Book Review

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Closed Chambers and Closed Minds: Some Snapshots Taken Inside the Supreme Court

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I. Introduction

Imagine getting your dream legal job and then finding out that your workplace is filled with name calling,¹ scheming,² screaming,³

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¹. See EDWARD LAZARUS, CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT 265 (1998). Lazarus notes that “[t]he conservatives sent one another a steady stream of messages trading information on cases and politically incorrect witticisms or ridiculing liberal clerks and Justices in the putdown brand of humor at which they excelled,” id. and that “[t]he cabal imagined itself to be fighting a comparable group, which they generally referred to as the ‘dreaded libs.’” id. at 266.

². See id. at 322 (“There is a line, albeit not a bright one, between the usual clerk role of offering one’s best advice then carrying out instruction, and the darker realm of scheming into which Patterson appeared to have strayed.”).

³. See id. at 270 (“I still remember midnight screaming matches in the red-carpeted no-man’s-land between the Blackmun and Kennedy Chambers as conservative clerks declared triumphantly that, yet again, they had found some technical reason—a lawyer’s error, a quirk of timing—for denying a stay of execution without even considering the merits of the
factionalism,\textsuperscript{4} pettiness,\textsuperscript{5} blood thirstiness,\textsuperscript{6} some shoving as well as other "destructive pathologies."\textsuperscript{7} Your orientation has the air of an indoctrination at San Quentin: "Across the room we glared at each other, eyes hooded with distrust or outright contempt. We were veterans of the nasty fight over the [Yonkers] case. We had been through one execution and nearly come to blows over others narrowly averted."\textsuperscript{8} No, the workplace is not a prison, a law firm, nor even a law school faculty, but that Potola of our legal culture—the Supreme Court. This discovery in \textit{Closed Chambers} is a surprise to the book's protagonist because the workplace is the Supreme Court.

\textit{Closed Chambers} is a peek at the inside of the Supreme Court. Edward Lazarus shows us some of the slides he took on his Supreme Court clerkship. He relies upon the memories of some fellow clerks, some Justices' papers, as well as some of the decisions written during his term and after. The operative word is "some" because not all the sources are revealed, nor everyone's opinion solicited. This territory—minus some of the gossip—has been covered in other books, and it is not a comprehensive history of petitioner's claims.

\textsuperscript{4} Lazarus states that "[w]e started the term arguing about everything and ended it in a silence punctuated occasionally by gloating or insults," and that "[the Justices] had split irreparably into two caucuses, each prearranging its own position while scheming against the other." \textit{Id.} at 324.

\textsuperscript{5} Describing the conservative clerks: "The conservative clerks of the Court shouldered heavy chips of resentment, airs of victimhood justified by numerous perceived wrongs, most notably the tarring of Robert Bork. At the same time, they were brash, snide, dismissive and very much feeling their oats knowing that at the Court (unlike law school), although outnumbered, they were ascendant—likely to have enough votes among the Justices to "win" most of the time." \textit{Id.} at 265.

\textsuperscript{6} See \textit{LAZARUS, supra} note 1, at 269 (describing the "cabal" of conservative clerks as pursuing a mission of "expediting executions," showing a resolve that "manifested itself in an amazing bloodthirst, a revelry in execution reminiscent of the celebratory crowds that years ago thronged to public hangings.").

\textsuperscript{7} Lazarus repeats the "urban legend" that Justice White "once pinioned another Justice's clerk against a wall for drafting a particularly biting dissent from one of White's opinions." \textit{Id.} at 37. Lazarus also notes that "[o]n a physical level, [some clerks] traded punishing fouls during our thrice weekly intramural basketball games." \textit{Id.} at 274. One afternoon "happy hour" involved a shoving match between two clerks that ended in a courtyard fountain. \textit{Id.} at 419.

Aside from the clerks' inability to play well with others, Lazarus also claims that the Court's decision-making process was plagued by "destructive pathologies." \textit{Id.} at 516

\textsuperscript{8} \textit{Id.} at 263.
even Lazarus’ term there. Rather, it is snapshots of certain scenes in the hot topic areas that Lazarus chose to cover, such as abortion, the death penalty, and civil rights. Lazarus claims that he got the inspiration for the book in 1992 during the Clarence Thomas confirmation hearings. Yet the book contains so much detail that one surmises that he kept a very good diary during his clerkship, and that the idea for a possible book was at least subconsciously forming about the time that he interviewed for his clerkship.

The Supreme Court performs a crucial function in our constitutional structure. With all its acknowledged importance, however, the system still works in mysterious ways. The petitions are submitted, the arguments are heard, and the opinions—pages and pages of them—come out into the public domain, but the production process is as closely guarded as the formula for Coke Classic. For example, another book on the Supreme Court, David O'Brien's Storm Center, has a picture of the Justices listening to oral argument with the caption: “The Supreme Court in session, February 8, 1935. This is the only known photograph of the Court in session.” Until Peter Irons defied the Court and published its recorded oral arguments, even these public arguments were considered to be for the exclusive use of the Court and scholars. Upset occurred again when Justice Thurgood Marshall’s papers were released to the Library of Congress shortly after his retirement for use by scholars. Justice Brennan’s release of some of his papers involving his earlier years on the Court also angered some Justices. The Supreme Court’s deliberative process is not government operating in the sunshine.


10. We Did Seriously Exacerbate the Divisions, Nat'L J., June 1, 1998, at A10 (interview with Edward Lazarus).

11. O'Brien, supra note 9, at 151.

12. See Peter Irons, May It Please the Court (1993); O'Brien, supra note 9, at 150-52.


14. See id. at 147.

The Justices have an understandable desire for privacy in their deliberations. Their working relationships would be more difficult under the glare of a totally open court, and the increased media attention could make the Court an even more political body. Much like executive privilege, confidentiality allows the Justices to debate ideas and issues freely and openly without worrying about reading the details in the *New York Times* the next day. A related problem is the value of mystique for the respect of the institution. A fall in esteem and respect for the Court might follow from making public the private deliberations (and sometimes petty bickering) of the members.

Given the importance and tradition of privacy to the Court, there have been charges of broken promises and breached confidences, and questions about sources in *Closed Chambers*. The reaction has been unfavorable. He was, after all, a trusted clerk of the Court. The criticisms range from allegations that Lazarus committed a crime in the use of certain information to pointing out inaccuracies. The book's closest relative, *The Brethren*, came out nearly two decades ago. It was subjected to similar criticisms, including violated oaths and broken confidences. Dozens of former Supreme Court clerks and perhaps some Justices apparently shared their innermost thoughts about the Court with the most famous investigative reporter of that time, Bob Woodward of the *Washington Post*. Whether he cleverly ferreted the information

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16. Several accounts of the hottest and most acrimonious arguments end with tempers cooling and calm disagreement prevailing. See, e.g., SIMON, supra note 9, at 76-79 (describing exchange between Kennedy and Brennan), id. at 102-06 (describing turmoil among Justices regarding abortion cases in the early 1970's).

17. See United States v. Nixon, 418 U.S. 683, 705 (1974) ("[T]he importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.").


20. See JEFFRIES, supra note 9, at 491.

21. See WOODWARD & ARMSTRONG, supra note 19 at 3 ("Most of the information in this book is based on interviews with more than two hundred people, including several Justices, more than 170 former law clerks, and several dozen former employees of the Court.").
out of them, or they willingly unburdened their souls, the result was a gossipy insider's glimpse of the process that produced such decisions as *The Pentagon Papers* and *Roe v. Wade* from the 1969 through the 1975 terms.

Why former clerks talk and whether they violated oaths or codes are problems that the Supreme Court will have to solve. Ironically, *Closed Chambers* may shut down some open discussion and debate among the Justices and may cause more cautious interaction between clerks and Justices at the Supreme Court, lest similar stories surface again. Indeed, there is much in this book to make every Court participant uncomfortable. Lazarus relates embarrassing personal details about the Justices' interactions. He also recounts slightly frightening stories about the Court, details that take you from the historical to case facts to argument and through each draft and change of vote. Although ostensibly written in a way that every person can understand the issues, the length and intricacy may confine this book to a relatively small cohort of Supreme Court watching aficionados. For the casual student of gossip, there will be too much to slog through pages of numbing analysis of death penalty cases to find out that a nickname for Justice Brennan was "piggy" (because he hogged opinion writing opportunities), or that Justice O'Connor was mad at Justice Brennan for "hoodwinking" her (the details of that feud are not given and therefore do not qualify it as either a believable story or just juicy gossip), that Justice Stevens was the "FedEx Justice" who spent much time at his condo in Florida, or that his colleagues thought Justice Kennedy a "bit of a priss." Although these shreds of scandal invariably attract attention, they add little

24. See Woodward & Armstrong, supra note 19, at 139-50, 229-40.
26. For example, to put the death penalty argument in a context, he begins with a recounting of the Scottsboro case, see Beecher v. Alabama, 398 U.S. 35 (1967), and links the Court's decision in McClesky v. Kemp to a failure (both conservative and liberal) to carry out the spirit of the Scottsboro and Brown decisions. See Lazarus, supra note 1, at 216-17.
27. Lazarus, supra note 1, at 310.
28. Id. at 277.
29. Id. at 279.
30. Id. at 251.
to Lazarus' thesis and detract attention from his more scholarly criticisms of the Supreme Court.

Past the workplace gossip, Lazarus makes many substantive criticisms about the Court and particular Justices. Keeping track of all the faults that he finds is sometimes difficult. There are two qualities, however, that Lazarus emphasizes as the missing links in the Court's structure over the last decade: (1) intellectual integrity or honesty, including a healthy respect for the rule of law; and (2) open-mindedness or a type of collegiality that would lead the Court's members to bridge the differences among themselves.31

*Closed Chambers* criticizes the extreme political nature of the positions taken by Justices in the last decade. In Lazarus' opinion, the Justices failed to deal honestly with precedent and were rigid and unwilling to compromise in dealing with opposing viewpoints. Lazarus' main gripe is that many of the Justices only seem interested in seeing their own vision embedded in the Court's opinions. He is critical of the result-oriented, single-minded approach of both sides on these controversial issues. They were, to understate the case, "polarized."32 The Justices appear more like politicians, intent upon using pure power (the rule of five) to see their platforms implemented, rather than scholarly judges intent upon using precedent, intellect, and reason to interpret the law.

Of course, a divided Court is not uncommon as members and times change. Given the manner of appointment—Presidents of different parties will attempt to appoint ideological allies—and the controversial subjects that the Court handles, polarization may be distressing, but it is not unexpected or uncommon.33 Rather than siding with any particular Justice or group of Justices in these disputes, Lazarus states that judges weigh competing cases, policies, and facts when judging a case, and can take many legally defensible paths. Discussions among the Justices, he suggests, would be more productive if they worked more on the process and focused less on the result.

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31. See *LAZARUS*, supra note 1, at 6 ("It is ... an institution broken into unyielding factions that have largely given up on a meaningful exchange of their respective views or, for that matter, a meaningful explication or defense of their own views.").

32. Id. at 274.

33. For example, the Roosevelt Court that President Truman inherited was "badly divided," with disputes between Justices Black and Jackson that were "deep-seated, ideological, and personal." O'BRIEN, supra note 9, at 87-88. The transition from the Warren Court to the Burger Court was not a smooth one either. See *id.* at 93.
Part II of this essay places *Closed Chambers* in the context of its author, sources, and time, and analyzes the limitations that each of these factors imposes on Lazarus' narrative. Part III examines Lazarus' discussion of the lack of intellectual honesty and collegiality and the excess of politics at the Supreme Court. It evaluates the claim that some members of the Court are neither candid nor consistent in their reasoning, ignore precedent when convenient, and are guided by results. The essay then examines: (1) the trade-offs that must be made among consensus, candor, and consistency; and (2) examines whether Lazarus is bothered more by the procedures or the substance of the Court's decisions. Part IV assesses Lazarus' proposed solution to these problems. Rather than proposing concrete reforms, the book advocates change from within "the souls of the Justices." Despite general pleas for more collegiality, candor, and consistency, Lazarus does not make a convincing case that adopting any specific methodology for deciding cases at the Supreme Court level will change the results or make them more palatable.

II. Setting the Scene at the Supreme Court

A. Soldiers and Generals on a Battlefield—Clerking at the Supreme Court Is War

When Edward Lazarus begins his clerkship with Justice Blackmun in 1988, we are presented with his picture of the young, ambitious idealist, book smart enough to be on Yale Law Review and street smart enough to get some banal, and not necessarily helpful, advice from a network of clerk buddies about what to expect when he is interviewed by Justice Blackmun (call him Mr. Justice, he will wear a cardigan, and he will tell you he might die during your clerkship). Lazarus is no dummy. Yet he claims genuine surprise when he finds himself a foot soldier on a battlefield, rather than a law clerk diligently ferreting out the law from great stacks of learned texts and volumes of court decisions. That the political nature of the Supreme Court escaped his notice before he walked into the Court is difficult to believe, although the

34. LAZARUS, supra note 1, at 518.
"guerrilla war" he found may have been more malevolent, personal, and pronounced than he expected.35

The two warring sides (for simplicity, called the conservatives and the liberals, but with characteristics of the Montagues and the Capulets) never even consider a truce during Lazarus' enlistment. Rather, they spend their time trying to capture several strategic sites—abortion, affirmative action, the death penalty, and habeas corpus—and wooing neutral parties for skirmishes and forays to extend their territory in these areas.36 The vision of war and battle are conjured up by such chapter titles as "Robert Bork and the Civil War," "A Fragile Peace," and "Old Battle, New Wounds." Even the book's subtitle—"The First Eyewitness Account of the Epic Struggles Inside the Supreme Court" makes one think of a lone battlefield survivor recounting horrors unknown to the outside world.

The "this is like a war" simile is too much, but it does reflect the image of a survivor who apparently went in an idealist and came out a realist, with idealized notions of reform. Although his stories support a critical legal studies view of the Court, Lazarus claims he is less cynical. At the end, he acts more appalled, with an attitude of "does anyone else know what goes on here because we need to do something about it." The clash between cynicism and idealism recalls the courtroom scene in the movie "A Few Good Men" in which the young Navy lawyer demands of the battle worn Marine general, "I want the truth," and the general snarls back, "You can't handle the truth." The questions here are whether we have the truth in Lazarus' account, and if so, does Lazarus know how to handle it.

B. Assessing the Battlefield Reports

As with all eyewitness testimony, we have to evaluate the testimony and the sources in context. Two of the issues to consider

35. See id. at 261 (“But nothing in this crash course and nothing in law school and nothing in my imagination prepared us for the tidal wave of politically charged cases that term, or for the depth of the moral, philosophical, and personal schisms that divided the Justices, or for the guerrilla war that liberal and conservative clerks conducted, largely out of sight of those Justices, to control the course of constitutional law.”).

36. See id. at 44 (“Once Justice Scalia distributed his memo identifying the Yonkers case as potentially useful for reshaping the prevailing legal landscape, the vote on the stay applications inevitably developed into a kind of quickie litmus test for a Justice's allegiance in the escalating civil war over the Court's purpose and identity.”).
here are: (1) the limited number and nature of informants for the book; and (2) the particular viewpoint and politics of the author, which is clerk-centered and moderately liberal.

1. **The Sources**—The limitations in Lazarus' account are: (1) the sources are non-representative; (2) the sources are often anonymous; and (3) the sources address only a limited number of cases. Part of the context is examining how Lazarus gathered his information. Lazarus uses the notes and papers of some Justices, his own personal experience, and the experience of some former law clerks and other sources, although it is doubtful that Lazarus solicited memories of the “cabalists”—as Lazarus not so fondly refers to several conservative clerks.

   The problems are apparent. We do not know if he has a representative or trustworthy sample of sources. That the sources are anonymous impedes a genuine assessment of credibility. Moreover, clerks also get only a limited glimpse into the Court. Their life experience may be limited, their term at the Court is short, and their immediate frame of reference is their Justice.\(^{37}\) They might form attachments to their Justice that lead to a more critical view of other chambers, especially ones that might disagree with their Justice. In short, the clerk’s perch does not provide an unobstructed view of the situation.

   Lazarus also does not have a representative sample of the Justices' papers, only the papers of Marshall and Brennan, who are both dead, and who happened to be liberals. That also may skew the narrative. He does rely, however, on the work of other scholars. Some of the stories he tells are also told in other accounts, but with different slants on the same facts.\(^{38}\)

2. **The Reporter’s Viewpoint**—Besides relying upon an unrepresentative sample of informants, Lazarus is looking at the situation through his own prism, and his prose reflects that fact. Examining his perspective allows us to better evaluate his account. To fit within his themes, he inflates the importance of the year he clerked, and he emphasizes the role of the clerks and a bitter liberal-conservative divide on the Court.

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37. Lazarus notes this limitation in the context of criticizing the Justices for relying on their clerks too much in their decision making. *See id.* at 273.
a. **The Time**—First, Lazarus has such an exaggerated view of the 1988 term that it undermines his credibility. He compares it with the 1937 term, when the court reversed course on the New Deal, and the 1954 term, when it decided *Brown v. Board of Education*.\(^{39}\) Despite his claim that the 1988 term saw "more landmark decisions in more fields of law than in any other year in history,"\(^{40}\) 1988 was not remotely remarkable. Although the Court decided one abortion case, *Webster v. Reproductive Health Service*,\(^{41}\) that case subsequently was knocked out of many Constitutional Law texts when *Casey v. Planned Parenthood of Southeastern Pennsylvania*\(^{42}\) was decided in 1992. In contrast, the 1937 decisions and *Brown* are still in the textbooks. Fame is generally fleeting in Constitutional Law—a problem that Lazarus repeatedly points out in the context of criticizing the manipulation of precedent on the Court. Most terms have some surprises and casualties, and the damage sometimes takes years to assess. Without agonizing over the details, suffice it to say that 1988 was not the best of times, nor the worst of times. It was not uninteresting, but nothing cataclysmic happened.

Abortion, the death penalty, civil rights—these are the topics that the Supreme Court routinely covers these days. To characterize 1988 as an unusual year is to place the Supreme Court outside its historical context as the focal point of the hot issues of the times. Despite his statement to the contrary, Lazarus seems to understand this point as well because only a portion of the book is devoted to the actual events of the 1988 term. He uses historical context throughout his book and talks at length about many important cases that occurred before and after 1988. Lazarus exaggerates that term's place in Supreme Court history because it fits within the "epic" theme, and he cannot be an "eyewitness" to anything that happened outside that term.

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39. 347 U.S. 483 (1954). Lazarus states:
It is fair to say, I believe, that during October term 1988 the Court handed down more landmark decisions in more fields of law than in any other year in its history and that the term must rank with the New Deal Watershed of 1937 and the year of *Brown*, 1954, as the most decisive of the century.


Moreover, to see only these controversial issues as defining the Supreme Court is inaccurate as well. After reading Lazarus' book, one thinks that all the Supreme Court handles is death penalty cases, abortion, affirmative action cases, and habeas petitions. The focus is narrow. *Closed Chambers* is bereft of stories of blood spilled over tax, social security, or admiralty cases. But those topics are deadly boring and do not make good copy. For example, it is not clear that the outcome of any ERISA case caused any heartache, plotting, or general agitation at the court. To fit the court into the "war" analogy, he makes much of the liberal-conservative divide, without a meaningful center. Whether that stark conservative-liberal split exists in the majority of cases that the Supreme Court decides every year is not clear from his account.

One critical point that Lazarus makes is that the death penalty bitterly divided the Court, and these cases may have affected the Justices' relationships in other areas as well as "destroy[ing] the integrity of the courts." By Lazarus' account, the death penalty cases caused bitter struggles among clerks that were personal, political, and ideological. With both the clerks and Justices, the pressures and tensions of the death penalty cases so infected the Court that the bitterness may have spilled over and contaminated the entire decisional process. The large number of petitions the Court handled, the last minute and emergency nature of the petitions, and the stark reality that execution was imminent for the petitioner make these highly emotional and difficult cases. Ironically, by chronicling these incidents before, during, and after the "historic" 1988 term, Lazarus attests to a problem that is not unique, but part of a long and agonizing struggle for the Court.

43. *See* LAZARUS, * supra* note 1, at 262 ("The more fundamental similarities [between the 1988-89 term court and the present one] are internal: the virtual disappearance of a meaningful center in favor of two sharply divided wings, the emergence of either Kennedy or O'Connor (depending on the area of law) as the controlling vote in almost every politically charged case, and the perpetuation of a Court culture that suffers from the same accusatory and uncompromising spirit of faction that now poisons American political society at large.").

44. *Id.* at 509.

45. The infection extends to relationships with the Courts of Appeal, including a particularly bitter battle with the Ninth Circuit. *See id.* at 505-509.

46. In 1986, the California Supreme Court suffered its own problems over the emotions raised by the death penalty when three justices suffered defeat in judicial retention elections. Their defeat was linked to a political backlash against perceived obstructionism of the operation of the death penalty. *See generally* Robert S. Thompson, *Judicial Retention Elections and Judicial Method: A Retrospective on the California Election of 1986*, 61 S. CAL.
b. **The Role of the Clerks—Supporting Cast or Main Characters?**—Lazarus' book contains a theme of mismanaged, overzealous law clerks, who do much of the Court's work. That story is centered in 1988, and "during October Term '88 the vast majority of opinions the Court issued were drafted exclusively by clerks." Lazarus believes that the clerks have a great deal of influence, more influence than they should. The latter point would be undeniable if in fact the clerks exclusively drafted the vast majority of opinions. Beyond claiming that the clerks' worst trait is that they produce wordy and heavily footnoted opinions that the Justices do not bother to understand, edit, or cut enough, although he is critical of those practices, Lazarus also claims several clerks are not just law researchers, but zealous advocates of particular conservative causes.

The clerks exercise considerable power through the Justices' participation in a certiorari pool, with eight Justices being influenced by the initial judgment of the clerk who works on that petition. The problem is that with so many chambers participating in the certiorari pool, the safety net provided by individual review of these certiorari petitions is lost. The power over the grant of certiorari is initially delegated to a young, inexperienced, short-time, perhaps partisan, recent law school graduate. It is a somewhat frightening picture because it is one in which the Justices

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47. **LAZARUS, supra** note 1, at 271.

48. Lazarus describes a Court "where Justices yield great and excessive power to immature, ideologically driven clerks, who in turn use that power to manipulate their bosses and the institution they ostensibly serve." *Id.* at 6. As Lazarus notes:

Certainly, the ultimate power to grant or deny a stay rested with the Justices. Still, when the final arguments reached the Court, the Justices were almost always long since home for the night, isolated from the tall stacks of paper in which the crucial elements of the case lay buried. The Justices counted on their clerks to distill for them the essence of the case, the facts, the issues, and the precedents that should inform their vote. They relied on us for advice.

*Id.* at 122-23. Lazarus also notes:

I can say with certainty that Rehnquist's mild suggestion of unconscious liberal bias in the cert. process does not even begin to capture either the very significant power that clerks wielded at the Court during my time (and in several years subsequent) or the very conscious and abusive manner in which clerks wielded that power for partisan political ends.

*Id.* at 263. He notes further Kennedy's clerks conniving on stays of execution, and how to get a vote against a stay. *See id.* at 270.

49. *See id.* at 272-73.

50. *See id.* at 263.
may never be exposed to the arguments for or against certiorari because they are filtered through the clerk.

Past the certiorari process, a clerk’s influence is tempered because the Justices have access to the briefs and arguments of both parties. Memos to and from the Justices are circulated with a variety of viewpoints. Lazarus notes that for some of the clerks their Justice’s vote was inevitable. There are other examples of clerks being unable to persuade their Justice to take a particular position or disapproved of the opinion of their Justice, and this is perhaps the best evidence that the Justices are not sold anything that they do not want to buy. Certainly other books about the Justices portray less clerk-centered scenarios, although criticism of reliance on clerks has been voiced by other commentators.

Lazarus often names the clerks that he feels overstepped their bounds, and they are the conservative clerks. He is direct, pointed, and personal in his criticism of them. It is one of the ironies of the book that in criticizing the Justices for their failures to bridge chasms between ideological differences, he certainly contributes to the divisiveness by singling out these clerks in a very public way and detailing his opinion of their personal and professional failings. If they were to return fire in the same way, it would lead to the same situation he condemns among the Justices. The only difference is that at least until now, it is a one-sided war of words.

The clerks’ influence was highest with certain conservative, but sometimes centrist Justices, including Kennedy and O’Connor.

51. See id. at 63-64.
52. See LAZARUS, supra note 1, at 123.
53. See, e.g., id. at 202 (noting that clerks for other conservative Justices were not successful in arguing that death penalty study should be given more “careful attention”), 207 (noting Justice Powell’s opinion of the court in McClesky was, for most of the clerks, “an obvious failure of logic and craft.”).
54. See generally JEFFRIES, supra note 9, at 243-562; SIMON, supra note 9.
55. LAZARUS, supra note 1, at 271-72.
56. See id. at 264-75.
57. For example, he specifically names the three conservative clerks who engaged in the “machinations” culminating in Kennedy’s vote switch in Patterson. See id. at 314-15. Although he is equally critical of Brennan in Patterson, he notes that Justice Brennan rewrote his opinion in a “transparently insincere” manner, id. at 316, in order to gain a dishonest tactical advantage “at a clerk’s suggestion” without specifically naming the clerk, id.
58. See id. at 270, 274.
Lazarus portrayed several clerks as manipulative Iagos in the chambers of some Justices. Primarily Justice Kennedy in *Patterson v. McLean Credit Union*\(^5\) and generally,\(^6\) and Justice O'Connor in *Webster* and *Richmond v. Croson*.\(^6\) Some clerks plant ideas in the Justices’ heads and connive to achieve their desired result.\(^6\)

“Some” is the operative word as there are stories of other clerks who refrain or restrain themselves from pressing cases with their Justices—they are often the ones who are, in Lazarus’ opinion, in the right.\(^6\)

Yet ultimately, Lazarus does not know exactly how the Justices arrived at their conclusions. Kennedy and O’Connor were open to persuasion (a positive quality) and looking for consensus (another positive quality) or perhaps just looking for a justification for their desired result. He relates stories of Justices inviting clerks to debate the issues before oral argument to bring out the problems, differences, and possible approaches.\(^6\)

The role of intellectual sounding board seems like a good use of clerk time. Although Lazarus at times seems to be extremely critical of some conservative clerks, Lazarus lays most of the blame for poorly reasoned decisions on the Justices, which is where it belongs.\(^6\) They sign their opinions and receive the criticism. Nor would one expect any Justice to lay responsibility for a decision at the clerk’s door.

But the idea of an on-the-scene, powerful advocate continually pressing one’s cause is disturbing, especially because Lazarus portrays it as deliberate partisan manipulation. Conservative clerks infiltrate not only their assigned chambers, but those of other Justices. Right or wrong, Lazarus’ tale of miscreant clerks touches a nerve. The clerks are operating within a fundamentally non-representative body with a closed deliberative process. The

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60. *See* Lazarus, *supra* note 1, at 314-16, 322 (“[F]ormer clerks consider [Kennedy] one of the more ‘clerk-driven’ Justices.”), 394-95 (“[I]n the minds of his clerks, [Kennedy] always held out at least the possibility of being persuaded . . . .”).
61. *See id.* at 273-274, 300, 391-393.
62. *See id.* at 314-15 (detailing the attempts of the “cabalists” clerks to sway Justice Kennedy’s vote in the *Patterson* case).
63. *See, e.g.*, *id.* at 201-02.
64. *See id.* at 394.
65. *See* Lazarus, *supra* note 1, at 300 (“The argument in [Richmond v. Croson] that O’Connor adopted was a favorite of Federalist Society members, developed the previous year by their guru Judge Alex Kozinski . . . and cleverly deployed by O’Connor’s cabalist clerk. But her acquiescence in its use was a matter of pure convenience, not conviction.”).
suggestion that they are manipulating the votes behind the scenes can carry weight precisely because we have no idea what goes on beyond the scenes.

On the other hand, clerks are also just one aspect of "outside" influence in the Court's work, meaning outside the briefs, the arguments, and the case law. Perhaps this theory is best illustrated by a story of one clerk's lack of influence. Justice Powell's clerk, during deliberations on the *Bowers v. Hardwick*\(^6\) case, did not disclose to Powell that the clerk was gay, letting Powell claim in the middle of the deliberations that he did not know anyone who was gay. Whether the clerk did not want to reveal his sexual orientation to Powell for personal reasons or did not think he should influence Powell's decision by such disclosure, the situation presented an untouched opportunity to confront Powell and to force him to make a more honest decision. Ultimately, Powell provided the fifth vote to hold that criminal prosecutions of consensual homosexual sodomy were not unconstitutional, although he concocted a potential Eighth Amendment argument that future litigants could try to sell to four other members of the Court. He later regretted the vote.\(^7\)

What if the clerk had told Powell of homosexuality and Powell had an epiphany that changed his vote sooner rather than later? Would the result be more frightening than his subsequent regret because the decision would have rested on a single clerk's influence? It is frightening that Powell's biography credits his understanding of the problems of restrictive abortion laws to conversations with his daughters and to his knowledge that a messenger in his law firm had helped someone get an abortion and she died as a result.\(^8\) To realize that some law is based on chance anecdotal experience, or on a form of judicial narrative is frightening. For advocates, the influence of personal experience is hidden from view, difficult to ferret out, figure out, and defend against. Academics and advocates waver between ignoring and acknowledging this invisible influence.

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\(^{6}\) 478 U.S. 186 (1986).

\(^{7}\) See Jeffries, supra note 9, at 530.

\(^{8}\) See id. at 347; Lazarus, supra note 1, at 367 ("The incident convinced Powell that women would seek abortions regardless of the law.").
Although Lazarus focuses on the clerk influence, the broader fear is that Supreme Court decisions are driven by anecdotes, intuition, and political views of the Justices and clerks. The clerks' own life experiences and perspectives potentially become part of the limited mix that produces those decisions. The clerks themselves are drawn from a narrow pool of society. The larger problem may be that some of the Justices make their decisions based on their own sometimes lopsided life experiences, including interactions with clerks, spouses, and children. Even empirical data is filtered through this prism. It is no surprise that judicial biographies focus attention on the Judge's background, personality, and experience, trying to explain how this combination produced that particular judge. In contrast, the actual decisions of the judge are generally focused on case precedent with no hint that personal experience had any role in the decision.

Both the claim that 1988 was an extraordinary year and the claim that the clerks' influence was too decisive in some cases may just be part of the overall tone of an "epic" account. In a manner, it is not unlike an "inside the beltway" account of life in which one either is the most influential person in Washington, D.C. or works for the most influential person in Washington, D.C. The subtitle, after all, is "The First Eyewitness Account of the Epic Struggles Inside the Supreme Court," for a reason. It is far more marketable than "One Clerk's Version of Some Everyday Struggles Inside the Supreme Court."

69. See Tony Mauro, The hidden power behind the Supreme Court Justices give pivotal role to novice lawyers, USA TODAY, March 13, 1998, at 12A (noting that the majority of Supreme Court clerks are graduates of elite law schools, white, male, and young). Lazarus notes that to get a Supreme Court clerkship, you need to get "a letter of recommendation from at least one professor (usually a former clerk) who is 'plugged in' to the clerkship network" LAZARUS, supra note 1, at 19. So the system perpetuates itself.

70. Lazarus notes how the personal experiences of the Justices often influenced their decisions. See LAZARUS, supra note 1, at 35 (Stevens on flag burning), 66, 107, 147, 214-15 (Marshall on racial bias), 135 (Rehnquist on the death penalty), 300 (O'Connor on state's rights), 367 (Powell on abortion), 367-68, 380 (Blackmun on abortion), 384, 501 (O'Connor on abortion and habeas), 386 (Powell on homosexuality).

71. Lazarus points this out in his criticism of Justice Powell and his alleged "statistical know-nothingness" approach to a study indicating application of the death penalty was race-based. Id. at 207, 211 (criticizing Justice Powell's approach in McKleskey v. Kemp). In Lazarus' opinion, the study showed that Powell's vision of "southern progress" was a myth, which was too much cognitive dissonance for Powell to accept. That caused him to find a way to ignore the study. See id. at 200-01.
c. The Justices-Heroic Figures or Mere Mortals?—Lazarus criticizes all the Justices on the Court, except perhaps Justices Souter and Harlan. According to Lazarus, the conservatives are heartless, the liberals are headless, and the center is directionless. Lazarus seems embittered towards the liberal members of the Court because they achieve results with which he agrees, but on what he believes to be indefensible grounds. Unlike James P. Simon's position in his recent book, The Center Holds, Lazarus expresses no admiration of the liberal members of the Court. Lazarus' account is critical of Brennan and Marshall and blames them for many of the failures in the period he surveys. Lazarus cannot hide his frustration with the Court's loss of the strength of its liberal members to illness and age (Brennan and Marshall), Florida (Stevens), and the library (Blackmun). On the other hand, the conservatives were enjoying a Renaissance, led by the "witty, brilliant, and self-satisfied" Scalia. What comes across—accurately or not—is a portrayal of the conservative Justices as smart, sharp, and energetic, and the liberal Justices as old, politically out-of-touch, and cantankerous.

Lazarus reflects this viewpoint in recounting events. Consider his account of the assignment of the majority opinion in the Patterson case. This case caused a stir because the Supreme Court ordered oral argument to reconsider a key precedent (the Runyon case) interpreting a civil rights statute. It looked as if the conservatives on the Court were headed for a frontal assault on basic liberal bases. The liberals would not go down without a battle, however, and part of that battle was a fight for the heart and mind of the newly appointed Justice Kennedy. Surprisingly,

72. The conservatives' attitude toward the death penalty, for example, was: "Let's get it over with." Id. at 160.
73. James F. Simon takes us on a tour of the same court and covers much of the same ground, but without some of the more gossipy material gleaned by Lazarus. The cases the two authors examine are almost the same—the Patterson racial discrimination claim, the Roe and Casey abortion cases, the McClesky case. The internal and confidential memoranda they cite are the same in many cases, but the interpretation of what happened on the same facts are sometimes very different. Simon also does not emphasize the clerks' alleged over involvement in opinion writing and in-fighting. See generally, SIMON, supra note 9.
74. See id. at 275-279, 351.
75. Id. at 279. Lazarus describes Rehnquist, in contrast to his predecessor Burger as "brainy, a quick thinker with a straightforward, easygoing manner that smoothed his sometimes jagged-edged written opinions." Id. at 191.
76. See id. at 309-21.
after the Court’s initial conference, he seemed capable of reaching a truce that would uphold the precedent. Justice Brennan, ranking member of the conference majority, got to assign the opinion. As Lazarus tells it:

\[\text{[Patterson]}\] seemed ideally suited for Earl Warren’s favorite opinion assignment strategy of protecting a bare majority by giving the writing assignment to its least certain member. If Brennan harbored doubts about Kennedy’s commitment at conference, the surest way to keep Kennedy’s vote would be to let him draft the opinion. Even if not, given the Court’s deep divisions and the inevitable pressure on Kennedy to return to the conservative fold, prudence alone argued strongly for giving him the assignment. But Brennan had not earned the nickname Piggy by handing off big cases for others to write. He returned from conference enthusiastic about Kennedy’s support and decided to write \text{Patterson} himself.\textsuperscript{77}

This account is hardly flattering to Justice Brennan. Consider, however, the same story with a different spin from a different author, James Simon in \textit{The Center Holds}:

As the senior justice in the majority (on both the \textit{Runyon} and \textit{Patterson} issues), Brennan was entitled to assign the majority opinion. He decided to give the assignment to himself, drawing on his vast experience to try, once again, to produce a majority opinion that would support his expansive vision of civil rights and liberties protections under the Constitution and federal statutes.\textsuperscript{78}

It is a matter of perspective. One author interprets the facts as self-indulgence; the other author portrays Justice Brennan a grand master executing a grand plan.\textsuperscript{79}

\textsuperscript{77} Id. at 310.

\textsuperscript{78} SIMON, supra note 9, at 49. Again, in contrast to this glowing tone, Lazarus notes in discussing Brennan’s role in \textit{Roe v. Wade}: “Brennan goaded the Court in spasmodic leaps toward his vision of the Constitution as an ever-expanding charter for achieving social justice.” LAZARUS, supra note 1, at 369.

\textsuperscript{79} Lazarus also faults Brennan and liberal law clerks for a messy resolution in \textit{Patterson}. Lazarus claims:

His clerks, as liberal or more liberal than the Justice himself, had a tin ear for phrasing arguments in ways that might appeal to a potential conservative ally. Even when they tried to be cautious and noncontroversial, from the conservative perspective, they overreached. And, in \textit{Patterson}, they weren’t even trying. The draft was laced with modes of argument and rhetorical flourishes about the Court’s commitment to fighting discrimination that were characteristic of
Simon sees the liberals holding together a coalition; Lazarus sees them as generally losing it. It is important to Simon's thesis that the liberals are seen as holding together the coalition. Lazarus uses the liberals' alleged foibles as part of his thesis that both sides of the ideological debate are in need of counseling, need to deal more honestly with the questions before them, and to be more collegial with each other. The point of his book is that the liberals are as dogmatic and zealous as the conservatives, and that both sides in the war are at fault. If he had accused only one side of the debate with possessing these qualities, critics would dismiss him as an ideologue on the losing side of an ideological war. Instead, he attempts to come off as even-handed in his criticism, without an ax to grind.

As to his own ideological orientation, Lazarus places himself in the moderate liberal camp, very much like Justice Blackmun, the Justice for whom he clerked. On the death penalty, for example, Lazarus criticizes the so-called abolitionists for their extreme,

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Brennan’s grand style but sent chills down conservative spines. LAZARUS, supra note 1, at 310 (citation omitted).

On the other hand, Simon, in The Center Holds, describes the same draft in a different manner:

Brennan devoted the first two-thirds of this draft opinion to the issue on which there was Court unanimity—the reaffirmation of Runyon v. McCrary. Brennan emphasized the established rule that the Court should not overrule precedents that interpret congressional statutes, since Congress had the power to correct interpretations that it did not approve of. Brennan laid out all the exceptions to this rule, all of the times when the Court should overrule congressional statutes, and then demonstrated why the Court had reaffirmed, not overruled, Runyon.

He concluded the section on the conspicuously cautious note that his clerk had suggested in his Patterson memorandum: although the Runyon majority’s interpretation of the 1866 Civil Rights Act was not the only acceptable interpretation of the statute, it was at the very least “plausible.” And given the Court’s respect for precedent, a “plausible” statutory interpretation by the Court, untouched by a later congressional amendment or statute, should be preserved. SIMON, supra note 9, at 55-56.

80. See LAZARUS, supra note 1, at 210 (“So it was even in a case as fundamental and difficult as McClesky. From start to finish, each side operated as if enclosed in its own cocoon. An ‘odd silence’ descended over the case, one clerk recalls. It was the silence of mutual scorn.”).

81. See id. at 266.

82. See id. at 114 (criticizing a death penalty opponent as a "fanatic" for failing to concede in oral argument that there may be some crimes—like blowing up New York City with a hydrogen bomb—for which the death penalty might be appropriate.). Lazarus states:

I didn’t become convinced that any particular murderer “deserved” to die or even that the death penalty was a good idea. But I did lose the capacity to believe that
uncompromising positions. Maintaining balance, he takes pains to describe some of the horrible acts that led to the sentence, while concluding that the defendant did not intentionally commit murder. He also states, however, that he saw prosecutorial and judicial misconduct aplenty, and "chronic ineptitude of defense counsel," that made imposition of the penalty problematic in a number of cases that he saw. He does not really detail any case in which he saw the death penalty as legitimate; a case in which there was no constitutional error. He places himself far from the conservative Justices who cannot honorably apply precedent especially when it might result in overturning a death sentence, and clerks who seem to carve notches in their desks every time it is inflicted. In other words, his aversion to the death penalty was not unthinking or wholesale, but he never seems to have seen a case in which it was fairly meted out. This attitude is very similar to the position he later ascribes to the Justice that he clerked for—Justice Blackmun.

III. Character Flaws That Lead to the Supreme Court's Troubles

Having examined Lazarus' perspective, one moves on to the purpose of the Lazarus story. Lazarus' point is that the quality of justice suffered because of a lack of intellectual candor and consistency and the absence of the meaningful exchange of ideas in the Supreme Court during the last decade. The Court became unable to reach a "collective judgment, to deliberate on the nation's fundamental values and beliefs, and to translate those values and beliefs into a coherent rule of law." Lazarus suggests change, but that change seems possible only if it begins in the

the death penalty was evil per se, that because of some abstract ideal of human dignity, under no circumstances could the state extinguish a life. Some human conduct was that terrible. I saw it every week.

Id. at 125.
83. See id. at 50, 72, 124-25.
84. See id. at 126-29.
85. See LAZARUS, supra note 1, at 209-210 (claiming that in the Tison v. Arizona, 481 U.S. 137 (1987), Supreme Court precedent in the form of Enmund v. Florida, 458 U.S. 782 (1982) required reversal, but conservatives tampered with the precedent to achieve the desired result because the "conservatives had no compunction about bending old law a bit to usher [the defendants] on their way.").
86. See id. at 161 ("But Blackmun's compulsive methodology also caused him to reflect almost daily on the awful responsibility of overseeing the taking of a life and made him increasingly concerned with the chronic irregularities he saw in the system.").
87. Id. at 165.
hearts and minds of the Justices. The problem is that Lazarus' goals of a collegial or collective process and consistent, honest decisions are sometimes in conflict with each other. Moreover, Lazarus does not specify exactly how the ideal process would work. Instead, he argues that flaws in the current process lead to decisions that are flawed. Yet, he is unable to show how changing the process would improve the quality of justice or decisions.

A. Defining the Problems and the Problems with the Definitions

1. The Lack of Intellectual Integrity—In expecting honesty of the Justices, Lazarus expected the Justices to wrestle with the difficult and to acknowledge the complex. Instead, he found the Justices content to manipulate the difficult issues and to overlook complexity. This criticism is based on his premise that there is no "right" approach to Constitutional interpretation. Accepting that there is no right method, there must be a "decency of process," and "trust and belief in mutual good faith".

There must be a sense that both sides are advancing legal arguments because they believe in them deeply and not as a stratagem for imposing their will on the law. There must be a sense that reasons matter more than results. The power to interpret carries the responsibility of good faith and self-denial.

88. See id. at 518.
89. Lazarus claims:

Certainly neither the Justices nor the academics who dissect their work have ever agreed on one. Just as Bork's jurisprudence on original intent suffered from the inherent weakness of too closely linking the law to an unknowable part, other modes of interpretation potentially cast the law adrift without reference to text, history, and structure of the document that is the charter of both our government and our liberties.

The most we can expect and what we must demand from the court as it expounds the law is an integrity born of consistency and sincerity. Legitimate constitutional arguments are not limitless; they may take several forms familiar to the law. They may be based on history, on precedent, on the text, on inferences from the way our government is structured, on appeals to ethics, or on prudential considerations about the consequences of a decision. Often, these modes of argument are used in combination, melded into a convincing whole. And none is perfect for every circumstance. Deciding which modes of argument best suit the facts and circumstances of a given case is both an inevitable moral choice and the essence of judging.

Id. at 248-49.
90. See LAZARUS, supra note 1, at 249.
When these are destroyed, nothing remains but counting votes and the exercise of raw power.\textsuperscript{91}

One problem with this theory is acceptance of the premise that there is no right approach to interpreting the Constitution. Many of the Justices believe deeply in the legal arguments that they are advancing, and that is why they want to impose them on the law. The more one feels there is a "right" and "wrong" way to interpret the Constitution, the less one is able to abide compromising one's approach. If those with firm commitments to certain ideological tracts have to compromise them, the Supreme Court opinions may then end up looking more like legislation—decorated with paragraphs satisfying this or that Justice and somewhat incoherent as a whole. Lazarus never adequately addresses how consensus is reached when the Justices' positions are so far apart. He spends time criticizing each side, but little time addressing how to bridge the gap.

Lazarus believes that many members of the Court were hard core ideologues in the results that they desired, but not necessarily in their rationales.\textsuperscript{92} He does not believe that either the conservatives or the liberals are wedded to a particular jurisprudence, but that they are wedded to particular results. Lazarus' argument about honesty in dealing with the precedent and facts is an admirable goal for the justice system; Justices should not misuse, mischaracterize, or ignore precedent or facts.

Nevertheless, charges of outright dishonesty are easy to make but hard to prove, given the fluid and complex nature of legal argument. Precedents often point in different directions and emphasis on one or another will lead to one result or another. This is especially true at the Supreme Court because there are so many matters of first impression. That may explain the difference between claims that a court is inconsistent in applying its own

\textsuperscript{91} \textit{Id.}
\textsuperscript{92} He notes that:

\begin{quote}
In pursuit of their legal counterrevolution, the conservatives seemed to care little or nothing about consistency and continuity in their use of legal doctrine or whether their arguments held up under scrutiny. The liberals, for their part, reached predictable results through complacent means, resting on old law even when its foundations had been exposed as shaky or when it seemed ill-suited to the case at hand.
\end{quote}

\textit{Id.} at 286.
precedent and proving that claim.93 Many judicial decisions could begin:

This is a difficult case. Precedents point in many directions. We could justify reaching the results desired by the respondents or the petitioners by a variety of different routes. This opinion explains the route we chose and why we believe it is the most justifiable.

As Lazarus argues time and again, there are many cases in which both sides could have been more honest in justifying the result that they wanted to reach.94 Lazarus’ book, like other books and many law review articles, is devoted in part to exposing the Court’s questionable calls and leaps in logic. Dissecting and criticizing Court opinions is a time honored pastime for legal academics. Lazarus’ own attempt to supplement his critiques with insider stories of personality disputes on the Court may be driven by a desire to appeal to a wider audience for material that is often technical, dull, and complex.

Even if both sides are honest in arriving at their decision, however, the Court may still lack consensus on the result, although admittedly with more intellectually honest majority and dissenting opinions. A cry for intellectual honesty—if that were the sole target of the book—is a worthy enough goal. What Lazarus adds to the record of criticism is a challenge for the Court to “engage in the enterprise of acknowledging and accommodating our most

93. See Arthur D. Hellman, Breaking the Banc: The Common Law Process in the Large Appellate Court, 23 Ariz. St. L.J. 915 (1991) The author found that evidence suggests “that what makes appellate outcomes unpredictable, even in a large court, is not an array of decisions pointing in different directions, but more often than not, the absence of a precedent that is closely on point.” Id. at 921.

94. See, e.g., Lazarus, supra note 1, at 216. For example, with regard to the death penalty decision in McClesky v. Kemp:

The result was in a way the worst of all worlds. The Court did not advance boldly to eradicate race discrimination in capital sentencing, even at the risk of losing the death penalty itself. Nor, by contrast, did it retreat honestly and forthrightly (as Justice Harlan had done long age in McGautha), conceding that the death penalty was permissibly imperfect and too intractable a puzzle for human wisdom to solve. Instead, the majority erected a facade of fairness and rationality, and pretended that the potential problems recognized in Gregg had been solved. And, in so doing, these Justices legitimized, for every participant in the death penalty system and for the public at large—a process that, at a minimum, they should have recognized as deeply flawed.

Id.
passionate differences."95 This second challenge—to reach consensus—is certainly the more difficult of the two challenges he presents.

2. **Collegiality and Open-Mindedness**—In finding intellectual dishonesty, Lazarus critiques the reasoning of many Supreme Court decisions. But he also attacks the process that produced them, a process that seems lacking in institutional collegiality. Collegiality is not the quality that makes the job nicer because the Justices and the clerks play tennis or golf together. It is not the personal that matters here, although Lazarus focuses in part on what an unhappy work place the Supreme Court was on occasion. As Lazarus phrases it, "[T]he soil of shared experience and principles, of compromise and understanding, had washed away,"96 and that "the delicate process of collective judicial decision breaks under the weight of unrelenting ideology and the arrogance of certainty."97

The members did not get along well enough to talk to one another about their points of difference in resolving the various cases:

To fulfill this mission, a body of nine independent, opinionated judges whose views in hard cases often prove irreconcilable must above all preserve a decency of process. For the system to work, for Justices in disagreement to achieve an exchange of ideas, undertake a search for common ground, or even reach an agreement respectfully to disagree, there must first be trust and belief in mutual good faith. There must be a sense that both sides are advancing legal arguments because they believe in them.98

It is not the first time a suggestion for a process of deliberation has been made and ignored. Justice Frankfurter often proposed more formal rules to ensure adequate deliberations, but his memorandum proposing the change—he circulated it every year for ten years—met with a decided lack of enthusiasm.99 Some Justices saw any proposal of specific "due deliberation" procedures as potentially impinging on the independence of the vote of the Justice. As Justice Douglas noted:

95. *Id.* at 324.
96. *Id.* at 72.
97. *Id.* at 249.
98. *Id.* at 9.
If we unanimously adopted rules on such matters we would be plagued by them, bogged down and interminably delayed. If we were not unanimous, the rules would be ineffective. I, for one, could not agree to give anyone any more control over when I vote than over how I vote.100

Justice Douglas does not admit that anything anyone could say could change his vote. Nor do the current Justices themselves seem to cry for more debate,101 even when not much debate goes on.102 Two of the more conservative Justices, Justices Rehnquist and Scalia, admitted that because the issues confronted are similar from year to year, further talk would probably not produce different results.103 Of course, their conservative views being on the winning side of most arguments these days, they have little to gain from further talk, and time and votes to lose. It is important, however, that the call for more debate comes from within the Court, because imposing it from outside the Court would likely make it all the more unsuccessful. The Justices must want to achieve a consensus in order to do so successfully.

There was a time when consensus could be informally encouraged as Chief Justice Marshall did in the early days of the Court. His methods included ensuring that all the Justices roomed in the same boardinghouse and writing the majority of opinions himself, even if he disagreed with the results.104 His success reflects his own personal charisma and brilliance, qualities not easily re-created. Such methods appear outdated and unworkable, and had their critics even in Marshall's days.105

100. Id. at 218.
101. See id. at 332-33 (noting that Justice Scalia has praised, in the face of criticism by the bar and scholars, the filing of dissenting and concurring opinions, as a means to improve the majority opinion, as well as providing a forum for debate and accurate record of the members' positions.).
102. See LAZARUS, supra note 1, at 210.
103. See O'BRIEN, supra note 9, at 232.
104. See O'BRIEN, supra note 9, at 137. O'Brien quotes John Marshall's philosophy:

The course of every tribunal must necessarily be, that the opinion which is to be delivered as the opinion of the court, is previously submitted to the consideration of all the judges; and, if any part of the reasoning be disapproved, it must be so modified as to receive the approbation of all, before it can be delivered as the opinion of all.

Id. (quoting Philadelphia Union, April 24, 1819) (quoted by D. MORGAN, JUSTICE WILLIAM JOHNSON: THE FIRST DISSENTER 173 (1954)). The Taney Court also emphasized consensus. See id. at 138.
105. See id. at 137-138.
Collegial discussion and consensus are fine ideas for a court in theory, but are hard to implement in practice. Lazarus’ book mentions both the personal and professional ill effects of ideological disagreements on the Supreme Court. It is not necessarily true, however, that personal relationships of ideologically opposed judges need to degenerate to armed encampments or stony silences. Judges with vastly different ideological views can interact fine personally but disagree about the case law. Judges of similar ideologies can find each other personally distasteful. The problem is how to mediate the differences and to find consensus, assuming that is the goal.

Lazarus’ suggestions of working in good faith and caring about reason more than results offers little practical help. In contrast to his specific criticism of the reasoning of the particular cases, he offers few concrete suggestions regarding how to bridge the gap. Specific suggestions are hard to identify because there may not be a middle ground for consensus on these issues. The problem he sees is that few Justices want to compromise, and Lazarus is unhappy with the results that the Court reaches under these circumstances.

3. **What if No One Wants to Compromise?**—Sometimes no middle ground exists for the Justices. The Justices care deeply and feel strongly about their views concerning conflicting precedents and policies. Yet, the losing side of the argument believes that if the other side had just listened more carefully, the winners would have found the loser’s argument persuasive. There is a real difference between listening and disagreeing and not listening. Sometimes the other side has listened to and understood the argument and may still disagree. They may not want to compromise their principles.

Lazarus details many occasions in which the members of the Court reviewed each other’s drafts and attempted to reach compromises. In the end, they simply disagreed. This disagreement does not show a lack of good faith, but disagreement with the approach or outcome of the other Justices. There comes a time to “call the question” and vote. The paradox here is that if one

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106. For example, Justice Douglas was reputed to be difficult to get along with, even for those ideologically aligned. See Jeffries, supra note 9, at 253-256 (noting Justice Douglas’ difficult personality and his strained personal relationships even with ideological soulmates).
acknowledges that there is no "right answer," one has to accept the problem that many approaches and results are acceptable, especially on topics that so deeply divide our society.

One has the feeling that it is not the process as much as the substantive decisions reached that bother Lazarus. Lazarus does not like the results that the Court reaches or the liberal Justices' methodology. Yet he maintains a blind faith that the right result will pop out if only the right process is used. But there is no proof that a different process would produce better results, and certainly Lazarus provides few practical examples of admirable Supreme Court decision models.

Moreover, some disagreements do naturally solidify. Regarding the death penalty cases, for example, "[o]n the long nights when someone's life hung in the balance, or in the days that followed, the Justices essentially never conferred with one another." The votes of five justices were certain, and the other four "made no attempt to join forces and steer the Court in concert." While the conservative group set itself on limiting appeals and speeding up the executions, the liberal side, in his view, set itself on increasing congestion in the system and delaying executions.

Lazarus is particularly critical of Brennan and Marshall on the death penalty. Yet, as Lazarus points out "someone's life hung in the balance," and surely Brennan and Marshall should be given some latitude to stick with their dissents to the majority's approach. Their conviction was based on their view of the death penalty in every case; they did not feel it was wrong because in any given case there was a mistake. It was a life or death issue. Their position may have hardened the conservatives to an automatic response of

107. ld. at 129.
108. ld.
109. Lazarus states that:

Brennan and Marshall did not pretend that their abolitionist position could be squared with the Court's precedents. Instead, they self-righteously excused themselves from following stare decisis . . . especially ones (as Gregg came to be) that the Court repeatedly reaffirmed . . . .

Whatever the duo's justification, their acid stream of abolitionist dissents ensured that the issue of capital punishment continually ate away at the connective tissue of the Court community. After Gregg, the Court handed down a number of decisions further restricting the death penalty. But every success for Brennan's and Marshall's short term goal of stalling executions only made an eventual backlash more certain.

ld. at 149.
favoring imposition, but allowing several people to die to prove that the Justices' could be flexible in their approaches may be asking too much. No evidence exists that meeting and conferring or conferences and discussions would have helped in these cases. Both Blackmun and Powell converted to the idea that the death penalty was unconstitutional, but Blackmun did so in his last days on the court while Powell did so after retirement. Both seem to have converted as a result of their personal experiences with the death penalty, rather than any legal arguments.

Lazarus appears to admire Blackmun's dissent in *McClesky*, which found an equal protection violation in the imposition of the death penalty, as a testament to Oliver Wendell Holmes adage that "[t]he life of the law has not been logic: it has been experience".  

In sixteen years as a Justice, through thousands of cert. petitions, hundreds of death penalty stays, and as Circuit Justice overseeing the execution-eager Missouri Supreme Court, Blackmun had developed an intimate acquaintance with the viscera of the death penalty. With an unmatched meticulousness, he had read, analyzed, annotated, and absorbed tens of thousands of pages detailing the minute factual and legal details of capital cases across the country. [Footnote omitted.] What moved Blackmun to speak out (indeed almost shout) in *McClesky* was not merely the thoroughness of the Baldus study or his decidedly Yankee view of southern history but his conviction born of experience that every day, in some courtroom across the South, race was playing a significant, pernicious, and unconstitutional role in the death penalty. The Baldus study did not prove this to him; it simply confirmed what Blackmun had come to know already.  

Blackmun's ultimate position differed from the abolitionist position of Brennan and Marshall perhaps only in the abolitionists' willingness to draw a broader conclusion sooner from the plethora of individual cases that all seemed pointed in the same direction, rather than to continue on a laborious case-by-case basis in deciding who would live and who would die. Conferences and discussions have much less to do with this belief than long-held ideologies and life experiences. The experience of being a Justice

110. *Id.* at 509.
111. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881).
112. LAZARUS, *supra* note 1, at 214.
can change one's perspective, but the change is not necessarily the result of discussions with other Justices.

Justice Blackmun provides another example. He provided the crucial fifth vote in a case that raised the Tenth Amendment from its grave—National League of Cities v. Usery. For ten years the legal community tried to figure out what the National League of Cities decision meant in leaving the states a "federal-free" zone in certain areas of "traditional state functions." Then Justice Blackmun tried to write another opinion on the same issue and he became the fifth vote to overturn National League of Cities, based on his experience in trying to design a workable standard to judge those "traditional functions" of state government that should be safe from federal encroachment. Again, experience overruled theory.

4. What if the Middle Ground Exists on Intellectual Quick-sand?—Lazarus is most critical of the ideologues on both sides who want to shift the law completely in the direction of their own philosophy, regardless of precedent or their colleague's opinions. But the two qualities that Lazarus focuses upon—open-mindedness and intellectual integrity (both honesty and consistency)—may be at odds with each other. To achieve more uniformity, to find common ground, everyone has to stretch and bend their own truth. That is how majorities are made and add more members. The making of a majority may require the members of it to fudge their rationales to accommodate the viewpoints of the other Justices. Lazarus wants a process of engagement, but that process may end up with less honesty and certainty, and fewer just results.

One of his prime examples—the death penalty—also illustrates that this is not a new problem that crept into the 1988 term. As Lazarus points out, the debate over abolition of the death penalty was alive in the Warren era, reached a splintered consensus with the Furman v. Georgia opinion striking down the death penalty, and then exploded again during the Rehnquist era.

115. See, e.g., Lazarus, supra note 1, at 88.
117. See Lazarus, supra note 1, at 106 (noting that the Furman opinions were the "longest collection of opinions ever.").
Lazarus criticizes the 5-4 *Furman* decision that struck down the death penalty—a radical shift in the law—as weak, meandering, and incoherent, and not based on the "shared language of principle, a common understanding of where the law has been, where the law should go, and how to travel the distance between." But the question of the correct way to decide these tough cases is answered with more platitudes and little insight. For example, Lazarus compares the *Furman* failure with the *Brown* victory:

Gone was any effort toward accommodation or persuasion or the felt need to deliver an opinion with a past and a future, and not as individuals. Not one of the Justices in the majority thought to reconsider his vote rather than march forward in total disarray.119

Although he expresses admiration for harmonious decisions like *Brown*, he also correctly criticizes the way some Justices took a position without reasoning.120 Generally, there is some trade off between intellectual consistency and consensus. Compromise involves sacrificing principle. Lazarus acknowledges this problem, but does not resolve it.121 He limits the need for compromise to the occasional or unusual case, with *Brown* as the paradigm. Given the state of the ideological split that he details in his book, surely this is an inaccurate assessment of the amount of compromise that would have to occur. Uniformity or consensus may be achieved only on highly volatile issues because the Justices feel that the perception of a united front is necessary as in *Brown* or *United States v. Nixon*,122 the case in which President Nixon suggested that he would comply only with a unanimous decision.123

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118. Id. at 109.
119. Id. at 110.
120. See id. at 290.
121. See id. at 322-23 ("A concern for the Court's external authority or for preserving collegiality within the Court inevitably requires Justices, on occasion, to compromise in their respective jurisprudences. Such compromises may be necessary, for example, to forge a Court majority, or out of a respect for precedent, or to allow the Court, in an unusual case, to speak with a single voice.").
123. The Justices working together as an institution to reach consensus in this manner is rare, as Lazarus' book and others, suggest. David O'Brien notes:

The unanimous decision and opinion in *United States v. Nixon* were exceptional. The justices have worked together to reach an institutional decision and opinion in this way, Justice Brennan recalled, only two or three times in the last thirty years. The trend is now to less consensus on the Court's rulings. The justices tend to be increasingly divided over their decisions. Individual opinions
Moreover, unanimity is not necessarily a worthwhile goal for its own sake. Lazarus raises hope at the end of the book for more consensus by citing the recent 9-0 decision in Clinton v. Jones. That case held that a sitting President can be subjected to a civil suit during his Presidency based on allegations of actions that occurred before taking office. Ironically, this example of the Court speaking "with a single institutional voice" proves that unanimity is no guarantee that a decision will be well-reasoned or reach the right result. History will be the ultimate judge of the correctness of that decision. Yet given the subsequent impeachment of President Clinton that flowed from the civil case, the Supreme Court may have been incorrect in unanimously asserting that "[a]s for the case at hand, if properly managed by the District Court, it appears to us highly unlikely to occupy any substantial amount of petitioner's [President Clinton's] time."

Although a consensus based decision seems desirable to Lazarus, by no means is it sufficient. Lazarus also criticizes Roe for its "stunningly brief" analysis, but it had seven joiners, including conservative members of the Court. He admits that none of the arguments that could have been made in Roe were "completely persuasive," but thought that the Court should have tried, rather than being swept away by "good intentions." He criticizes the Court for building "the right house on the wrong land and [putting] it up too quickly." So, Lazarus likes the result, but cannot defend the route to it. At least, however, the Justices built the result in Roe as a collegial workforce and reached a consensus. But nothing pleases Lazarus because he wants a consensus process to lead to the results that he wants down the legal path he finds most defensible. This is an impossible dream.

have become more highly prized than institutional opinions. The Court now functions more like a legislative body relying simply on a tally of the votes to decide cases than like a collegial body working toward collective decisions and opinions.

O'BRIEN, supra note 9, at 274.
125. LAZARUS, supra note 1, at 516 ("Also, in some recent rulings—for example the Court's unanimous denial of President Clinton's claim of immunity from the Paula Jones suit—the Justices have shown an ability, however rarely invoked, to set aside lurking partisanship and speak with a single institutional voice.").
126. 520 U.S. at 1648.
127. LAZARUS, supra note 1, at 366.
128. Id. at 366-67.
129. Id. at 371.
In forging a majority and being collegial, a Justice could find the common legal ground shaky. Lazarus is quick to claim that he does not endorse the Justices coming together to form an opinion that a majority can agree on if the principles involved are sacrificed. Lazarus wants the Justices to move to the correct solution based on principle, not back room bartering. He believes that a correct decision would be reached if the Justices were consistent, candid, and collegial in resolving their differences:

This is not simply a matter of finding the "vital center," so much in vogue in today's political rhetoric. It is a matter of finding ways to acknowledge and accommodate even our most passionate differences, the ones where no common ground exists. For the Justices, this process demands a strong measure of empathy for opposing points of view and an emphasis on their common commitment to the enterprise of the Court itself. It means understanding when to stand on principle, when to put a matter off, and when to simply yield. It means submerging one's ideology and self expression beneath the Court's larger duty to maintain clarity, coherence, and continuity in the law.130

After this inspirational passage, Lazarus leaves us only with two hints of this ever occurring in the two centuries of the Court's existence—in Chief Justice John Marshall's Court and in Chief Justice Earl Warren's Court, more specifically the Brown v. Board of Education decision.131 The dearth of examples of Supreme Court opinions that are in Lazarus' opinion acceptable, only shows that it is difficult to find any Supreme Court opinions that do not have some share of intellectual manipulation. Moreover, as noted above, the Brown decision had its own problems with trade-offs, political compromises, and maneuverings.132

John Marshall's decision in Marbury v. Madison133 is a classically political and intellectually leaky opinion that is brilliant in result.134 The issues are complex and not capable of easy

130. Id. at 9.
131. See id. at 9-10, 323.
132. See LAZARUS, supra note 1, at 323 ("Brown is a short, flat, and almost unexplained opinion because, if Warren had crafted it any other way, he would have lost the grudging concurrence of his colleague from Kentucky, Stanley Reed, who did not think much of the ruling even in its bland form.").
133. 5 U.S. (1 Cranch) 137 (1803).
resolution. That is what makes Justice Marshall’s argument in *Marbury* so disingenuous. Marshall argued that judicial review was necessarily implied because it would be foolish to assume that the Supreme Court should stand idly by if the Congress were to pass, for example, a law declaring one witness or a private confession enough to convict someone of treason. After all, the Constitution expressly requires that, “no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.”\(^{135}\) Yet he selected one of the few examples in the Constitution in which easy resort to the text was possible. Historically, the Supreme Court’s job has been to interpret more ambiguous phrasing such as “due process of law.” Marshall’s subsequent decision in *McCulloch v. Maryland*\(^ {136}\) interpreting the necessary and proper clause is a much better example of the complex nature of the job.

Underlying Lazarus’ process argument—the Justices should work together in a common enterprise—is the theory that if everyone just looked at the situation in a more intellectually honest and collegial manner, they would come to his (the correct and principled) point of view.\(^ {137}\) It is at least as likely, however, that a process of consensus decision-making, which involves “submerging one’s ideology and self expression,”\(^ {138}\) would produce incoherent decisions.

5. *The Problem With Appointing Centrists*—Appointing centrists appears to be a good solution because centrists eliminate the problems of dealing with firmly held ideologies. Justice Powell’s biographer, for example, described Powell in a way that seems the very essence of what Lazarus is looking for in a Supreme Court jurist. Justice Powell approached his job as a “characteristic [search] to narrow conflict, to accommodate opposing views, and when not possible, to disagree without deepening divisions and precluding future rapprochement.”\(^ {139}\) He looked to the middle to resolve disputes. Yet centrist may differ from the ideologues

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137. See LAZARUS, *supra* note 1, at 71 (discussing one death penalty case as a “relatively easy case” where the cases “virtually compelled the Court” to rule for the defendant, but they split 4-4).
138. *Id.* at 9.
139. JEFFRIES, *supra* note 9, at 561.
only in that their guiding vision is less easy to discern. For example, Justice Powell, seems to have been driven in his vision by what he, intellectually and experientially, viewed as good social policy. Centrists may also have other problems. For example, Powell was not a coalition builder. It was his view or separate opinions. The result was that if a group needed Powell for a majority, the majority's reasoning had to adapt to Powell's view resulting in the production of doctrinally muddied and inconsistent opinions.

For example, Justice Powell provided the swing vote in *Plyler v. Doe,* striking down a Texas statute that denied a public education to children of aliens illegally residing in the United States. In bringing Powell into the fold, Justice Brennan took his original draft that was doctrinally coherent, but unacceptable to Powell, and produced a doctrinally incoherent opinion that was acceptable to Powell.

The *Bakke* affirmative action decision is another illustration in which two sides took definitive positions, both of which were legally more defensible than Powell's opinion that cast the deciding vote on each of the major issues. Although a good example of a politically appropriate compromise, the legal reasoning left much to be desired. Decisions held together by coalitions will reflect the centrists' quirkiness or inconsistent reasoning.

Lazarus expresses admiration for Justice Souter, who helped hold the Court together during the *Casey* abortion crisis. Lazarus does, however, give the reader enough facts of both the dissenting and concurring opinions to know that the centrists, including

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142. *See id.* at 230.
143. *As one commentator noted:* What resulted was an opinion that on one level had almost no generative or doctrinal significance because it involved too many considerations. On another level, the opinion had profound doctrinal significance because one could interpret it to hold that the Supreme Court will strike down statutes that are unconstitutional when a majority of the Court thinks those statutes are unwise social policy. Powell's jurisprudence produced an opinion that was almost nothing more than a direct reflection of his views of social policy.

145. *See generally JEFFRIES, supra* note 9, at 469-73, 484.
Souter, could be justly criticized for the hypocrisy of a compromise that allowed *Roe* to be re-affirmed in theory and reversed when applied.\(^\text{146}\) Lazarus also acknowledges the role of the centrists such as the troika of Stevens, Powell, and Stewart in the post-*Furman* furor in *Gregg*, when some of the Justices tried to undo *Furman*.\(^\text{147}\)

As the system becomes increasingly polarized, choosing moderates may be the only route to confirmation through a Senate divided by ideological debates about the death penalty, abortion, and affirmative action. Many of the Justices possess highly political backgrounds\(^\text{148}\)—partisanship is in all honesty a prerequisite in many cases to appointment\(^\text{149}\)—and submergence of those backgrounds may be difficult. A tension exists between the reality of a political background and the attempt to suppress it in opinion writing to appear more nonpartisan in keeping with the image of the judiciary. Yet the Bork and Thomas confirmation hearings may have made Presidents more cautious in their choices because of the Senate, causing more moderates to be appointed, and toning down the Court.\(^\text{150}\) It remains to be seen whether this might have the necessary leavening effect on the extreme partisanship that Lazarus

\(\text{146. See generally Tushnet, supra note 148.}\)

\(\text{147. See } \text{LAZARUS, supra note 1, at 116-17. With regard to the death penalty generally, he says, } \ldots \text{ Id. at 159.}\)


\(\text{149. This proposition was acknowledged by Justice Scalia in his dissent in } \text{Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990):}\)

\(\text{Id. at 92-93 (citations omitted).}\)

\(\text{150. See Ronald Stidman, et al., } \text{The Voting Behavior of President Clinton's Judicial Appointees, 80 JUDICATURE 16 (1996) ("President Clinton sought ideologically moderate judges. Not surprisingly, the decisions of his appointees overall also have been moderate.").}\)
argues infected the Court during his term as well as other terms and whether the opinions will become more principled or just moderately quirky.

Choosing only political moderates or centrists is not a route that Lazarus recommends, because he does not believe having an ideology is inconsistent with being either open minded or intellectually honest, and he acknowledges the problems of idiosyncratic views. Lazarus claims neither that the Court should necessarily be composed of centrists nor that only moderates be appointed, but that its activist and ideological judges need to respect “reason, consistency, and principle.” That leads us back to the problem of how to find middle ground, which is unresolved.

In the end, Lazarus provides no examples of good judicial behavior and reasoning. The reason may be that there is often a trade-off between honesty and consensus, and it is difficult—especially in the controversial issues areas that he discusses—to find to the contrary. The Justices come to the Court with many life experiences and viewpoints. Although they may profess to honestly read the briefs, to listen to the arguments, and to debate their colleagues with an open mind, it is not surprising that many of their opinions in these controversial areas have been determined by time and life experience.

IV. Proposing A Solution

As Lazarus’ story unfolds, a pattern emerges. He: (1) carefully articulates the polar approaches in an area, (2) criticizes both sides, and (3) then urges Court member to engage in more careful and sincere deliberation, with an eye toward production of “well-reasoned and persuasive explanations for their decisions.” To get from step two to step three requires an unspecified leap of faith.

Lazarus offers no concrete reforms to achieve a more intellectually honest Court that works towards consensus. No great changes are proposed, no constitutional amendments are suggested, and no commissions are to be created to deal with what the book jacket describes as the “tragic failings” of the modern Court. At the end of the book, he proposes that the solution lies with the

151. See LAZARUS, supra note 1, at 420, 515-17.
152. Id. at 517.
153. Id. at 422.
“souls” of the Justices, and their ability to renounce their arrogance. His most important qualities for future Supreme Court Justices are “open-mindedness and intellectual integrity.”\(^\text{154}\)

Who would openly disagree that these are important qualities? These qualities—intellectual honesty and collegiality—are often bantered about as admirable goals for the judicial system. These qualities are popular, in part, because everyone can claim allegiance to them while simultaneously accusing others of betraying those values, a point Lazarus recognizes. The problem is that neither Justice Brennan nor Scalia (two of the classic culprits in Lazarus’ mind) would see it that way—“Yes, I need to be more open-minded and develop more intellectual integrity.” Given the nature of the book, which is highly critical of many of the Justices, it may not inspire further soul searching on the Justices’ part.

Good reason exists not to suggest any institutional reforms. Any formal reform of the Court system has to take into account the political process through which those reforms must pass. Yet the current polarized political process is at fault in many ways for the situation that currently exists at the Court. Any reforms would likely barnacle even more politics on to the process. People who want to quit smoking probably will not find much help at a tobacco company. So too, a judiciary in need of de-politicization should not seek reform through the legislative process. Lazarus dates many of the conflicts on the current court to the Bork confirmation debacle—in which the liberals tasted blood and the conservatives vowed revenge.\(^\text{155}\) The politically intense turned their efforts to

\(^{154}\) Id. at 518. On the Bork confirmation, Lazarus also criticizes the liberal and conservative camps for their no-holds-barred defense of their positions. See id. at 243-44. Professor Lawrence Tribe took a similar position with regard to the abortion dispute, pleading for more listening and understanding of the other side’s position, and removing the issue from politics. See LAWRENCE TRIBE, ABORTION: THE CLASH OF ABSOLUTES (1990).

\(^{155}\) Lazarus states:

Skewering Bork on the issue of privacy ushered in the era of ‘stealth’ nominees, during which a chief qualification for the Court became a lack of public comment coupled with a denial of private comment on Roe v. Wade, the most disputed case of the modern era. The Bork experience also established intense political campaigning and special interest lobbying as a fixed part of the nomination process. Such truth-twisting campaigning made a casualty of candor in the selection of life-tenured appointees to our highest court. The lobbying ate away the thin but crucial divide between law and politics—the public belief that the Supreme Court is not merely another political institution and that judges can and should stand above the expedient trade offs of the day.

LAZARUS, supra note 1, at 248. Earlier in his book, Lazarus noted that “[i]n my view, that nomination fight—full of deceptions on both sides—unleashed yet a new level of rancor and
the judiciary and found that the third branch responded to political pressure. Lazarus attributes some of the conflict he found on the Court to the "fight to the death" strategies employed by both sides and later employed at the Court among some clerks and Justices. Tinkering with the structure of the system threatens the independence of the judiciary, an independent evil, because the legislative political process will be set in motion. The politicized nature of the Supreme Court appointment process is already a concern for Lazarus. In the end, it is difficult to suggest any institutional reform to deal with judges who stretch the law too far at any level of the system. At least one study suggests that the best check within the federal appellate system is mixed panels of appointees from political parties. Apparently whistle blowers can keep abuses in check. This approach may work less well at the Supreme Court level because there is no one to run to "tell on" the offending judge, whereas the Supreme Court provides the dissenting tattletales at the federal appeals level with an occasional hearing. The presence of dissenting opinions on the Supreme Court that vigorously point out the flaws in the majority's reasoning may serve the same function as will critical analysis of the Court's opinions from outside the Court.

V. Conclusion

Many readers of Lazarus' book who are familiar with the field of constitutional law will be as "shocked" by the stories as the police officer in Casablanca was upon finding gambling going on at Rick's gin joint. The accusation of political and unprincipled decision making Lazarus levels at the Supreme Court is not headline news. Many of the same criticisms are in other books and law review articles, some with different slants, but most without the gossip. Lazarus' book is more controversial, however, because of his former position of trust at the Court.

self-destructiveness in the nation's legal culture generally and at the Court in particular." Id. at 13. 156. See id. at 243-44. 157. See Frank B. Cross & Emerson H. Tiller, Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals, 107 YALE L.J. 2155, 2156 (finding that "the presence of a judge whose policy preferences differ from the majority's and who will expose the majority's manipulation or disregard of the applicable legal doctrine (if such manipulation or disregard were needed to reach the majority's preferred outcome)—is a significant determinant of whether judges will perform their designated role as principled legal decisionmakers.").
Lazarus book is also likely to confirm the Justices’ worst fears about opening up their doors and send them scurrying to seal all exits in the clerks’ code of ethics. If other clerks or Justices responded in kind to Lazarus’ *Mommie Dearest* style memoir, it would be highly destructive to the Court’s processes, something that Lazarus professes to care deeply about. Ironically, with this book, Lazarus himself seems to have gone nuclear in the guerrilla war he condemns at the Court. Moreover, if Lazarus succeeds in making the Supreme Court’s decision making process a topic of public debate, it may make the Court even more the target of the same political processes that have a negative effect on its internal workings. That the Justices do not always act in an intellectually honest manner is an open secret. That the Justices are not ever political is a legal fiction that helps the institution function with only minor attention from the openly political actors in the legislative and executive branches. Once we do away with that fiction, however, the Supreme Court could become a much more visible prize for capture.

Lazarus is not cynical and believes the Court can fix its flaws. His prescription of encouraging a more collegial atmosphere and intellectual open-mindedness reflects a faith in the process that history may not justify and political appointment procedures do not encourage. Beyond providing fairly routine criticisms of the Court’s reasoning in a number of areas, the book fails to deliver any substantial suggestions for change. Instead, Lazarus advocates diffuse goals for the system that are neither reconcilable nor proven effective.
