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THE RULE OF FIVE GUYS

*Lisa Heinzerling**

THE RULE OF FIVE: MAKING CLIMATE HISTORY AT THE SUPREME COURT. By *Richard J. Lazarus*. Cambridge: The Belknap Press of Harvard University Press. 2020. Pp. 358. \$29.95.

Fourteen years ago, a sundry team of states, cities, environmental and public health organizations, and a U.S. territory persuaded the Supreme Court to rule that the Clean Air Act gives the Environmental Protection Agency (EPA) the power to regulate greenhouse gases, that the EPA may not refuse to exercise this power based on policy judgments not reflected in the statute, that the EPA's refusal to initiate a regulatory proceeding on greenhouse gases was judicially reviewable under the same standard that applies to other agency actions, and that the entities before the Court had standing to challenge the EPA's deliberate inaction on climate change.¹ The decision in *Massachusetts v. EPA* was a bracing win, on every issue before the Court, for climate policy and the rule of law. It led to the first legally consequential acknowledgement by the United States government that greenhouse gases emitted as a result of human activity are endangering human health and welfare,² and it made way for the first federal regulatory programs to control greenhouse gases.³

I had the great privilege of playing a key role in litigating the case in the Supreme Court and in setting up the EPA regulatory programs that followed. In the Supreme Court, I was the lead author of the petition for certiorari and petitioners' briefs on the merits. In the first two years of the Obama Administration, I was a senior climate advisor to the EPA administrator and then the head of the EPA's policy office. Serving in these capacities has been,

* Justice William J. Brennan, Jr., Professor of Law, Georgetown University Law Center. I am grateful to Weston Coward and Sam Pickerill for excellent research assistance, and to David Bookbinder, Brad Campbell, Uriel Hinberg, Marty Lederman, Judy Lichtenberg, David Luban, Naomi Mezey, Vic Nourse, Phil Schrag, Mike Seidman, Gerry Spann, Cherian Vergheese, David Vladeck, and Robin West for characteristically generous and astute comments. I also greatly benefited from my Georgetown colleagues' comments at a faculty workshop on this Review.

1. *Massachusetts v. EPA*, 549 U.S. 497 (2007).

2. See Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,499 (Dec. 15, 2009) (to be codified at 40 C.F.R. ch. I).

3. See, e.g., Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324 (May 7, 2010) (to be codified at 40 C.F.R. pt. 85, 86, 600; 49 C.F.R. pt. 531, 533, 536-38).

so far, the most rewarding and challenging experience of my professional life. The stakes were enormous, the problems complex, and the players deeply human.

In *The Rule of Five: Making Climate History at the Supreme Court*, Professor Richard Lazarus⁴ chronicles the litigation in *Massachusetts v. EPA*, beginning with the original citizens' petition asking the EPA to regulate greenhouse gas emissions from motor vehicles and culminating in the Supreme Court's decision and its aftermath. The bulk of the book is devoted to the legal tactics and personal conflicts among several of the attorneys who participated in the case. Unsurprisingly, given my central role in the case, I have a great many reactions to the book's rendering of these tactics and conflicts.

Let me start by saying that whoever chose the novelist Scott Turow as the lead blurbist for the book jacket nailed it. The book is crowded with ambitious lawyers, wise judges, tangled law, and stately courtrooms. There is a just cause and a triumphant outcome. There are heroes and antiheroes, with these judgments disguised but not hidden by Lazarus's facially neutral third-person narrative. To top it all off, a courtroom scene serves as the dramatic climax (pp. 207–19). The book is, against all odds, a legal thriller.

All this novelistic drama, however, comes with costs. The costs are a deficit in critical judgment and a surfeit of gender traditionalism. The deficit in critical judgment manifests in Lazarus's unalloyed reverence for the Supreme Court and apparent resistance to critiquing its work. This reverence is most vividly on display in the book's descriptions of the Supreme Court building and its contents (pp. 169–70). The entire building becomes, in Lazarus's narrative, a kind of reliquary: every object the justices touch, from pewter mugs to leather chairs to spittoons, takes on some larger and quasi-sacred meaning. The politics that otherwise stalk the city in which the Court sits do not, we are made to infer, darken the doors of this special building. And a frank acknowledgement of the gendered character of the men's-club atmosphere of the Court is lost in Lazarus's romanticizing.

The Rule of Five's account of the legal ruling in *Massachusetts v. EPA* is weakened by Lazarus's exaltation of the Court. The 5–4 decision was, of course, as close as they come, yet the book spends no time on the portent of the strongly worded dissents or on the likely fate of the relevant legal issues on today's Court—a Court that now has a solid majority of conservative justices who have little appreciation for the public protections of the modern regulatory state. Lazarus concludes with a rote call for congressional action without acknowledging that the legal doctrines deployed by the conservative justices in *Massachusetts* can—and likely will—be used, perhaps destructively, in reviewing any new law or regulation on climate change (pp. 290–93). Lazarus's discussion of the legal argumentation in *Massachusetts* is, in fact, so peculiarly incomplete and ingenuous in places that I was confounded. I,

4. Howard and Katherine Aibel Professor of Law, Harvard Law School.

too, like a “hopeful and inspiring story” (p. 2), but not at the expense of clear vision.

The book’s deficit in critical judgment, now paired with unspoken gender traditionalism, also surfaces in its treatment of the human dramas of *Massachusetts v. EPA*. Lazarus’s account is blind to the subtle gender dynamics of the case and, most troublingly, to his own reenactment of them. Lazarus selects as his cast of characters “five guys,” as he calls them (p. 55), and “a gal,” as he calls me (p. 113). His account of the five guys’ roles in the case uncritically accepts their version of events and then distorts it by fixating on and amplifying the conflicts that arose during this high-stakes litigation. In Lazarus’s rendering, the contributions and sacrifices of the female lawyers, including my own, recede to make room for the men.

I begin this Review, in Part I, with a critical appraisal of the noncritical perspective Lazarus brings to his treatment of the Supreme Court. In Part II, I turn to an analysis of Lazarus’s account of the legal issues presented in *Massachusetts v. EPA*. I close, in Part III, by recasting my own place in this historic case.

I. INSIDE THE TEMPLE

The title of Lazarus’s book comes from a long-circulating story about Justice William J. Brennan, Jr., the legal mastermind behind the Warren Court’s famous decisions on voting rights, civil liberties, and criminal procedure, and a proud proponent of “living constitutionalism.” According to Lazarus’s version of the story, after Justice Brennan stumped his law clerks with the question of what is the most important principle of constitutional law, he would simply hold one hand up in the air, his five fingers spread wide—representing the number of votes needed to make any outcome in the Court the law of the land: the rule of five (pp. 181–82).⁵ Beyond this gesture to the power dynamics involved in the Court’s work, however, Lazarus steers well clear of any engagement with the implications of the political—let alone partisan—nature of the Court’s docket and rulings.

The Rule of Five provides a clear and engaging introduction to the justices’ procedures and rituals concerning everything from granting review to deciding cases to taking meals together. Lazarus also leads the reader on a walk inside the Court’s marble temple, giving tantalizing glimpses into the ornate and formal rooms where the justices hear cases, decide outcomes, and eat their postargument lunches together. The smell of dark wood and aged leather—and even chewing tobacco—all but rises from the book’s pages as Lazarus intricately describes the leather chairs, mahogany tables, pewter mugs, and spittoons-cum-wastebaskets that adorn the justices’ collective workspace.

5. I do not recall Justice Brennan talking about the rule of five when I clerked for him, but my co-clerks assure me he did.

At every step of this tour, Lazarus ties the accoutrements and rituals of the justices to history, tradition, and precedent. The chairs they use in their private dining room date from 1795 (p. 223). The individual pewter mugs set out in the courtroom for each justice contain the names of all the justices in what Lazarus calls the current justice's "lineage"—by which he means the line of justices whose "seat" the current justice occupies, going all the way back to the first justice who occupied that slot (pp. 170–71). When the justices eat together, they do not simply sit where they wish, or even according to seniority, as they do in the courtroom and in their private conference room (pp. 177, 227); they sit in the seats assigned to the justices in their "lineage" (p. 223). Portraits of former justices, selected by the sitting chief justice, perhaps with a "deliberate[] . . . message" in mind (p. 227), look down on the conference table where the justices gather to decide cases. Chief Justice Roberts has chosen to keep portraits of Chief Justices John Marshall and John Jay in this place of honor (p. 227).

There is "nothing incidental," Lazarus reports, about any of the "traditions and rituals" he describes (p. 224). Rather, he says, they serve to remind the justices of their "strong ties . . . to their predecessors" and to the "binding precedent" of the Court (p. 224)—which, Lazarus intones, the justices are "bound to follow" until the decisions are overturned (pp. 227–28). In similar fashion, he says, the justices' ritualized postargument luncheons "bind[] them to each other . . . with good conversation" about such topics as family, local politics, or even the advocates who argue before them—any topic, he reports, except for the legal issues with which they are grappling (pp. 224–25). At the conferences where they decide cases, their deliberations take the form of a "formulaic, dispassionate ritual" in which they never speak out of turn, with speaking order determined by seniority (pp. 228–29). In Lazarus's admiring account, "[t]hese well-worn traditions bind the Justices to the past" (p. 224).

One could draw a quite different lesson—a decidedly nonreverential one—from the traditions and rituals *The Rule of Five* describes. First, the Court's workplace, as Lazarus describes it, is anything but collaborative or even congenial. He draws a portrait of a group of colleagues who, even when they share a meal together, do not all eat the same food (p. 226). They discuss everything but their work. When they do communicate with each other about the important issues that come before them, it is either in the highly formal and noninteractive setting of their conference (pp. 226–28), at which they report their initial votes, or in formal memos from one justice to another. Their "good conversation" sounds like the kind of small talk one might expect at an office party with colleagues one barely knows, rather than a conversation among colleagues bound together for life in one of the most important workplaces in the country.

Although Lazarus does not refer to it, there is irony in the justices' minute attention to ritualistic details meant to signal their respect for past decisions, even as the justices undo or itch to undo past decisions. As of 2019, the Roberts Court had overruled precedents at about the same rate as its two immediate predecessors, but over 70 percent of these outcomes came in 5–4

decisions, as compared to about 30 percent on the Rehnquist Court.⁶ The Roberts Court has distinguished itself, moreover, by its members' loud, frequent, and dead-serious threats to reconsider foundational precedents, particularly those involving the administrative state, which forms such an important backdrop to *Massachusetts v. EPA*.⁷ Perhaps most pertinent here, in a case decided after *Massachusetts*, the Court rebuked the EPA for, in essence, taking seriously the Court's core holding that the term "air pollutants" in the Clean Air Act includes greenhouse gases.⁸ The Court did not overrule *Massachusetts*, but it surely did not feel itself "bound to follow" it. The very notion that the Court is bound to follow precedent until it formally overrules it is either naïve or disingenuous.⁹ This idea is, in fact, a strategic myth, useful for signaling that the Court is adhering to the rule of law even while it undermines prior decisions.

Of course, there are other meanings one might draw from the justices' rituals and relics. One might wonder what it is like for a female justice to be assigned a pewter mug etched with the names of only men. Or for a justice of color to receive a mug etched with the names of only white justices, some number of whom were slave owners. Remarkably, there appears to be no official reckoning of the number of Supreme Court justices in our history who owned other humans, but we can say that today's justices have on their pewter mugs the names of more former justices who owned other humans than of men of color or women of any background.¹⁰ And the portraits of Chief Justices Jay and Marshall that Chief Justice Roberts has chosen to keep in the

6. Jimmy Hoover, *The Long Game: Inside the Supreme Court's Playbook on Precedent*, LAW360 (Oct. 7, 2019), <https://www.law360.com/appellate/articles/1206353> [<https://perma.cc/QLX5-98P6>]; *Precedent and the Roberts Court in 4 Charts*, LAW360 (Oct. 7, 2019, 9:32 PM), <https://www.law360.com/articles/1207062> [<https://perma.cc/TKJ3-2LDZ>].

7. See, e.g., *Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Alito, J., concurring in the judgment) (indicating desire to revisit longstanding nondelegation precedents); *id.* at 2131 (Gorsuch, J., dissenting) (arguing for revised and more assertive approach to nondelegation); *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (mem.) (statement of Kavanaugh, J., respecting the denial of certiorari) (agreeing with the denial of certiorari but expressing interest in revisiting nondelegation precedent); *Michigan v. EPA*, 135 S. Ct. 2699, 2712–14 (2015) (Thomas, J., concurring) (arguing that *Chevron* deference may be unconstitutional); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152–53 (10th Cir. 2016) (Gorsuch, J., concurring) (arguing that *Chevron* deference abdicates courts' responsibility to interpret laws).

8. *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 316–17 (2014).

9. See, e.g., *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020) (remaking the Court's ruling in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), while purporting to retain it).

10. One former justice was Black; two were women. One need only count three of our justices who owned enslaved persons to equal this number: our first chief justice, John Jay, Ned Benton & Judy Lynne Peters, *Slavery and the Extended Family of John Jay*, N.Y. SLAVERY RECS. INDEX, <https://nyslavery.commons.gc.cuny.edu/slavery-and-the-extended-family-of-john-jay/> [<https://perma.cc/D6KT-6KBZ>]; our most famous chief justice, John Marshall, PAUL FINKELMAN SUPREME INJUSTICE 36 (2018); and our most famously racist chief justice, Roger Taney, *id.* at 179–80.

justices' conference room commemorate slave-owning justices.¹¹ "Tradition" in the U.S. legal system has a complicated meaning for women and for people of color, but nothing in Lazarus's reverential treatment of the justices' traditions hints at the gendered and racialized message these traditions send. It is important to remember that "the space in which justice is done shapes what we think it means."¹²

The problem with *The Rule of Five's* reverential attitude toward the Court is not only aesthetic or symbolic. It is jurisprudential. The celebration of the relics and rituals that bind the justices to the past, and to predecessors who were almost entirely white and male property owners—and in appreciable proportion, slave owners—betrays a backward-looking mindset that valorizes a troubled history and disfavors departures from the legal status quo. But, as I discuss next, departures from the legal status quo are exactly what we need in order to defend aggressive future action on climate change. We need a new jurisprudence of administrative law that embraces rather than shuns the public protections of the modern administrative state and views government lassitude and recalcitrance with the critical eye they deserve. Adopting a gushing posture toward the Supreme Court, one that accepts the justices' own visions of themselves as apolitical actors working outside the scrum, obscures a clear view of the jurisprudential obstacles that now stand in the way of ambitious action on climate change.

II. THE UNFINISHED BUSINESS OF *MASSACHUSETTS V. EPA*

The legal issues decided in *Massachusetts v. EPA* concerned statutory interpretation, agency discretion, the availability of judicial review, and standing to sue. *Massachusetts v. EPA* delivered a major victory to petitioners on each of these issues. Notably, however, the Court decided these questions by a vote of 5–4. Justice Scalia wrote the dissent on the issues of statutory authority and agency discretion,¹³ and Chief Justice Roberts wrote the dissent on standing.¹⁴ The dissents alone would be worrying enough for one anxious to defend aggressive future action on climate change. But the Court has in the intervening years become even more conservative on regulatory matters, with Justice Gorsuch replacing Justice Scalia and Justice Kavanaugh replacing Justice Kennedy. Five guys who, as judges, have shown little appreciation for the protections of the modern regulatory state—Chief Justice Roberts

11. On Jay's ownership of enslaved persons, see Benton & Peters, *supra* note 10. On Marshall's ownership of enslaved persons, see FINKELMAN, *supra* note 10, at 36 ("Marshall bought and sold slaves, gave them to relatives, and actively participated in the business of human bondage.").

12. Norman W. Spaulding, *The Enclosure of Justice: Courthouse Architecture, Due Process, and the Dead Metaphor of Trial*, 24 YALE J.L. & HUMANS. 311, 343 (2012).

13. *Massachusetts v. EPA*, 549 U.S. 497, 549 (2007) (Scalia, J., dissenting).

14. *Id.* at 535 (Roberts, C.J., dissenting).

and Justices Thomas, Alito, Gorsuch, and Kavanaugh—are poised to sit in judgment on any new legislation or regulation on climate change.¹⁵

The Rule of Five spends little time on the dissents in *Massachusetts v. EPA* and no time on the changed composition of the Supreme Court.¹⁶ The book calls for congressional action on climate change (p. 292), without acknowledging that any future action on this problem will run headlong into conservative legal approaches that are skewed against it. The conservative justices' approach to statutory interpretation, agency discretion, and access to courts favors passivity over action, and small steps over big steps, on problems like climate change. Thus, while legislative action is necessary if we are to meet the full scale of the climate threat, it is not sufficient. Any legislative changes will still be filtered through the political and ideological predispositions of the courts. The courts, too, must change their legal approach in order to make way for regulatory action that is as ambitious as the climate threat is dire. This is the unfinished business of *Massachusetts v. EPA*.

A. *Skewing Statutes Against Action*

The most prominent legal question in *Massachusetts v. EPA* was whether the Clean Air Act empowers the EPA to regulate greenhouse gas emissions.¹⁷ Lazarus's treatment of this issue focuses more on personal drama, particularly the petitioners' chaotic brief-writing process in the D.C. Circuit, than on legal principles (pp. 69–74). As for the legal question itself, Lazarus brushes it aside as “easy,” “border[ing] on the irrefutable,” leaving “no room for debate” (pp. 70, 74). So breezily does Lazarus treat this legal issue that one might easily read Lazarus's book from cover to cover without realizing that four justices found it “easy” in the opposite direction.¹⁸

Yet the dissenting justices' skewed approach to statutory issues like the one in *Massachusetts* portends trouble for aggressive action on climate change, even if that action comes in the context of new legislation specifically tailored to this problem. The conservative justices' general approach to statutory interpretation goes beyond the Clean Air Act and reaches any congressional effort to force action on problems as significant as climate change. Any such effort will necessarily give an administrative agency significant

15. After *The Rule of Five* was published, a sixth conservative justice, Amy Coney Barrett, joined the Court, replacing Justice Ruth Bader Ginsburg. Barbara Sprunt, *Amy Coney Barrett Confirmed to Supreme Court, Takes Constitutional Oath*, NPR (Oct. 26, 2020, 8:07 PM), <https://www.npr.org/2020/10/26/927640619/senate-confirms-amy-coney-barrett-to-the-supreme-court> [<https://perma.cc/E6PY-BCEJ>]. While Justice Barrett shares many of the ideological perspectives of the other conservative justices, she has not yet revealed her overall approach to regulatory issues.

16. Justice Gorsuch is not mentioned in Lazarus's book; Justice Kavanaugh is mentioned only for a fellowship he held after law school. P. 124.

17. *Massachusetts*, 549 U.S. at 505.

18. Lazarus's one, unelaborated reference to the justices' disagreement on this issue occurs in a discussion of the justices' votes at conference. Pp. 247–52.

regulatory power, power that may be undercut by the conservative justices' biased approach to statutory interpretation.

In *Massachusetts*, the Court reviewed the EPA's decision rejecting a citizens' petition to regulate greenhouse gas emissions from motor vehicles. In that decision, the EPA explained that it simply had no such authority under the Clean Air Act. The EPA's reasoning was broad enough to include not only motor vehicles but also all other pollution sources subject to regulation under the Act.¹⁹ If the EPA's decision were upheld, no regulation of greenhouse gases under the Clean Air Act would be permissible.

Before reaching this issue, however, the Court addressed whether the EPA's decision rejecting a petition for rulemaking was judicially reviewable and, if so, under what standard. The federal government argued that the decision was reviewable, but on a "more deferential standard" than an agency decision to issue a rule.²⁰ Analogizing an agency's denial of a rulemaking petition to an agency's decision not to bring an enforcement action, private respondents supporting the EPA argued that the decision was not reviewable at all.²¹ Although the question was not formally before the Court, the Court answered these arguments before turning to the merits. It found that an agency decision denying a rulemaking petition is indeed judicially reviewable, under the same standard (the arbitrary-and-capricious standard, ubiquitous in administrative law) as other agency decisions.²² Although Lazarus does not mention this aspect of the Court's ruling, it answered an important question in administrative law, one that—had it gone the other way—could have greatly limited the courts' supervision of agencies' refusals to initiate rulemaking.

On the merits of the statutory question, the petitioners' briefs—for which I served as the lead author—argued that the Clean Air Act plainly gives the EPA authority to regulate greenhouse gases. The Act requires the EPA to regulate "air pollutant[s]" emitted by motor vehicles if the agency finds that emissions of such pollutants "may reasonably be anticipated to endanger public health or welfare."²³ Congress defined "air pollutant" to "includ[e] any physical, chemical . . . substance or matter which is emitted into . . . the ambient air."²⁴ Greenhouse gases are physical and chemical substances emitted into the ambient air. Although petitioners' argument also explained how their interpretation—and only their interpretation—was faithful to other provisions of the Act and to its overall structure, the core of the argument was that greenhouse gases were air pollutants potentially sub-

19. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,925 (Sept. 8, 2003).

20. Brief for the Fed. Respondent at 39, *Massachusetts*, 549 U.S. 497 (No. 05-1120).

21. Brief for Respondents All. of Auto. Mfrs., Engine Mfrs. Ass'n, Nat'l Auto. Dealers Ass'n, Truck Mfrs. Ass'n at 44, *Massachusetts*, 549 U.S. 497 (No. 05-1120).

22. *Massachusetts*, 549 U.S. at 527-28.

23. 42 U.S.C. § 7521(a).

24. 42 U.S.C. § 7602(g).

ject to regulation under the Clean Air Act because the Act as much as said so.²⁵ Writing for the majority, Justice Stevens agreed that the statute unambiguously precluded the EPA's interpretation.²⁶

In his dissent, joined by three other justices, Justice Scalia found the Clean Air Act ambiguous on this central question. He thought that the broad "including" clause of the definition of air pollutant could as naturally be interpreted to narrow the category of pollutants covered by the Act as to broaden it.²⁷ Despite the fact that the Act allows the EPA to regulate a particular air pollutant only if it endangers health or the environment, Scalia worried that petitioners' interpretation would make the Clean Air Act cover "everything airborne, from Frisbees to flatulence."²⁸ He objected to the idea that greenhouse gases are "polluting the air"; he would have limited the concept of pollution to "impurities."²⁹ Because he found the statute ambiguous and the EPA's interpretation "eminently reasonable," he chastised the majority for "substituting its own desired outcome for the reasoned judgment of the responsible agency."³⁰ He asserted that, "[n]o matter how important the underlying policy issues at stake," the principle of *Chevron* deference dictated a result in favor of the EPA.³¹

The EPA's decision to interpret the Clean Air Act to deny the agency the power to regulate greenhouse gases was a decision of extreme importance—environmentally, economically, and politically. The Clean Air Act is the most direct and comprehensive federal statute regulating air pollution. If applied to greenhouse gases, it holds the power to regulate a very large portion of the greenhouse-gas-emitting sources in the United States.³² No other regulatory statute comes close in this regard.

One can start to grasp the environmental and economic significance of denying the EPA's power to regulate greenhouse gases under the Clean Air Act by looking at the benefits conferred by Obama-era rules on greenhouse gases. The Clean Power Plan, the EPA's rule on greenhouse gas emissions from power plants, was projected to reduce annual carbon dioxide (CO₂) emissions by 74 million metric tons in 2030,³³ while the EPA's CO₂ rule un-

25. See Brief for Petitioners at 11–32, *Massachusetts*, 549 U.S. 497 (No. 05-1120).

26. *Massachusetts*, 549 U.S. at 528–32.

27. *Id.* at 556–57 (Scalia, J., dissenting).

28. *Id.* at 557–58, 558 n.2.

29. *Id.* at 559–60.

30. *Id.*

31. *Id.* at 560 (emphasis added).

32. See Regulating Greenhouse Gas Emissions Under the Clean Air Act, 73 Fed. Reg. 44,354, 44,355 (July 30, 2008) (to be codified at 40 C.F.R. ch. I).

33. See HEALTH & ENV'T IMPACT DIV., OFF. OF AIR QUALITY PLAN. & STANDARDS, EPA, EPA-452/R-18-006, REGULATORY IMPACT ANALYSIS FOR THE PROPOSED EMISSION GUIDELINES FOR GREENHOUSE GAS EMISSIONS FROM EXISTING ELECTRIC UTILITY GENERATING UNITS; REVISIONS TO EMISSION GUIDELINE IMPLEMENTING REGULATIONS; REVISIONS TO NEW SOURCE REVIEW PROGRAM, at ES-7, ES-8 tbl.ES-5 (2018), <https://www.epa.gov/sites>

der the Obama-era Clean Car Standards projected an 872-million-metric-ton cumulative decrease in CO₂ emissions over the lifetime of vehicles through model year 2029.³⁴ These environmental benefits had concomitantly large economic consequences. These economic benefits in large part come from improved health: by 2035 the Clean Power Plan was projected to reduce annual premature deaths by 389–898, reduce annual lost work days by 36,000, and reduce lost school days by 16,000,³⁵ resulting in a combined benefit of \$4.3–\$9.3 billion.³⁶ Similarly, the Clean Car Standards were projected to have \$31.1 billion in net benefits over the lifetimes of vehicles through model year 2029,³⁷ including a reduction in premature deaths by 444–1000 and a reduction in lost work days of over 58,000.³⁸ These positive consequences were made possible by the application of Clean Air Act regulatory standards to greenhouse gases; they are the obverse of the negative consequences of denying this legal authority. The political significance of a decision denying legal authority to regulate greenhouse gases is amply illustrated by former Vice President Dick Cheney’s strenuous efforts to orchestrate a public denial of this authority by President George W. Bush (pp. 32–34).

The EPA’s decision to deny itself the power to regulate greenhouse gases was, in short, a decision of great environmental, economic, and political significance. And Justice Scalia and three of his colleagues would have deferred to it under *Chevron*.

For the conservative justices, however, deference does not work in the other direction. Indeed, these justices had an opportunity to show just how skewed their approach to statutory interpretation is when they reviewed one of the EPA’s regulatory responses to *Massachusetts v. EPA*. In *Utility Air Regulatory Group v. EPA*, the Court rejected the EPA’s application of the Clean Air Act’s stationary-source permitting program to greenhouse gases.³⁹ This time, Justice Scalia wrote for the majority. The EPA’s interpretation, he said, “would bring about an enormous and transformative expansion in the EPA’s regulatory authority without clear congressional authorization. . . . We

/production/files/2018-08/documents/utilities_ria_proposed_ace_2018-08.pdf [https://perma.cc/T747-MLYV].

34. NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP’T OF TRANSP. & EPA, PRELIMINARY REGULATORY IMPACT ANALYSIS: THE SAFER AFFORDABLE FUEL-EFFICIENT (SAFE) VEHICLES RULE FOR MODEL YEAR 2021–2026 PASSENGER CARS AND LIGHT TRUCKS 127 (2018), https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/ld_cafe_co2_nhtsa_2127-al76_epa_pria_181016.pdf [https://perma.cc/M9NJ-JTBN].

35. See HEALTH & ENV’T IMPACT DIV., OFF. AIR QUALITY PLAN. & STANDARDS, EPA, *supra* note 33, at 4-34 tbl.4-7.

36. *Id.* at 4-42 tbl.4-13.

37. NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP’T OF TRANSP. & EPA, FINAL REGULATORY IMPACT ANALYSIS: THE SAFER AFFORDABLE FUEL-EFFICIENT (SAFE) VEHICLES RULE FOR MODEL YEAR 2021–2026 PASSENGER CARS AND LIGHT TRUCKS 83 tbl.II-21 (2020), https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/final_safe_fria_web_version_2007-01.pdf [https://perma.cc/GW8B-ARCC].

38. *Id.* at 1635 tbl.VII-373.

39. 573 U.S. 302, 333 (2014).

expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"⁴⁰

Placed side by side, the conservative justices' opinions in *Massachusetts v. EPA* and *UARG v. EPA* vividly illustrate the bias in the Court's approach to statutory interpretation. If Congress wishes to deprive an agency of regulatory power over a question of great economic and political significance, it need not say so in clear terms, and an agency renouncing that power deserves deference.⁴¹ If, however, Congress wishes to grant an agency regulatory power over such a question, it must speak clearly, and an agency affirming such power deserves no deference. *Massachusetts* and *UARG* both involved climate change, and both involved the EPA's regulatory power to address major sources of greenhouse gases. The crucial difference, for the conservative justices, was that in *Massachusetts* the EPA didn't want to do anything about climate change, whereas in *UARG*, it did. The Court's interpretive approach to "major questions" is nothing other than a political preference for inaction over action.⁴²

The Court may have indulged this uneven preference in another climate case as well when, by a vote of 5–4, it granted a stay of the Obama Administration's Clean Power Plan before a lower court had even reviewed it.⁴³ Although the conservative justices did not explain their votes, the applications for a stay principally argued that the EPA had misinterpreted the Clean Air Act, and they relied heavily on *UARG* and its skewed interpretive principle in making this argument.⁴⁴ The Court's stay meant that the signature climate initiative of the Obama Administration never took effect.⁴⁵ Striking-

40. *Util. Air Regul. Grp.*, 573 U.S. at 324.

41. In the years since *Massachusetts v. EPA*, the conservative justices have become openly hostile to the principle of *Chevron* deference. See, e.g., Kristin E. Hickman & Aaron L. Nielson, *Narrowing Chevron's Domain*, 70 DUKE L.J. 931 (2021). Today, they might well frame an opinion in a case like *Massachusetts v. EPA* in terms of their beliefs about how clear Congress must be in order to assign major questions to administrative agencies rather than in terms of *Chevron* deference.

42. See Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 1986–90 (2017); William W. Buzbee, *Anti-regulatory Skewing and Political Choice in UARG*, 39 HARV. ENV'T L. REV. 63 (2015).

43. *West Virginia v. EPA*, 136 S. Ct. 1000 (2016) (mem.) (one of five identical orders, granting five separate applications for stay).

44. Lisa Heinzerling, *The Supreme Court's Clean-Power Power Grab*, 28 GEO. ENV'T L. REV. 425, 428–29 (2016).

45. See *West Virginia*, 136 S. Ct. 1000 (ordering the stay would remain in effect not only until the D.C. Circuit had ruled on challenges to the EPA's program but also until either the deadline for applying for review in the Supreme Court had passed or the Court had declined to grant review); Bethany A. Davis Noll & Richard L. Revesz, *Regulation in Transition*, 104 MINN. L. REV. 1, 30–31 (2019) (noting that the EPA repealed the regulation before the D.C. Circuit decided it on the merits).

ly, although Lazarus briefly mentions the litigation over the Clean Power Plan, he does not mention the Court's controversial stay.⁴⁶

Nor does Lazarus allude to the conservative justices' "major questions" principle, which would favor inaction over action, and small steps over big steps, on climate change. With this interpretive principle in hand, the courts could weaken or eviscerate even brand-new legislation on climate change by asymmetrically disempowering the administrative agency charged with implementing the law. Even as Lazarus concludes his book by observing that the country's response to climate change must ultimately come through Congress rather than through the courts (p. 292), he does not acknowledge that the courts themselves will sit in review of the work product of the agency Congress charges with taking action on climate. In fact, he says something like the opposite: "[T]he kind of transformative change that *Massachusetts* sought to trigger can begin in a courthouse," Lazarus writes, "but it never ends there" (p. 292).

It is simply not true that transformative change never ends in a courthouse. One need look no further than the troubled judicial history of the Affordable Care Act (ACA) to be reminded that the Supreme Court, not Congress, has the final word in interpreting and passing constitutional judgment on legislative choices, and that the current Supreme Court is not shy about wielding this power. The ACA survived constitutional invalidation by only one vote,⁴⁷ and it is now before the Court again in a sequel to its first close brush with death.⁴⁸ An interpretation that would have incapacitated the statute was only narrowly avoided, with the Court deploying its interpretive canon on "major questions" to interpret the statute on its own, without any deference to the relevant agency.⁴⁹ Ominously, five justices have, moreover, recently signaled their eagerness to begin to rework, and to vigorously enforce, the constitutional nondelegation doctrine⁵⁰—perhaps using the major questions idea, with its built-in bias against ambitious government action, as their guiding principle.⁵¹

46. Pp. 285–87. The Court has now apparently fallen in love with orders of this kind. See Stephen I. Vladeck, Essay, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 126 (2019); Stephen I. Vladeck, Opinion, *How the Supreme Court Is Quietly Enabling Trump*, N.Y. TIMES (June 17, 2020), <https://www.nytimes.com/2020/06/17/opinion/supreme-courts-trump-relief.html> [<https://perma.cc/T68L-LNF9>].

47. *NFIB v. Sebelius*, 567 U.S. 519 (2012).

48. *California v. Texas*, 140 S. Ct. 1262 (2020) (mem.) (granting certiorari on whether zeroing out the penalty for not buying health insurance rendered the ACA unconstitutional).

49. See *King v. Burwell*, 135 S. Ct. 2480, 2484, 2488–89 (2015).

50. See, e.g., *Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Alito, J., concurring in the judgment); *id.* (Gorsuch, J., dissenting); *Paul v. United States*, 140 S. Ct. 342 (2019) (mem.) (statement of Kavanaugh, J., respecting the denial of certiorari).

51. See *Paul*, 140 S. Ct. at 342 (statement of Kavanaugh, J., respecting the denial of certiorari) (describing approach to nondelegation that would hold unconstitutional "congressional delegations to agencies of authority to decide major policy questions").

Any new statute on climate change will run into this court-made buzz saw. Without a fundamental change in the Court's approach to statutory interpretation and the separation of powers, even a new statute on climate change will be vulnerable to an administration that is hostile to it and to a Court that prefers passive over active government. Surely Lazarus knows this; it is remarkable he does not mention it.

B. *Preferring Not To*

The trickiest legal question in *Massachusetts v. EPA* was whether, even if the EPA had the power to regulate greenhouse gases under the Clean Air Act, it could decline to exercise this power because it preferred not to. Lazarus's treatment of this issue, as well, is a head-scratcher. "[B]oring," "arcane," and "pedantic" are among his descriptors for this issue (p. 118). Although in describing the issue in this way he is putting himself in the position of a reader unfamiliar with administrative law, in fact his own rendering of the issue is strangely unsophisticated. He does not seem to grasp the issue's importance, for climate policy and for administrative law more generally, and he misperceives the nature of both our argumentation and the Court's ruling on it.

In its decision rejecting the petition to regulate greenhouse gas emissions from motor vehicles, the EPA announced that it would not regulate greenhouse gases even if the Clean Air Act gave it the power to do so. Under a heading entitled "Different Policy Approach," the EPA emphasized its preference for voluntary measures over the "inefficient" and "piecemeal" approach of the Clean Air Act; worried that there might not be reasonably available technology to control greenhouse gases from motor vehicles; cautioned that "unilateral" EPA action on climate change could threaten negotiations with developing countries over greenhouse gas reductions; and offered a long list of incompletely resolved scientific issues surrounding the problem of climate change.⁵²

Before the challenge to the EPA's decision came to the Supreme Court (and before I joined petitioners' legal team), petitioners themselves were deeply divided over, and perhaps confused about, the nature of the EPA's decision on this issue. In the D.C. Circuit, petitioners declared themselves unable to tell whether the EPA had refused to regulate because it did not want to or because it had found that greenhouse gases were not dangerous, and they faulted the EPA for failing to articulate a "discernible decisionmaking path."⁵³ They also placed the question about the limits to the EPA's discretion in a hypothetical framework, complaining that the EPA had announced that even if it had found that greenhouse gas emissions from motor vehicles endangered public health and welfare, it would not regulate

52. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,929-31 (Sept. 8, 2003).

53. Final Brief for Petitioners in Consol. Cases at 46, *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005) (No. 03-1361).

them.⁵⁴ Their presentation in the D.C. Circuit managed both to fuzz up the EPA's actual decision and to make it appear without present consequence; no matter what else the EPA might have done, it surely had *not* decided that greenhouse gases were dangerous, and to worry about what the EPA would or would not do if it had done that made petitioners' complaint seem premature.

Judge Randolph, who wrote the only opinion in the D.C. Circuit that drew two votes, was—unintentionally—very helpful in this regard. In rejecting petitioners' challenge to the EPA's decision, he succeeded in both crystallizing the nature of the EPA's decision and offering a breathtakingly expansive view of executive power. He did not accept petitioners' vague characterization of the EPA's decision, and he embraced the EPA's discretion to take into account “the sort of policy judgments Congress makes when it decides whether to enact legislation regulating a particular area.”⁵⁵ Having a clear and problematic legal target was crucial in petitioners' pitch for review in the Supreme Court.

Petitioners pounced on this target in the cert petition. Lazarus fixates on the fact that petitioners placed this issue first in the petition, before the issue of the EPA's authority to regulate greenhouse gases under the Clean Air Act.⁵⁶ In focusing only on the order of questions presented, Lazarus misses the substantive import of this first issue. The issue was central to the case because if petitioners lost on that issue, the EPA's refusal to act on greenhouse gases would have been affirmed. Equally important, losing on that issue would have been a defeat for the rule of law; agencies could avoid statutory obligations they did not embrace by saying little more than that they did not embrace them. Lazarus incorrectly attributes to petitioners a tactical interest in this issue, but not a substantive one; it was good, he implies, only for the purpose of catching the justices' attention.⁵⁷ In his telling, petitioners gave the issue “short shrift,” dropping “any pretense” of interest in the issue when it came to the merits brief (p. 138). In fact, however, this issue was as intellectually interesting and broadly consequential as any other issue in the case, as it went to the heart of agencies' legal obligation to explain their decisions.

This obligation of explanation has been central to recent Supreme Court decisions pushing back on the Trump Administration's administrative excesses. In 2019, in *Department of Commerce v. New York*, the Court rejected the secretary of commerce's explanation of his decision to add a citizenship question to the 2020 Census.⁵⁸ The Court found “contrived” the secretary's explanation that adding the question was important for purposes of voting rights enforcement.⁵⁹ After the Court's remand requiring either an adequate

54. *Id.* at 48–49.

55. *See Massachusetts v. EPA*, 415 F.3d 50, 57–58 (D.C. Cir. 2005).

56. *See* p. 118.

57. *See* pp. 118–19.

58. 139 S. Ct. 2551 (2019).

59. *Dep't of Com.*, 139 S. Ct. at 2575–76.

explanation or a different choice, the secretary dropped the question entirely.⁶⁰ In 2020, in *Department of Homeland Security v. Regents of the University of California*, the Court rejected the Department of Homeland Security's (DHS) explanation for its rescission of the Deferred Action for Childhood Arrivals (DACA) program created by the Obama Administration.⁶¹ The Court faulted the agency for failing to consider a less draconian alternative than complete rescission and for failing to take into account the serious reliance interests that had been created by the DACA program.⁶² The Court returned the matter to DHS for further consideration; meanwhile, it left DACA in place.⁶³

In these two cases, the Supreme Court confirmed its continuing fidelity to the basic administrative-law requirement that agencies provide reasoned explanations for the decisions they make. The Court has long enforced this requirement with the simple command that an agency whose explanation is found wanting must go back to the drawing board and try again.⁶⁴ As shown by the aftermath of the cases on the Census and DACA, such a command is far from trivial. Some reasons won't write, as the Department of Commerce found on remand from the Census case.⁶⁵ And reason giving entails taking seriously options the agency might rather ignore, as DHS seems to have found on remand from the DACA case. Although the solicitor general had represented to the Court that remanding the matter to DHS for an adequate explanation "would be an idle and useless formality" because DHS had *already* decided that DACA should be terminated,⁶⁶ in fact DHS, on remand, has narrowed but not terminated the policy.⁶⁷ The requirement of reason giving is, in other words, not an empty formality but a powerful lever that

60. Ann E. Marimow, Matt Zaptosky & Tara Bahrapour, *2020 Census Will Not Include Citizenship Question, Justice Department Confirms*, WASH. POST (July 2, 2019, 8:00 PM), https://www.washingtonpost.com/local/social-issues/2020-census-will-not-include-citizenship-question-doj-confirms/2019/07/02/0067be4a-9c44-11e9-9ed4-c9089972ad5a_story.html [<https://perma.cc/V2TW-8LJG>].

61. 140 S. Ct. 1891 (2020).

62. *Regents of the Univ. of Cal.*, 140 S. Ct. at 1910–15.

63. *Id.* at 1916; *Casa de Md. v. U.S. Dep't of Homeland Sec.*, No. 8:17-CV-02942 (D. Md. July 17, 2020) (order vacating rescission of DACA policy).

64. For a classic statement to this effect, see *SEC v. Cheney Corp.*, 318 U.S. 80, 94–95 (1943).

65. See *supra* note 60 and accompanying text.

66. Reply Brief for the Petitioners at 6–7, *Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (Nos. 18-587, 18-588 & 18-589) (quoting *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969) (plurality opinion)).

67. Memorandum from Chad F. Wolf, Acting Sec'y, U.S. Dep't of Homeland Sec., to Mark Morgan, Senior Off. Performing the Duties of Comm'r, U.S. Customs & Border Prot., Matthew Albence, Senior Off. Performing the Duties of Dir., U.S. Immigr. & Customs Enf't, and Joseph Edlow, Deputy Dir. of Pol'y, U.S. Citizenship & Immigr. Servs. (July 28, 2020), https://www.dhs.gov/sites/default/files/publications/20_0728_s1_daca-reconsideration-memo.pdf [<https://perma.cc/D4PJ-P9NZ>].

can expose and prevent the senselessness and headstrongness that an agency might otherwise embrace.

Lazarus's account of the legal challenge to the EPA's announced refusal to regulate greenhouse gases misses these features of the reason-giving requirement of administrative law. Throughout the book, he treats this issue as a sideshow, a shiny object to sneakily entice the justices to take the case but otherwise of little interest.⁶⁸ Perhaps even more perplexingly, he frames petitioners' legal argument on this issue as a kind of sad compromise (p. 266), even going so far as to compare it to the Court's infamous "all deliberate speed" order following *Brown v. Board of Education*.⁶⁹ This is quite strange.

In the briefs in *Massachusetts v. EPA*, petitioners took pains at every turn to assure the Court that they were asking the Court only to send the case back to the EPA so that it could make a new decision on the petition to regulate greenhouse gases, one consistent with the agency's legal power and responsibilities under the Clean Air Act.⁷⁰ Petitioners did not do this as a feint, or a compromise, but as a matter of straight-up administrative law. The only remedy available for an agency's failure to explain a regulatory choice is an order telling the agency to think again, and to offer a fresh explanation; courts will not make up reasons themselves.⁷¹ That is all petitioners asked the Court to do. Indeed, that is all petitioners wanted the Court to do.

Beyond being the only remedy consistent with existing principles of administrative law, this was the only remedy petitioners thought compatible with the Court's role in the government structure. The last institution in the country petitioners wanted to address the scientific evidence of climate change was the Supreme Court. No good can come of empowering the Supreme Court to pronounce upon hugely consequential scientific questions. The risks in such an institutional power grab are evident in the conservative justices' dissents in *Massachusetts v. EPA*, wherein they do not shrink from opining on the clean (not "unclean") nature of carbon dioxide⁷² and on the scientific evidence of greenhouse gases' contributions to coastal inundation.⁷³ Petitioners' reticence in framing their prayer for relief in the Court

68. See, e.g., pp. 118–19.

69. Pp. 264–66 (citing *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955)).

70. See Petition for Writ of Certiorari at 4, *Massachusetts v. EPA*, 549 U.S. 497 (2007) (No. 05-1120); Brief for Petitioners, *supra* note 25, at 3 ("Petitioners ask this Court to correct EPA's legal errors and to remand the case to the agency with directions to apply the correct legal standard to this matter; that is all. A judgment in favor of petitioners will not mandate regulation of air pollutants associated with climate change, nor will it dictate a particular answer to the question whether such pollutants are endangering public health or welfare."); Reply Brief for the Petitioners at 27, *Massachusetts*, 549 U.S. 497 (No. 05-1120).

71. *SEC v. Chenery Corp.*, 318 U.S. 80, 87–88, 94–95 (1943).

72. *Massachusetts*, 549 U.S. at 559–60 (Scalia, J., dissenting).

73. *Id.* at 541–46 (Roberts, C.J., dissenting). Although Lazarus lauds Justice Stevens for "staking out a position" on the fact and cause of the "rise in global temperatures," p. 253 (quot-

wasn't tactical; it was elemental. It is peculiar that Lazarus does not appear to understand this.

Lazarus's treatment of the issue of agency discretion also simply ignores the conservative justices' dissent. The dissenting justices would have condoned the EPA's declaration that it would refuse to regulate even if it had the statutory authority to do so. They thought it was perfectly reasonable for the agency to cite policy concerns in this choice,⁷⁴ and they "simply [could not] conceive" of what else the agency should have said in discussing the scientific questions that remained about climate change.⁷⁵ Under the conservative justices' approach to agency discretion, the EPA would have been empowered to decline to exercise statutory authority based on reasoning indicating its disapproval of the underlying statute and to merely gesture toward residual scientific uncertainty in explaining its inaction under a statute designed to empower the agency to act even in the face of scientific uncertainty.

Today's Court is an even less favorable venue for controlling agency passivity than it was when *Massachusetts v. EPA* was decided. Justices Gorsuch and Kavanaugh made their names in the lower appellate courts by lambasting the scope of administrative agencies' regulatory power.⁷⁶ *The Rule of Five's* faith in the saving grace of congressional action does not come to terms with the troubling prospect that the conservative justices on the Court today might condone agency recalcitrance even under a brand-new statute aimed at tackling climate change.

C. *Standing Upside Down*

The riskiest legal issue for petitioners in *Massachusetts v. EPA* was standing. The worry was that if they lost on this issue, they would possibly doom future attempts to force action on climate change through recourse to the courts. In its present form, this legal issue, too, skews against ambitious action on climate change. Standing law tends to disfavor plaintiffs who suffer from widespread, future-oriented harm that comes from many sources. If one wanted to construct a legal doctrine in order to disadvantage people who ask the courts to protect them from injury due to climate change, the Court's standing doctrine would serve this purpose well.

In *Massachusetts v. EPA*, there was an additional, ironic wrinkle. Petitioners in *Massachusetts* wanted the Court to require the EPA to take a seri-

ing *Massachusetts*, 549 U.S. at 497), my own preference would have been for the majority, as well as the dissent, to refrain from opining on the science of climate change.

74. *Massachusetts*, 549 U.S. at 552 (Scalia, J., dissenting).

75. *Id.* at 555.

76. See, e.g., *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152–53 (10th Cir. 2016) (Gorsuch, J., concurring) (arguing that *Chevron* deference abdicates courts' responsibility to interpret laws); *U.S. Telecom Assoc. v. FCC*, 855 F.3d 381, 417 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc) (per curiam) (arguing for invalidation of FCC's net neutrality rule because it involved a major question that Congress had not clearly authorized the agency to address).

ous look at the science of climate change and make a determination whether greenhouse gases endanger public health and welfare.⁷⁷ Petitioners did not want the Court itself to conduct this scientific inquiry; they wanted the expert agency to do so.⁷⁸ But—here is the irony—in order even to get into court to ask for this relief, petitioners had to convince the Court that greenhouse gases were in fact endangering them. The upside-down law of standing puts courts in charge of making factual determinations best left to the experts charged by Congress with making them.

Petitioners' argument on standing came in the reply brief.⁷⁹ *The Rule of Five* does not mention it, but the Supreme Court actually denied review on the issue of standing. In opposing the petition for review, the federal government asked the Court to grant review on the issue of standing in the event it took up the broader case,⁸⁰ but the Court declined.⁸¹ Petitioners knew all along that the Court, given its composition, would address standing even if it did not grant review on this issue. It had done so before, after all.⁸² The Court's denial of the government's request for review did, however, give petitioners a subtle opportunity. Because the Court had not added this question to the case, petitioners were under no obligation to address it in their opening brief on the merits. Thus, they could sit back and wait for the government to show its hand on standing before making their argument. This tactic allowed petitioners to wait to shape their arguments on standing until they had seen the government's arguments.

In the reply brief, petitioners opened by telling the Court that ordinary principles of statutory interpretation and administrative law were enough to decide the case in their favor. They assured the Court that it did not need to create any new, climate-specific legal doctrine in order to rule for them.⁸³ This was true as well, they argued, of standing. Focusing especially on the present and future loss of coastal land, petitioners argued that Massachusetts was suffering an injury in fact caused by manmade greenhouse gas emissions and redressable by a ruling in their favor.

Petitioners won, but barely. In an opinion by the Chief Justice, the dissenting four justices excoriated the majority for finding the requirements of standing met. The Chief Justice's opinion exudes disdain for petitioners' arguments and presumes to pronounce upon scientific questions related to climate change. The Chief Justice all but proclaims that no environmental plaintiff has Article III standing to complain when the government fails to

77. See Brief for Petitioners, *supra* note 25, at 38.

78. See *id.* at 47.

79. Reply Brief for the Petitioners, *supra* note 70, at 1.

80. Brief for Fed. Respondent, *supra* note 20, at i.

81. Orders for June 26 Through Sept. 28, 2006, 548 U.S. 901, 903 (2006) (granting review without adding third question).

82. See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 88 (1998).

83. Reply Brief for the Petitioners, *supra* note 70, at 10.

act on climate change: “[R]edress of grievances of the sort at issue here ‘is the function of Congress and the Chief Executive,’ not the federal courts.”⁸⁴

Here, too, Lazarus spends no time on the substance of the strongly worded dissent. Virtually all of his attention to the issue of standing is fixed on oral argument.⁸⁵ There, Justice Scalia pummeled Jim Milkey—an attorney with the Massachusetts Attorney General’s office and petitioners’ oral advocate in the Supreme Court—with question after question about the basis for petitioners’ standing. Lazarus has said that Milkey “tamed” Justice Scalia during the oral argument’s questions on standing⁸⁶—an intriguing summation, given Justice Scalia’s caustic dissent in the case and his joining in Chief Justice Roberts’s sarcastic opinion rejecting petitioners’ standing. Milkey did a very fine job at the oral argument, and nothing I say here should be interpreted otherwise, but he did not bring Justice Scalia to heel.

Lazarus also does not grapple with the future import of the conservatives’ rejection of standing, especially given the even more conservative composition of today’s Court. If, as Chief Justice Roberts implied, no environmental plaintiff has standing to challenge a government decision not to act on climate change, then even brand-new climate legislation could be neutered in the absence of any suitable plaintiff to challenge government recalcitrance.

The gist of Lazarus’s narrative about the legal issues in *Massachusetts v. EPA* is that petitioners’ victory in the Supreme Court was as complete as it could be, and that any further action on climate change must come through the political branches—Congress and the executive—rather than through the courts.⁸⁷ This narrative ignores the dangers that the theories of the dissenting justices and the legal approaches of the current Court pose to aggressive action on climate change, even if that action comes through new legislation. We need new legislation to address climate change, for sure, but we also need the Court to make way for such law by reworking the legal doctrines that disfavor it. And we need the justices to understand, as Lazarus seems not to, that the doctrines they might deploy in legal disputes relating to climate change—such as declining to defer to agencies’ legal judgments on large questions, treading lightly when agencies fail to act, and refusing to hear legal controversies that affect multitudes—are neither passive nor virtuous.

Lazarus’s treatment of the legal issues in *Massachusetts v. EPA* also has consequences for his narrative of the human story behind the case. He deems the question of statutory interpretation—on which four justices dissented—“easy” and “irrefutable,” and the question of agency discretion—which petitioners needed to win in order to win the case, and which has been

84. *Massachusetts v. EPA*, 549 U.S. 497, 535 (2007).

85. See p. 192.

86. *Transcript - Massachusetts v. EPA*, OUTSIDE/IN, <http://outsideinradio.org/transcript-massachusetts-v-epa> [<https://perma.cc/2UCS-2RCG>] (podcast transcript).

87. See, e.g., p. 292.

the central issue in the Court's highest-profile recent cases in administrative law—a sideshow (pp. 70–74). On standing, he declares Jim Milkey's oral argument to have "tamed" a justice who joined an excoriating dissent.⁸⁸

In making these choices, Lazarus quietly minimizes the hard legal work done on these issues in the briefs on the merits and foregrounds the oral argument. And in an unexplained inversion of settled wisdom about the relative importance of briefs on the merits and oral argument in the Supreme Court, Lazarus devotes four entire chapters to the oral argument in *Massachusetts v. EPA*, and just a handful of pages in one chapter—"The Lure of the Lectern," primarily focused on the disputes over who would deliver the oral argument—to the briefs on the merits.⁸⁹

What could account for these curious choices?

III. THE MEN OF MASSACHUSETTS V. EPA

The Rule of Five is as much a story about the human dramas of *Massachusetts v. EPA* as it is a story about its legal significance. In Lazarus's narrative, at the heart of the human story of *Massachusetts v. EPA* was a tense conflict, "almost Shakespearean in nature,"⁹⁰ over who would do the oral argument in the case. Since I am one of the actors in Lazarus's drama, it seems appropriate to relate my own version of these events before turning to my criticisms of the version Lazarus tells. For the same reason, though, I acknowledge at the outset that I am not a neutral narrator in this story.

But, actually, neither is Lazarus. The day the Court granted review in *Massachusetts* based on the cert petition I wrote, Jim Milkey of the Massachusetts Attorney General's office called me to ask whether I would be willing to write the briefs on the merits. He and I came to an understanding that if I agreed to write the briefs, we would decide later who—he or I—would do the oral argument. At that moment, however, there were not just two but three people hoping to serve as lead attorney in the case. In addition to Milkey and me, Richard Lazarus himself was vying to be selected as the brief writer and oral advocate for the petitioners. The day review was granted, another lawyer on petitioners' legal team, David Bookbinder, asked Lazarus—then my faculty colleague at Georgetown—whether Lazarus himself would be interested in serving as counsel of record and briefing and arguing the case if the petitioners, including Massachusetts, chose to have someone other

88. Sam Evans-Brown, *How Massachusetts v. EPA Forced the U.S. Government to Take On Climate Change*, INSIDE CLIMATE NEWS (June 4, 2020), <https://insid climateneews.org/news/04062020/massachusetts-v-epa-emissions-pollution-climate-change> [https://perma.cc/SBA4-S98D].

89. Chapters Thirteen to Sixteen of the book cover the oral argument. Pages 134–41 discuss the briefs on the merits.

90. Jean Bundy, *The Rule of Five: Making Climate History at the Supreme Court*, ANCHORAGE PRESS (July 6, 2020), https://www.anchoragepress.com/the-rule-of-five-making-climate-history-at-the-supreme-court/article_077a30e8-bfbe-11ea-92b2-672028f38282.html [https://perma.cc/8QNR-97DD].

than Jim Milkey serve these roles.⁹¹ The answer from Lazarus was yes. The next day, Lazarus provided Bookbinder with a detailed memo explaining why he, Lazarus, should be the person to write the briefs and do the oral argument if Jim Milkey (and, by necessary implication, I)⁹² did not do so. It is striking that Lazarus does not disclose his own desire to take on the case in his book about the case. If anything, Lazarus's above-the-fray, third-person narrative of the case implicitly disclaims any such personal interest.

When I was hired to write the briefs in *Massachusetts*, Jim Milkey informed me that I needed to be appointed as a special assistant attorney general if I wanted to do the oral argument. At some point while I was completing the opening brief on the merits or just after, Milkey began contacting his (mostly male) colleagues in other attorney generals' offices around the country—who also represented petitioners in the case—to persuade them that he, not I, should do the argument. Soon, a different group of lawyers began a push to have me do the argument. I, after all, had written the briefs in the case and knew the arguments and counterarguments best.

Petitioners could not agree among themselves who should do the oral argument. Eventually, Jim Milkey declared that my designation as a special assistant attorney general—which Milkey had said I needed *in order to do the argument*—actually *precluded* me from doing the argument if his male boss did not agree to my doing the argument.⁹³ And, Milkey reported, his boss would not so agree. Even then, the lawyers who favored me as the oral advocate were willing to press on.

I had become convinced, however, that the unyielding controversy over oral argument was not good for the case. The lawyers for petitioners had become entrenched in two opposing camps rather than being united against the EPA's refusal to act on climate change. And we still had a long way to go. There was a reply brief to come, followed by oral argument.

I therefore withdrew from the contest over oral argument, ceding the floor to Milkey. I wrote to all of petitioners' counsel explaining what had happened, how I thought the behind-the-scenes wrangling was bad for the case, and what I proposed to do about completing the case in a responsible fashion.⁹⁴ I informed counsel I would write the reply brief, despite not doing the oral argument, on the condition that my reply not be subject to the word-by-word editing that had consumed a tremendous amount of time and

91. At that time, Bookbinder told me about his correspondence with Lazarus and about Lazarus's interest in taking on the case. For purposes of writing this Review, I confirmed with Bookbinder my recollection of his contemporaneous recounting of these events. Email from David Bookbinder, Couns., Sierra Club, to author (July 30, 2020) (on file with author).

92. At this time, Lazarus knew that Jim Milkey had already spoken to me about writing the briefs and possibly doing the oral argument in the case; I had told Lazarus about my conversation with Milkey.

93. See p. 145 (citing Lazarus's interviews with Milkey and Bookbinder and an October 2 email from Milkey to Bookbinder).

94. Email from author to select petitioners' counsel in *Massachusetts v. EPA* (Oct. 4, 2006) (on file with author).

energy during the opening briefing.⁹⁵ One prominent environmental lawyer responded that he was “aghast” at the turn of events that had caused me to withdraw.

I then turned to finishing the case. I wrote dozens of questions for Milkey to consider in preparing for oral argument.⁹⁶ I ghostwrote scores of questions for one of his interlocutors at the first moot court, in which I was not invited to participate as a questioner. I tried to persuade Milkey to be open to receiving questions and guidance from the other lawyers who had been deeply involved in the case, after Milkey had cut off all communication with them. And I wrote a reply brief that responded to fifteen separate briefs on the opposing side, and in that brief I laid out, for the first time, our legal theory on the question of standing.

After we won, Milkey spent months trying to keep me from obtaining any attorney’s fees from the U.S. government for my work on the case. He first argued among co-counsel for petitioners that my status as a special assistant attorney general—which, again, he had told me I must have in order to be eligible to argue the case—precluded any award of fees to me. Once he had accepted the notion that I should receive some fees, he lobbied hard to limit my fees on the theory that awarding me the fees I requested would be a “personal windfall” to me that exceeded the average salary of lawyers in his office and that every dollar awarded to me would come from the coffers of state and local city governments or public interest groups.⁹⁷ Eventually, after other attorneys in the case pushed back against Milkey’s position, I was awarded fees.

In all of this—the word-by-word edits of my briefs, the wrangling over oral argument, the dispute over fees—I sensed a gender dimension that was hard to pin down. No one ever said anything overtly sexist. All the lawyers in the case were self-identified liberals who would have been shocked at the thought they might treat a woman differently from a man. And at least the careful scrutiny given to every word of my briefs was perhaps understandable, given the high stakes of the case. Yet I still wondered whether a man in my position, with my credentials and talents, would have been treated the same way. Perhaps the best testament to the gendered dynamic of the litigation comes, ironically, from Richard Lazarus himself. During the one, brief conversation I had with Lazarus about his book project, he referred to the word-by-word editing of my briefs, saying something to the effect that he had never had to write a brief in such circumstances.

Of course he hadn’t. He wouldn’t have been asked to. In the same conversation, he laid out for me his theory of my brief-writing process, explaining how I had gone from accommodating my co-counsel to taking firmer

95. *Id.*

96. See Email from author to select petitioners’ counsel in *Massachusetts v. EPA* (Oct. 29, 2006) (on file with author).

97. Email from Jim Milkey to author and select petitioners’ counsel in *Massachusetts v. EPA* (Aug. 13, 2008) (on file with author).

control. In this conversation, Lazarus managed both to concede that he sensed something amiss and to make it seem like my fault, like I shouldn't have stood for it. Lazarus doubles down on this mindset—something was amiss, and it was my fault—in his book's narrative of the brief-writing process, both noting the line-by-line scrutiny of my drafts and suggesting that "[my] efforts to accommodate" co-counsel's comments weakened the initial drafts (pp. 138–39). This gender obliviousness runs throughout Lazarus's narrative, with the consequence that Lazarus not only reenacts but exacerbates the gender dynamic I sensed while litigating *Massachusetts*.

I am critical of Lazarus's narrative despite the fact that I come off pretty well in it. In Lazarus's rendering, I was the attorney largely responsible for persuading the Court to review petitioners' case—the first time, Lazarus reports, the Court granted review at environmentalists' behest after a loss to the EPA in the lower courts (p. 116). Lazarus praises me for "cleverly" reordering the questions presented in the cert petition to place the question about agency discretion, an administrative-law issue of broad interest to the justices, before the question of statutory interpretation (p. 118). Lazarus also remarks at some length on the "flair" and "personality" of my writing in the cert petition (p. 120) and the "confident, engaging, and entertaining" prose of the opening brief on the merits (p. 140). He observes, moreover, that to settle the conflict over oral argument, I "swallowed [my] pride and agreed to play a subordinate role in the most high profile part of the case" (p. 146).

What more can I ask for from a history of a case in which I was so deeply involved? How can I object to Lazarus's narrative when it contains praise for me? To ask for more from Lazarus—to insist that he fully credit my substantive work on the case, and that of other female attorneys, and to question his narrative placing several men at the center of the victory in the Court—seems ill-mannered, maybe even ungrateful or greedy. Yet I am also acutely aware that my fear of seeming ill-mannered, ungrateful, or greedy has a great deal to do with the fact that I am a woman. An easy way for a woman to have her work—including a book review in a law journal—dismissed is for her to come off as *unpleasant*. The conundrum a woman confronts, then, is that she risks leaving her work minimized by others if she says nothing about their sidelining, but she also risks having her work minimized by others if she speaks up.⁹⁸ Trying to reclaim one's place from a gendered narrative stirs up the very gender dynamics one is trying to overcome.

What more could I ask for from Lazarus's narrative of *Massachusetts v. EPA*? Quite a lot, it turns out.

First on the list is a more inclusive vision of the relevant cast of characters. Lazarus's story about the lawyers in *Massachusetts* revolves around "five

98. Cf. Kate Manne, *Warren Succeeded Because Voters Saw Her as Caring. That's Also Why She Failed.*, WASH. POST (Mar. 6, 2020, 9:57 AM), https://www.washingtonpost.com/outlook/warren-succeeded-because-voters-saw-her-as-caring-thats-also-why-she-failed/2020/03/06/8064b7c2-5f0f-11ea-b014-4fafa866bb81_story.html [https://perma.cc/L4FU-YBDB] (highlighting this conundrum in Elizabeth Warren's presidential campaign).

guys” (p. 55), as he calls them, and “a gal” (p. 113), as he calls me. The five guys get their own chapter—entitled “The Carbon Dioxide Warriors”—and subheadings with their own names (Chapter Five); I get part of one chapter, with a subheading identifying me as “A Pistol from Minnesota” (p. 113–21). By Lazarus’s own account, he singles out the five guys for special attention because they were the ones who “assumed the most prominent leadership positions” in the litigation (p. 56). Two of them also were, Lazarus reports, the “dominant personalities” on petitioners’ side (p. 64). With these loaded criteria in hand, is it surprising that Lazarus’s story is mostly about five men? I also made Lazarus’s cast of characters, but I wrote the briefs!

No other female attorney who worked on the case for petitioners figures more than glancingly in Lazarus’s narrative. Yet women beyond me played important roles at both the cert stage and the merits stage, as illustrated by several examples. At the cert stage, three amicus briefs in support of petitioners helped to increase the probability that the Court would grant review.⁹⁹ These briefs were all written or co-written by women. Jennifer Bradley co-wrote a brief on behalf of the U.S. Conference of Mayors and other entities related to local government,¹⁰⁰ Kristen Engel co-wrote a brief on behalf of climate scientists,¹⁰¹ and Frances Raskin wrote a brief on behalf of entities associated with Alaskan Tribes concerned about climate change.¹⁰² At the merits stage, Caitlin Halligan, then the solicitor general of the state of New York, was an indispensable collaborator and advisor in the brief-writing process. Carol Iancu of the Massachusetts Attorney General’s office was a core member of that office’s legal team. Women were also well represented in the amicus filings on behalf of petitioners at the merits stage. Out of all the women I have mentioned, however, only Carol Iancu appears (briefly) in Lazarus’s narrative (p. 158). Given the significant role women played in the *Massachusetts* litigation, whittling the cast of characters down to “five guys” and “a gal” is problematic.

Indeed, the very choice to write a narrative that gives pride of place to several individuals more than to the collective enterprise is itself a gendered reprisal of the great-man history that *The Rule of Five* tacitly embraces in describing the Supreme Court. Lazarus singles out the most solitary moments in the history of *Massachusetts v. EPA*—Joe Mendelson’s preparation and filing of the petition to regulate greenhouse gases, and Jim Milkey’s turn at

99. In encouraging amicus participation at the cert stage, I was aware of research indicating that the likelihood of the Court granting review increases with such participation. See, e.g., Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109 (1988).

100. Brief of the U.S. Conf. of Mayors et al. as Amici Curiae in Support of Petitioners, *Massachusetts v. EPA*, 549 U.S. 497 (2007) (No. 05-1120).

101. Brief of Amici Curiae Climate Scientists David Battisti et al. in Support of Petitioners, *Massachusetts*, 549 U.S. 497 (No. 05-1120).

102. Brief of Amici Curiae Alaska Inter-Tribal Council et al. in Support of Petitioners, *Massachusetts*, 549 U.S. 497 (No. 05-1120).

the Supreme Court lection¹⁰³—as the signal moments in a case brought about only by the collaborative and collective efforts of many. Indeed, Lazarus begins the book with Mendelson, “acting very much alone” in setting the relevant events in motion (p. 1), and he ends it with “one committed person” making “all the difference” (p. 293).

Likewise, Lazarus’s account of Milkey’s preparation for oral argument turns a complicated, collaborative, at times conflictual process of legal argumentation into a solitary quest for legal inspiration. In the four chapters devoted to Milkey’s preparation for and delivery of the oral argument, Lazarus writes as though Milkey conceived on his own the legal theory and arguments he would present to the justices¹⁰⁴—as if the briefs on the merits had not already done so. Milkey needed to decide, Lazarus writes, on the theme of the case (pp. 157–58); his loose-leaf binder for oral argument “reflected the argument he had developed over time” (p. 159); he needed to make clear “the limited nature of the relief” petitioners were seeking and emphasize that “petitioners were not asking the Court to order the EPA to regulate greenhouse gases” (p. 164); his opening sentence to the Court, referring to “ordinary principles of statutory interpretation and administrative law,” was worked out over a period of “months,” during the preparation for oral argument (p. 188). And so on. Milkey had a great deal of work to do, no doubt, in preparing for oral argument, but one thing he did not need to do was come up with a theory of the case; the briefs had already done that. Of course Lazarus knows this; he himself is an experienced and accomplished Supreme Court advocate.¹⁰⁵ Yet he chose to tell this part of the story largely from the point of view of a lone male protagonist.

After narrowing his scope of interest to five guys and a gal, Lazarus proceeds to uncritically accept the five guys’ version of the human dramas of *Massachusetts v. EPA*. Lazarus relies heavily on litigation emails supplied to him by some number of the lawyers in the case, including emails I sent to my co-counsel in the litigation.¹⁰⁶ I had not expected these confidential emails to be made public. Lazarus did not tell me he had my emails and draft briefs until our one, brief conversation about his book project, in which he referred to them while explaining his own theory of my brief-writing process to me. The person or persons who supplied Lazarus with my emails did so selectively and in secret, omitting emails crucial to understanding the full personal story behind the case and failing to tell me they were giving my emails to Lazarus. As I have described, for example, the climax of the fight over oral argument came when I sent my email withdrawing from consideration as the oral advocate because I thought the conflict over oral argument was harmful to the case. Whoever sent Lazarus other emails did not provide Lazarus with

103. See, e.g., pp. 54, 185–203.

104. See, e.g., pp. 157–58, 159, 164, 188–89, 190–91, 197, 202, 215.

105. *Faculty Profiles: Richard J. Lazarus*, HARV. L. SCH., <https://hls.harvard.edu/faculty/directory/10509/Lazarus> [<https://perma.cc/WL5B-KU38>].

106. See, e.g., pp. 140–47.

this email. (I did, after Lazarus recounted for me an incorrect version of events based on the emails he had.) The selective disclosure of emails to Lazarus should have tipped him off that not everyone he was talking to was playing straight with him. Yet Lazarus's narrative appears to take as gospel the five guys' version of events.

A portion of this narrative attributes feelings, thoughts, and behavior to me. I was so "distressed" during briefing that I might have left the case (p. 143). I wouldn't speak to Milkey during the run-up to oral argument, after our conflicts over who would do the argument (p. 158). I did not participate in Milkey's oral argument preparation (p. 158). I filed only a "solid" reply brief because of the personal conflicts in the case (p. 152). I, along with co-counsel, planted a "time bomb" in the case by failing to resolve the oral argument question as soon as review was granted, and this time bomb "came close to dooming [the] case" (p. 136).

None of this is true. But the gravest insinuation is the last one. Lazarus has made similar statements in publicity interviews about the book. He has referred to the conflict between Milkey and me as a "great, destructive personal conflict" that was "almost Shakespearean in nature,"¹⁰⁷ and he has not spared me from his global judgment that the "internal conflicts" in the case were "so intense and destructive that they threatened the petitioners' ability to be effective advocates."¹⁰⁸

This reproach, at best, betrays a false neutrality in adjudging our conflict so epic and destructive that we almost spoiled the case—as if we were the first Supreme Court advocates ever to disagree about who should do the oral argument. Worse, Lazarus is effectively tut-tutting me for advocating for what I had been promised: a chance to do the oral argument. When I was denied this opportunity, I completed my remaining work on the case as responsibly and effectively as I had completed my earlier work. The proof of the pudding is in the eating: we won on every issue presented, based on legal theories developed in the briefs.

In hyping the conflicts among the lawyers in *Massachusetts, The Rule of Five* chooses drama over nuance. Jim Milkey and I disagreed about who would be the public face of a case that could have been decided on the briefs alone. I would have liked doing the oral argument. But I, along with the other lead attorneys in *Massachusetts v. EPA*, have won acclaim and had amazing professional experiences as a consequence of our respective roles in the case. I have always felt that, whatever the challenges associated with working on the case, being able to contribute to it was a huge privilege. Any human undertaking where the stakes are so high is bound to come with conflict and drama. In this case, despite the difficulties I have described here, it also came

107. Bundy, *supra* note 90.

108. Ronald Collins, *Ask the Author: Lawyers' Law – Those Who Helped the Supreme Court Shape the Environmental Law of the Land*, SCOTUSBLOG (Mar. 13, 2020, 10:08 AM), <https://www.scotusblog.com/2020/03/ask-the-author-lawyers-law-those-who-helped-the-supreme-court-shape-the-environmental-law-of-the-land> [<https://perma.cc/7MFY-3CLT>].

with earnest and at times even joyful collaboration. *The Rule of Five* misses these subtleties.

CONCLUSION

I have never written a law review article quite like this one. It has roused me not only to analyze legal principles that are part of my normal professional life but also to relate events and reactions that are more personal than the standard law journal fare. I debated whether to discuss the gendered aspects of the human dramas in *Massachusetts v. EPA*, and Lazarus's reenactment of them, at all; often, little good comes of such uncovering. But I wouldn't have felt right about it if I hadn't. Many challenges facing women today come subtly, not overtly, and they come from men who may mean no harm. And yet they keep coming.

