

Beyond the specific text of section 111(d), EPA's interpretive judgment also makes sense in light of the larger structure of the Clean Air Act. Throughout the Act, Congress preserved EPA's ability to respond to new threats from air pollution without having to obtain new legislative authority. The provisions on the NAAQS, for example, are open-ended insofar as they allow EPA to add pollutants to the current list of pollutants covered by the NAAQS if EPA finds these pollutants meet certain conditions.<sup>35</sup> Likewise, section 112 on hazardous air pollutants, while adopting a provisional list of pollutants to be regulated under this section, also gives EPA the authority to add pollutants to the list when they meet certain conditions.<sup>36</sup> The provisions of the Act applying to specific polluting sources, such as automobiles, also have this open-ended character; they are triggered by EPA's finding that pollutants

---

<sup>34</sup> See, e.g., Final Brief for Respondents, *Murray Energy Corp. v. EPA*, 33-54 (March 9, 2015), available at [http://www.eenews.net/assets/2015/03/09/document\\_ew\\_02.pdf](http://www.eenews.net/assets/2015/03/09/document_ew_02.pdf).

<sup>35</sup> 42 U.S.C. § 7408(a)(1).

<sup>36</sup> 42 U.S.C. § 7412(b)(1), (2).



emitted by them endanger public health or welfare.<sup>37</sup> Indeed, this was, of course, how greenhouse gases first came into the Clean Air Act's regulatory fold.<sup>38</sup> In all of these ways, the Clean Air Act is pervasively structured to allow, and even require, EPA to respond to new scientific evidence of injury from air pollution by addressing it through the Act's regulatory provisions. In arguing that the amendments to section 111(d) enacted in 1990 left EPA unable to address greenhouse gas emissions from power plants once it had regulated *other* emissions from power plants, the critics of EPA's Clean Power Plan bust the mold set throughout the rest of the Clean Air Act. Nothing in section 111(d) or the rest of the Act suggests that this was Congress's intention.

### **III. The Legality of Moving "Beyond the Fence Line" under Section 111(d)**

The critics of EPA's Clean Power Plan have raised another broad legal argument against the plan. They believe that EPA's proposed consideration of "beyond-the-fence-line" measures in the plan plainly violates the Clean Air Act. This claim, too, misses the mark.

EPA has proposed to include "beyond-the-fence-line" carbon-reducing measures in the Clean Power Plan in two ways. First, it has proposed to include such measures in calculating the carbon emissions targets for States. Second, it has proposed to include these measures in the "building blocks" it offers to States as examples of how to meet their emissions targets. In offering these measures as part

---

<sup>37</sup> 42 U.S.C. § 7521(a)(1).

<sup>38</sup> *Massachusetts v. EPA*, 549 U.S. 497 (2007).

of the building blocks for reducing carbon emissions, EPA has not required any State to adopt such measures.

EPA's sensible proposal to take into account a broad range of opportunities for emissions reduction, and not to limit its range of vision to technological fixes at individual sources, reflects a reasonable interpretation of section 111(d). The central legal concept of section 111(d) is that of a "standard of performance,"<sup>39</sup> defined as "the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirement) the Administrator determines has been adequately demonstrated."<sup>40</sup> This definition is notably broad, leaving EPA generous room to consider regulatory strategies that take advantage of the best mix of options available to address a particular pollution problem. Although several other features of section 111 might suggest that Congress had traditional, source-specific regulation in mind,<sup>41</sup> Congress did, in 1990, amend section 111 to remove an explicit reference to technology-based requirements for fossil-fuel-fired stationary sources.<sup>42</sup> Especially given that the beyond-the-fence-line measures that EPA has

---

<sup>39</sup> 42 U.S.C. § 7411(d)(1).

<sup>40</sup> 42 U.S.C. § 7411(a)(1).

<sup>41</sup> Lisa Heinzerling and Rena I. Steinzor, *A Perfect Storm: Mercury and the Bush Administration*, 34 ENVTL. L. REP. 10297, 10309 (2004).

<sup>42</sup> The 1977 amendments to the Clean Air Act had revised section 111(a)(1) to define "standard of performance," as applied to fossil-fuel-fired stationary sources, to require a "percentage reduction" in emissions, from the emissions which would have resulted from fuels not treated before combustion. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 109(c)(1)(A), 91 Stat. 685, 700. The 1990 amendments repealed the "percent reduction" condition. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 403(a), 104 Stat. 2399, 2631.

proposed to consider – such as renewable portfolio standards and demand-side energy efficiency programs – are already being used in a number of States,<sup>43</sup> inclusion of such measures in determining the States' emissions reduction targets and in the menu of possible regulatory strategies for the States to adopt in meeting those targets is a reasonable way to balance the multifarious factors that go into developing regulatory programs under section 111(d).

---

<sup>43</sup> EPA, Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units; Proposed Rule, 79 Fed. Reg. 34830, 34832-35 (June 18, 2014).