Opening Closed Chambers

Erwin Chemerinsky
Book Review

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America is deeply divided along ideological lines. This is hardly a new phenomenon; throughout our history, our country has been split by issues on which no compromise is possible. For the first third of American history, the divisive issue was slavery. Later, the nation divided over Reconstruction, labor unions, the New Deal, the perceived communist threat, and civil rights. Today, topics such as abortion, affirmative action, and the death penalty split left and right, with deeply held beliefs existing on both sides.

It is hardly surprising that the issues that divide the nation also split the Supreme Court. Liberal Justices, like liberals in contemporary American society, are likely to be pro-choice, supportive of affirmative action, and against the death penalty. Conservative Justices, like conservatives throughout the country, generally have the opposite views. Indeed, whether people are "liberal" or "conservative" is largely a function of their views on these issues.

In his new book, Closed Chambers, Edward Lazarus expresses great dismay that, for the last decade, the Supreme Court has been politically

† Sydney M. Irmas Professor of Law and Political Science, University of Southern California. I have great affection and admiration for both Edward Lazarus and Alex Kozinski, sentiments that I hope are not masked by my critical comments. I want to thank Scott Altman and Catherine Fisk for their helpful comments on an earlier draft and Nancy Morgan for her excellent research assistance.
divided, particularly over the issues just mentioned.\textsuperscript{1} Lazarus worries that this division has infected the Court in a manner that threatens its long-term legitimacy, and he argues that the ideological politicization of the Court has made it intellectually dishonest in its processes and opinions.

My initial reaction to Lazarus’s book was to applaud its wonderful prose and its wealth of new information, but to question its underlying assumption that the Supreme Court should be or can be apolitical. I saw little evidence in the book that the Court’s processes had been compromised. I thought that Lazarus’s impressive work would be the occasion for a reexamination of the appropriate judicial role in dealing with the issues that divide the nation and for asking whether Lazarus’s premises, which are derived from the legal process school, are appropriate for evaluating the Court as it enters the twenty-first century. My primary concern was that the book’s wide audience of nonlawyers might uncritically accept the author’s assumptions about the possibility and desirability of an apolitical Court.

Unfortunately, this aspect of Lazarus’s book seems to have been completely overlooked.\textsuperscript{2} Instead, the focus has been on the propriety of Lazarus writing the book at all. The debate has been over whether it was appropriate for a former Supreme Court clerk to write about the Court and particularly about the Term during which he clerked.\textsuperscript{3} In a review published in this Journal, United States Court of Appeals Judge Alex Kozinski sharply attacks Lazarus for taking this course.\textsuperscript{4} Using virtually every negative thing said about the book in every critical review yet published, Kozinski claims that Lazarus acted unethically and immorally.

Kozinski’s accusations are completely unfounded. There is little indication that Lazarus used confidential information that he gained as a result of being a clerk. Much of the new information in the book comes from papers that Justice Thurgood Marshall made publicly available, and much of the rest comes from interviews that Lazarus conducted over several years of working on the book. In Part I of this Review, I argue that

\begin{itemize}
\item \textsuperscript{1} Edward P. Lazarus, Closed Chambers: The First Eyewitness Account of the Epic Struggles Inside the Supreme Court (1998).
\item \textsuperscript{3} See sources cited supra note 2.
\item \textsuperscript{4} See Alex Kozinski, Conduct Unbecoming, 108 YALE L.J. 835 (1999). Kozinski has publicly declared that he has “nothing but contempt” for Lazarus and that Lazarus is no longer welcome to appear as an attorney before him. See Tony Mauro, Supreme Court Tightens Secrecy Rules for Clerks, USA TODAY, Nov. 9, 1998, at A1. This personal animosity is evident throughout Kozinski’s review.
\end{itemize}
Lazarus did nothing wrong and that the criticisms of Kozinski and others are misguided.

Unfortunately, those who object to Lazarus writing the book also find it necessary to declare that there is nothing new within it that is worth knowing. Kozinski, for example, writes: "In a book that lays claim to brilliance and scholarship, Lazarus comes up with not a single new insight about the Supreme Court or the areas of law he discusses." There is something contradictory about lambasting an author for revealing secrets and then saying that there really were no secrets after all. And here, too, I think that Kozinski is simply wrong. Lazarus's book makes an extremely important contribution to our understanding of the Supreme Court, particularly the Rehnquist Court of the last decade. In part, the contribution comes from opening the Court to public scrutiny. In part, it comes from the wealth of new information that the book presents. Part II of this Review describes these substantial new contributions.

Lazarus does not attempt to be a neutral reporter. Rather, he has a normative agenda: He is deeply dismayed by the political division on the current Court and criticizes this split throughout the book. For example, he writes in the introductory chapter that the "severities of these divisions have corroded the Court's institutional culture and driven the Justices to disregard the principles of decision making—deliberation, integrity of argument, self-restraint—that separate the judicial function from the exercise of purely political power." Indeed, the book is filled with such normative judgments, which Lazarus often expresses in passing, such as when he says that the majority's approach in Furman v. Georgia, which temporarily ended the death penalty, "betrayed the very rule of law they claimed to be upholding."

It is here that I disagree with Lazarus. I believe the Court is, and always has been, a political institution in that it decides issues that are intensely and inherently politically divisive. Lazarus's oft-proclaimed desire for a separation of law and politics is one that I do not understand or share. In Part III, I criticize Lazarus for not defending his normative vision and

5. Kozinski, supra note 4, at 873.
6. In defense of Kozinski, he in fact says that Lazarus does reveal secrets, but none worth knowing. See id. at 877 (referring to Lazarus's book as being filled with "hurtful and irrelevant claptrap" and saying that the book demonstrates that former clerks "are not in a good position to give us useful information about the institution they serve"). I disagree with Kozinski here on two levels. First, I am concerned by the notion that a single person could judge whether certain knowledge is worthless for society. Also, I believe that the information in Lazarus's book is in fact extremely important. For example, how the Court handles death cases—and whether it serves as a meaningful check against lawless executions—is enormously important. I address these points in Part II.
7. LAZARUS, supra note 1, at 7; see also id. at 248 (speaking of the "thin but crucial divide between law and politics").
9. LAZARUS, supra note 1, at 109.
instead presenting it as if it were self-evident. Moreover, I disagree with his view of the possibility and desirability of an apolitical Court. A Court with a Justice Brennan and a Justice Scalia will necessarily be ideologically divided. As explained in Part III, I believe that Lazarus fails to establish his claim that the Court’s ideological divisions have caused it to act improperly or in an intellectually dishonest manner.

Lazarus speaks of the Court as if it were a fragile institution with shaky legitimacy. To the contrary, two centuries of judicial review have made the Court one of the most highly respected institutions in American society. There is no indication that its internal divisions have harmed its public image. In fact, as I will argue, the descriptions in Lazarus’s book also could support a very different set of conclusions. Lazarus depicts a Court immune from lobbying or improper influence: a group of men and women deeply engaged in the cases before them and struggling to do the best they can.

I. DID EDWARD LAZARUS DO ANYTHING WRONG?

Imagine a law clerk who, soon after working for a Justice, goes public with information he learned during his clerkship. The former clerk writes a book in which he recounts conversations held within chambers and other forms of inside information. The sole source for this information is the author’s firsthand experience during the clerkship. How should we regard such a clerk? It is an interesting question, but it is not a question that arises from Edward Lazarus’s book.

The most serious charge against Lazarus would be that he revealed confidential communications with Justice Harry Blackmun, for whom he clerked during October Term 1988. The relationship between a Justice and his or her clerk demands the greatest trust, and it is here that confidential communications are most likely to occur. In the entire book, however, Lazarus recounts only four conversations with his Justice. One is the description of his interview with Justice Blackmun for the clerkship. The depiction is of a warm conversation, and it reveals no Court secrets. Second, Lazarus describes how at their first breakfast together at the Court, Justice Blackmun said to Lazarus, “The pancakes aren’t so good on Mondays . . . . The griddle goes stale over the weekend.” Third, after Justice Blackmun returned to the chambers following the conference in the Webster case, Lazarus describes the following exchange: “In any event, I

10. This is not to deny that there may be other confidential communications within the Court to which a law clerk can be privy. I discuss Kozinski’s charge that Lazarus breached his duty to the Court infra text accompanying notes 43-52.
11. See LAZARUS, supra note 1, at 23.
12. Id. at 38.
stayed in my office and waited for Blackmun to come through my door on the way to his own. I caught his eye as he slipped quietly by, and he gave a little shake of his head, then whispered, 'We'll see.'" 14

The fourth conversation is the only substantive exchange that Lazarus reveals. It is a telephone conversation in which Justice Blackmun requested Lazarus's advice as to whether he should vote to stay a district court judge's contempt order in the Yonkers housing desegregation case. 15 Lazarus discloses that he advised such a vote and that Justice Blackmun followed that recommendation. 16

Perhaps Lazarus can be criticized for revealing that one conversation. 17 If it is true that communications between a Justice and a clerk are forever privileged—something I dispute below—Lazarus should not have disclosed the exchange. But this one, relatively innocuous conversation hardly seems to justify the vitriol that Kozinski and others have heaped upon him. 18

Admittedly, Lazarus's publisher did him no favors in the presentation and marketing of the book. Its subtitle is: "The First Eyewitness Account of the Epic Struggles Inside the Supreme Court." 19 Its cover boldly identifies Lazarus as: "Former Supreme Court Clerk." 20 The inside of the book jacket proclaims:

Never before has one of these clerks stepped forward to reveal how the Court really works—and why it often fails the country and the cause of justice. In this groundbreaking book, award-winning historian Edward Lazarus, a former clerk to Justice Harry A. Blackmun, guides the reader through the Court's inner sanctum, explaining as only an eyewitness can the collisions of law, politics and personality as the Justices wrestle with the most fiercely disputed issues of our time. 21

It is no wonder that this promotion triggered criticism of Lazarus for revealing Court secrets learned during his clerkship. The cover promises no

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14. LAZARUS, supra note 1, at 401.
16. See LAZARUS, supra note 1, at 45-46.
17. Kozinski indicates that such criticism is only possible because Lazarus allegedly did not obtain Justice Blackmun's consent prior to writing the book. See Kozinski, supra note 4, at 839. But contrary to Kozinski's accusations, we have no idea whether Lazarus obtained such consent. Justice Blackmun has made no public statement about the book; Kozinski simply repeats a quotation that "some people close to" Justice Blackmun say that he did not know that Lazarus was writing the book. Id. Justice Blackmun has said nothing, and his silence cannot be interpreted as either criticism or approval of Lazarus's text.
19. LAZARUS, supra note 1, at front cover.
20. Id.
21. LAZARUS, supra note 1, at book jacket.
less. But we all learned long ago not to judge a book by its cover, and Lazarus's book must be appraised on the basis of what he wrote—not the publisher's hype.

Much of Lazarus's book concerns Supreme Court cases decided before and after the Term that he clerked for Justice Blackmun. Lazarus's material about his own Term comes from sources external to his clerkship. He explains that his book is based primarily on a close reading of the publicly available papers of former Justice Thurgood Marshall and on interviews he conducted with many sources, including other former clerks.22 Lazarus is clear about this from the outset. In his Author's Note, he writes:

I have been careful to avoid disclosing information I am privy to solely because I was privileged to work for Justice Blackmun. In other words, I have reconstructed what I knew and supplemented that knowledge through primary sources (either publicly available or provided by others) and dozens of interviews conducted over the last five years. Indeed, some of the more controversial revelations in the book, including events that occurred during my clerkship year, are things of which I was unaware—or dimly aware—at the time.23

But this does not satisfy Kozinski or Lazarus's other critics. They maintain that his writing about the Term during which he was at the Court, even if based upon other sources, was unethical in that it violated a duty of confidentiality;24 may have been illegal in that it may have violated federal laws prohibiting the removal of documents from the Court;25 and was immoral in that it involved a breach of trust and loyalty.26 These are serious accusations, and each requires separate examination.

A. Did Edward Lazarus Act Unethically?

The claim that Lazarus acted unethically rests on two propositions: (1) that clerks have an ethical duty never to reveal what they learned during their clerkship; and (2) that Lazarus disclosed secrets in violation of this duty. The former claim is questionable, and the latter is unsubstantiated.

22. See id. at xi.
23. Id. One might respond by arguing that it is impossible to evaluate Lazarus’s claim regarding his sources, because he does not specifically reveal them. I discuss this below. See infra text accompanying notes 45-46.
24. See Kozinski, supra note 4, at 838-46.
25. See id. at 844.
26. See id. at 846-49, 875.
1. What Is the Ethical Duty of a Former Clerk?

No consensus exists as to what former Supreme Court clerks can and cannot say. Lazarus is not the first former Supreme Court clerk to write about the Court or even about his Term at the Court. There is simply no clearly established rule that governs what former clerks may or may not disclose about their experience.

Kozinski contends that clerks have a permanent duty of confidentiality. He points to two primary sources for this putative duty: (1) the Code of Conduct for Law Clerks of the Supreme Court, and (2) an analogy to the attorney-client privilege. As for the former, it is at best unclear whether the Code applies to Lazarus, since it was promulgated while he was already working for Justice Blackmun. Even more importantly, the last paragraph of the Code makes it quite clear that it applies to law clerks only during their tenure at the Court:

A person to whom this Code becomes applicable shall comply with it immediately upon commencement of his or her clerkship and throughout such clerkship. Violations of the Code by a law clerk may be disciplined by his or her appointing Justice, including dismissal.

The Code could not be clearer: it applies "throughout [the] clerkship." It could have said, but does not, that the confidentiality provisions apply forever. Kozinski makes two responses to this. First, he argues that earlier paragraphs explicitly state that the confidentiality duty is an ongoing one and that the explicit trumps the implied. There are many problems with this argument. A close reading of the paragraphs that Kozinski invokes

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27. See, e.g., DENNIS J. HUTCHINSON, THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF JUSTICE BYRON R. WHITE (1998); J. HARVIE WILKINSON, III, SERVING JUSTICE: A SUPREME COURT CLERK'S VIEW (1974). Professor David Garrow has documented that law clerks frequently have revealed confidential information learned at the Court in a wide variety of contexts. After extensively reviewing dozens of such instances, Garrow concludes: "The historical record of the past six decades demonstrates that a host of professionally respected and academically celebrated former clerks have recounted, by name and 'on the record,' stories of (1) case-specific intra-Court incidents, (2) private remarks of one Justice about another, and (3) their influence in the drafting and construction of important, well-known opinions." David J. Garrow, "The Lowest Form of Animal Life"?: Supreme Court Clerks and Supreme Court History, 84 CORNELL L. REV. (forthcoming 1999). In fact, Professor Garrow concludes that Dennis Hutchinson's biography of Justice White reveals far more confidential information than Lazarus's book. See id. 28. CODE OF CONDUCT FOR LAW CLERKS OF THE SUPREME COURT OF THE UNITED STATES (1989) [hereinafter SUPREME COURT CODE OF CONDUCT]; Kozinski, supra note 4, at 843-45. 29. SUPREME COURT CODE OF CONDUCT, supra note 28. As Kozinski notes on the first page of his review, the Code was promulgated during the 1988 Term, the one in which Lazarus clerked. Kozinski, supra note 4, at 835; see also id. at 875 (noting that the Code was adopted in 1989). 30. See SUPREME COURT CODE OF CONDUCT, supra note 28. 31. See Kozinski, supra note 4, at 845.
shows that they are primarily about the clerk’s duty to the Justice during the clerkship. For example, Kozinski quotes from Canon 2 of the Code of Conduct, which declares: “The law clerk owes the Justice and the Court complete confidentiality, accuracy and loyalty. The Justice relies upon the law clerk’s research in reaching conclusions on pending cases.” The Code also provides:

The relationship between Justice and law clerk is essentially a confidential one. A law clerk should abstain from public comment about a pending or impending proceeding in the Court. A law clerk should never disclose to any person any confidential information received in the course of the law clerk’s duties, nor should the law clerk employ such information for personal gain.

These provisions are written in the present tense and the focus of these paragraphs is very much on the clerk’s duty during the Term; nothing in them specifically states, as Kozinski asserts, a duty that lasts beyond the clerkship. Indeed, Kozinski overlooks the significance of the sole enforcement mechanism in the clerks’ Code of Conduct: “Violations of the Code by a law clerk may be disciplined by his or her appointing Justice, including dismissal.” The Justice only has disciplinary authority during the clerkship. If the Code really intended to regulate conduct beyond the clerkship it likely would have provided other disciplinary mechanisms, such as referral for bar discipline or sanctions imposed by the Supreme Court, including denial of authority to practice there.

Leaving all discipline to the clerk’s employing Justice strongly indicates that the Code was meant to apply only during the clerkship. There is a basic difference for law clerks between revealing confidences about pending cases and discussing decisions after they have been made public. Advance word about what the Supreme Court is going to decide could have enormous economic value. Decisions on the validity of mergers or the legitimacy of economic regulations, for instance, can have momentous consequences, and leaks from the Court while such cases are pending can create large, unfair market advantages. In contrast, the harms of disclosure after such decisions come down are far more speculative, and perhaps nonexistent. It is quite possible that the drafters of the Code of Conduct had this particular understanding in mind and thus did not contemplate a scenario like that occasioned by Lazarus.

This is not to say that former clerks should feel free to reveal any and all information learned during their clerkships. Indeed, Lazarus felt a need

32. *Id.* at 843; **SUPREME COURT CODE OF CONDUCT,** *supra* note 28, at Canon 2.
33. **SUPREME COURT CODE OF CONDUCT,** *supra* note 28, at Canon 3(C).
34. *Id.*
to keep his substantive conversations with Justice Blackmun confidential. The point is a much more limited one: Whatever ethical duty exists for former clerks must derive from a source other than the Code of Conduct, which is written in terms of a current clerk's duty of secrecy.

Kozinski offers a second justification for the clerk's duty of secrecy: an analogy to the attorney-client relationship. Indeed, in many places throughout his review, the crucial, and sometimes the only, support for Kozinski's criticisms is the application of the attorney-client privilege and cases interpreting it. This analogy is flawed for many reasons.

First, the Code of Conduct expressly describes a clerk's relationship to a Justice as a "lawyer-lawyer" relationship, not an attorney-client relationship. Nothing in the Code justifies thinking of conversations between a Justice and his or her clerk as protected by an attorney-client privilege. Kozinski invokes the attorney-client privilege to support his claims of confidentiality, but offers no reason to believe that the clerk-Justice relationship involves the same principles. There is great rhetorical force in cloaking the clerk-Justice relationship in the secrecy of the attorney-client relationship, but neither the law nor the arguments in Kozinski's review support this approach.

Second, the clarity of the duty attorneys owe clients is vastly different from the uncertainty about the former clerk's precise obligations. The very silence of the Code of Conduct about future secrecy makes it different from the attorney-client privilege, which the law clearly establishes as permanent and inviolate. Kozinski's analogy to the attorney-client privilege undercuts his own argument about a former clerk's ethical obligations. The rules of professional conduct and the case law are clear that an attorney must forever protect client confidences. No such provision exists for law clerks.

Third, in invoking the attorney-client privilege, Kozinski begs a critical question: To whom is the duty owed? The attorney owes the client a duty of confidentiality, and it is the client alone who can complain of a breach. The Code of Conduct makes it clear that the clerk's primary duty is owed to the Justice for whom he or she is clerking. It is the Justice, and the Justice alone, who has authority under the Code to enforce it. If the clerk-Justice

35. Id. at Canon 2.
36. See, e.g., CAL. BUS. & PROF. § 6068(e) (West 1990) ("It is the duty of the attorney...[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."); Swidler & Berlin v. United States, 118 S. Ct. 2081, 2084-85 (1998) (holding that the attorney-client privilege survives death); In re Lilly, 2 Cal. St. B. Ct. Rptr. 473, 478 (1993) (holding that the attorney-client privilege is permanent).
37. Cf. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS (1986) 253-54 (noting that while clients and lawyers can invoke the privilege, only clients can waive the privilege).
privilege is like the attorney-client privilege, only Justice Blackmun can invoke the privilege and complain of disclosures. He has not done so.\textsuperscript{36}

Apart from the Clerk’s Code of Conduct or the analogy to the attorney-client privilege, a normative argument could be made that former clerks have an ongoing ethical duty of secrecy as to what they learned during their clerkship. I do not deny that some such duty exists, but defining its scope is enormously difficult. Former Supreme Court clerks are often hired as appellate counsel because of inside information they gained during their clerkships about what arguments particular Justices might find persuasive. As previously mentioned, law professors often draw on what they learned during their clerkships for articles.\textsuperscript{39} More importantly, information learned during a clerkship may have differing degrees of sensitivity; not all of this information need be forever protected as confidential.

Kozinski also argues that the duty of confidentiality is demonstrated by the fact that many former Supreme Court clerks have criticized Lazarus, but none have defended him.\textsuperscript{40} This, however, proves nothing. There is no doubt that the Justices dislike Lazarus’s book. I personally have heard one Supreme Court Justice speak very negatively about it and have heard stories from others who have spoken to members of the Court. This is hardly surprising given the book’s unflattering portrayals. Former clerks surely do not want to alienate the Justices for whom they served. Thus, they are likely to see nothing to gain by speaking out in favor of Lazarus’s effort and much to lose by doing so. The reality is that only a handful of clerks, compared to the one thousand to whom Kozinski refers,\textsuperscript{41} have said anything about the book.

Defining the ethical duty of a former clerk is a hard task and one that requires a careful and nuanced analysis. Instead of providing one, Kozinski attempts to invoke an all-inclusive, permanent duty encompassing all information learned at the Court. This is unjustified; the grounds for confidentiality that Kozinski provides do not warrant permanent secrecy of all acquired information. Perhaps Lazarus’s book will provide the occasion for defining the proper scope of a former clerk’s duty of confidentiality.\textsuperscript{42} But since this duty has not yet been delineated, Lazarus cannot be accused of breaching it. Even more importantly, as discussed below, Lazarus’s

\textsuperscript{36} See supra note 17. Perhaps Kozinski could argue that the entire Court, and not merely Justice Blackmun, was Lazarus’s client. But again, this claim is belied by the Code of Conduct, which makes the individual Justice the sole enforcement mechanism and emphasizes the clerk’s duty to that Justice. See SUPREME COURT CODE OF CONDUCT, supra note 28. Moreover, it is the individual Justice who hires a clerk, directs the clerk, and can fire a clerk. If a clerk for a Justice breaches confidentiality, no other Justice—not even the Chief Justice on behalf of the Court—can fire him or her.

\textsuperscript{39} See supra text accompanying note 27.

\textsuperscript{40} See Kozinski, supra note 4, at 837-38.

\textsuperscript{41} See id. at 837.

\textsuperscript{42} See Mauro, supra note 4, at A1.
reliance on external sources makes it unnecessary to determine the proper scope of a former clerk’s ethical obligations.

2. Did Lazarus Breach a Duty of Confidentiality?

Even if we assume that the Code of Conduct does impose a duty of permanent confidentiality on Lazarus, did he breach it? Kozinski relies heavily on the language of Canon 2 of the Code, which states: “A law clerk should never disclose to any person any confidential information received in the course of the law clerk’s duties, nor should the law clerk employ such information for personal gain.” The key words in evaluating Lazarus’s book are “received in the course of the law clerk’s duties.” Lazarus relies on information gained from sources beyond his own experience working for Justice Blackmun, particularly the Marshall papers and interviews with other clerks. Hence, there is no violation of this rule, even assuming that it applies.

Judge Kozinski makes three arguments as to why Lazarus acted unethically. First, he says that Lazarus does not disclose his sources, and therefore there is no way to verify his claim that he gained the information from sources external to his clerkship. Once again, Kozinski begs the question of to whom Lazarus owes this duty. Using Kozinski’s analogy to the attorney-client privilege, the duty is owed only to the Justice for whom Lazarus clerked, or at most, to the Supreme Court. Therefore, Lazarus has no duty to Kozinski, to me, or to the general public to prove that he did not rely on confidential information.

Kozinski is correct that readers must rely on Lazarus’s word for his claim that he did not utilize confidential information learned solely during his clerkship. It is Kozinski, however, who makes the serious charge of unethical conduct, and he cannot prove his case by trying to shift the burden to Lazarus. The benefit of confidential sources, such as those used by Lazarus, is that they provide information that would not be available if attribution were given; the disadvantage is that when the source of

43. It is possible to argue that even if the Code of Conduct does not apply to law clerks there is still an ethical duty based upon a common understanding that clerks should not reveal information learned at the Court. At the very least, the accusation of violating this “common understanding” is much less serious than the claim of violating a written code of ethics. In a profession governed by a written code, a claim of violating a code provision carries much more rhetorical and actual force than the charge of violating an unwritten norm. The former implies clearly unethical behavior in a way that the latter does not. The problem with Kozinski’s claim based on common understandings is that there can be legitimate disagreement about what was understood. Moreover, the contours of this common understanding are uncertain. Other former clerks have written books about the Court, including information about their Terms. See sources cited supra note 27.
44. SUPREME COURT CODE OF CONDUCT, supra note 28, at Canon 3(C).
45. See Kozinski, supra note 4, at 838-40.
information is unknown, its veracity is difficult to evaluate. Lazarus’s claims, based on confidential, unidentified sources, can be doubted and, like all such accounts, should be treated with some skepticism, but that does not prove that Lazarus acted unethically.

Second, Kozinski argues that Lazarus acted unethically because he encouraged other clerks to breach their own confidentiality duties. Kozinski states: “[I]t seems absurd to argue that a former clerk honors his own duty of confidentiality by inducing other clerks to betray theirs.” Kozinski argues that the former clerks were more willing to speak to Lazarus because he worked with them. Kozinski declares:

Would former clerks have been willing to discuss events at the Court during their mutual time there? Certainly, as there is no wall of confidentiality between law clerks of the same vintage.... Clerks... would have assumed he was familiar with the events himself and was talking to them to refresh his recollection or gain a new perspective.

Kozinski’s argument assumes that former clerks have a duty not to discuss their work even after their clerkships have been over for several years. Again, even assuming this, Kozinski creates a duty nowhere contained in the Code: A former law clerk’s duty not to encourage other clerks to reveal information learned during their clerkships. The ethical charge against Lazarus is based on the Code of Conduct, but this Code contains no rule prohibiting anyone, including former clerks, from speaking with clerks or former clerks.

I would expect that Lazarus informed his former co-clerks that he was writing a book about the Court before he spoke with them. There is no evidence that he failed in this duty of disclosure or otherwise acted unethically in speaking with former clerks. Kozinski again tries to deal with this by shifting the burden to Lazarus. Kozinski implies that Lazarus has the burden of establishing that he did not take advantage of his position as a former law clerk. Once more, Lazarus has no duty to Kozinski, or anyone other than Justice Blackmun, to prove anything. Also, Kozinski unfairly places a burden on Lazarus that cannot possibly be met; Lazarus seemingly could satisfy Kozinski only by presenting sworn affidavits from every confidential source indicating precisely what Lazarus said prior to the interview. Such disclosure would force Lazarus into betraying his promise of confidentiality to these sources.

47. Kozinski, supra note 4, at 840.
48. Id. at 841.
49. See id.
Kozinski’s also relies upon the argument that Lazarus deceived the former clerks into speaking with him. He writes: “Lazarus does not claim that he alerted fellow clerks that they should treat him as if he were an ordinary journalist. Without such a warning, he cannot claim that the disclosures made to him by fellow clerks were independent of his own status as a former clerk.”

It is quite understandable, however, that Lazarus does not describe in detail the conversations he had with fellow clerks before their interviews. When he wrote the book, no one had questioned the methods of these interviews, and thus it was not to be expected that he would need to address Kozinski’s later criticisms.

In sum, Kozinski has no way to know what Lazarus said, or did not say, to those he interviewed. Kozinski simply assumes the worst—that Lazarus deceived his fellow former clerks—and then criticizes him on this basis. Yet Kozinski, for all of his efforts to criticize Lazarus, could not find one clerk to say that he or she was duped into talking with Lazarus. Perhaps that is because the clerks who were his sources do not want their identities to be known, or perhaps it is because they knew exactly what Lazarus was doing and saw no problem with helping him. The point is that Kozinski expressly criticizes Lazarus for deceiving his fellow clerks, yet there is no evidence whatsoever to support that serious charge.

Finally, Kozinski argues that Lazarus acted improperly because he benefited from knowledge gained as a clerk. Kozinski maintains that even if information gained as a clerk was substantiated from other sources, his behavior was still inappropriate. Kozinski writes:

The flaws in Lazarus’s reconstruction theory are highlighted by comparing him to a lawyer who writes a book disclosing client confidences. Like Lazarus, the lawyer claims he breached no ethical duty because he assumed the role of journalist and then had a long conversation with his co-counsel, during the course of which the other lawyer revealed every piece of confidential information that found its way into the book. Would we accept this as an adequate excuse for the disclosure?

Kozinski cites to a case involving the attorney-client privilege as support for this point.

Once more, Kozinski improperly assumes that the attorney-client privilege and the clerk-Justice privilege are identical. In addition to the reasons discussed above as to why they are not analogous, it is crucial to recognize the extreme nature of the bar that Kozinski’s theory would

50. Id.
51. Id. at 842 (citations omitted).
52. See id. at 842 n.39.
impose on former Supreme Court clerks. No former clerk could ever discuss—in a classroom, in an article, in a book, or anywhere else—any case without proving that everything uttered was based on publicly available information. According to Kozinski, because clerks undoubtedly learn things about earlier Term cases during their tenure, they also cannot discuss these cases without meeting the standard of proof that he imposes.

This reasoning helps explain why the attorney-client relationship is not analogous to the clerk-Justice relationship. An attorney is forever limited to discussing only publicly available information about a case. In contrast, Kozinski’s burden, taken seriously, would preclude clerks from talking about any case decided by the Court during the Term in which they clerked or any previous Term. This burden cannot be right, as it is both unrealistic and unfair. Clerks will inevitably discuss cases from their Terms in classes they teach, briefs they write, and articles they author. Rather, so long as the clerk relies on other sources of information, there is no breach of duty to the Justice or the Court.

Kozinski is correct when he states that former clerks have an advantage in knowing what to look for in the publicly available papers of a former Justice or what to ask in speaking to a former clerk. But this point does not prove that such clerks act improperly when they rely upon such sources. There is an enormous difference between revealing confidences and reporting publicly available information. The Marshall papers are available to anyone who visits the Library of Congress. Former law clerks should not be prohibited from using such publicly available information in the same manner as historians and reporters.

B. Did Edward Lazarus Act Illegally?

The most serious charge lodged against Lazarus is that he violated federal law by using documents illegally removed from the Supreme Court. This possibility was first raised by Richard Painter in an op-ed piece in the Wall Street Journal. Painter wrote:

Portions of this book are based on written memoranda and e-mail communications that have apparently been taken from the Supreme Court building. It is possible that Justice Blackmun or another justice authorized their removal.... If there was no such authorization, however, there is an even more serious issue to consider. Federal law makes it a crime to convert government records to personal use without authorization (18 U.S.C. § 641) or to remove records deposited with a federal court without

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authorization (18 U.S.C. § 2071). On their face, these statutes appear to prohibit anyone from removing confidential records from the Supreme Court without permission and using those records in a book sold to the public.\textsuperscript{54}

Kozinski elaborates on this suggestion:

Even if Lazarus himself did not remove the documents from the building, somebody must have done so in contravention of the Supreme Court Code of Conduct, and possibly in violation of federal criminal law. It is unethical for a former law clerk—particularly one who is now a federal prosecutor—to profit from items procured in such an illicit fashion. To take possession of the purloined documents and seek fame and fortune from publishing them is the moral equivalent of trafficking in stolen merchandise.\textsuperscript{55}

These veiled accusations are based on nothing more than surmise. As discussed above, Kozinski, throughout his review, attempts to place the burden of proof on Lazarus. But in our society a person never has the duty of proving that he or she did not commit a crime.

Lazarus could have gotten access to memoranda not in the Marshall papers in many different ways without violating the law. Individuals with strong recollections of the documents might have described them to Lazarus, and similar descriptions from several individuals would have provided the needed corroboration. Former clerks might have obtained permission from their Justices to remove copies of memoranda that they drafted or helped write. It is even possible that someone at the Court shared documents with Lazarus.

The document that is particularly at issue is a memorandum concerning \textit{Webster v. Reproductive Health Services}\textsuperscript{56} that Lazarus did not know about during the time of his clerkship. As to this document, there can be no charge that Lazarus revealed a confidence he received while at the Court. Therefore, as to this document, Lazarus is truly like any other reporter. No reporter who gained access to such a document through confidential interviews would be accused of a crime.\textsuperscript{57} Nor should Lazarus. Unless

\textsuperscript{54} \textit{Id.}

\textsuperscript{55} Kozinski, \textit{supra} note 4, at 844-45.

\textsuperscript{56} 492 U.S. 490 (1989).

\textsuperscript{57} Kozinski says that Lazarus cannot equate himself with a reporter because former co-clerks would place more trust in him and think that they were just refreshing his recollections. \textit{See} Kozinski, \textit{supra} note 4, at 841. But as to the \textit{Webster} memorandum, Lazarus was very much in the role of reporter because any clerk from chambers that had the memorandum knew that Lazarus could not have a copy, as none was circulated to Justice Blackmun. More importantly, a reporter is a person who communicates information to the public. Sources may trust reporters for many different reasons. Why a particular source chose to trust Lazarus has nothing to do with his status as a reporter.
Painter and Kozinski have real evidence of a legal violation, they should be ashamed of their insinuations.

C. Did Edward Lazarus Act Immorally?

Besides claiming that Lazarus breached the Supreme Court Code of Conduct and perhaps federal statutes, Kozinski charges Lazarus with a breach of trust. Kozinski writes: “Lazarus also violated the bond of loyalty to his Justice, the other Justices, and his fellow clerks. During the Term of Lazarus’s clerkship, everyone at the Court (except Lazarus) acted on the common understanding that what happened within the Court’s nonpublic areas would not be made public.”

Kozinski does not say what creates or defines this duty of loyalty. He alludes to it as being an unspoken agreement, shared by all who work at the Court. Yet, my experience hardly comports with Kozinski’s assertion. I have heard countless former clerks tell stories—flattering and unflattering—about their Justices, their co-clerks, their cases, and their experiences. Indeed, it has been publicly reported that Kozinski speaks with his former clerks who are working at the Court about their activities. The sole support for Kozinski’s duty of loyalty seems to be an unwritten, unspoken understanding that does not exist.

More significantly, what is the trust that Lazarus violated? If the breach of trust lies in simply disclosing confidential information about cases, then this charge collapses into the accusation of unethical conduct discussed above and again is answered by Lazarus’s reliance on external sources.

The real basis for the claim of breach of trust, however, seems to be that Lazarus portrayed some of the Justices and clerks in an unfavorable manner. Kozinski makes it clear from the outset of his review that this is what troubles him the most. In the initial footnote, Kozinski writes:

I clerked for Justice (then Judge) Kennedy, who is ill-treated in the book, and one of Justice Kennedy’s clerks, who is portrayed as a cross between Don Corleone and Freddie Krueger, clerked for me prior to his tenure at the Supreme Court. I also clerked for Chief Justice Burger, who is briefly though brutally savaged, and I know and respect Chief Justice Rehnquist, several of the Associate

58. Id. at 846.
59. See id.; see also id. at 875 (speaking of a “common understanding” among clerks and Justices at the Court).
60. See Rex Bossett, Clerks Route to Top Court: Their Choice of Circuit and Judge Shapes Chance To Serve Supremes, NAT’L L.J., Oct. 20, 1997, at A1 (“Judge Kozinski, who keeps in touch with his former clerks, says having them go to the Supreme Court gives him added intelligence about what the Justices are ‘interested in’; that is, ‘hot issues’ and ‘what may be right for certiorari petitions.’”).
Justices, and a number of their former clerks who are mentioned unfavorably.\textsuperscript{61}

In fact, Kozinski later makes explicit his claim that the duty of loyalty is largely a duty not to embarrass the Court. He declares:

The terms of this understanding were not written down and its contours were not crystal clear. \ldots Thus, clerks generally felt free to tell endearing or inspiring stories \ldots in a tribute to their bosses or other Justices. But it was clearly understood that, under normal circumstances, whatever one learned inside the Court—whether or not it was covered by the duty of confidentiality—would not be repeated on the outside, especially if it tended to demean the Court, the Justices, or fellow clerks.\textsuperscript{62}

In other words, Kozinski asserts that the duty of loyalty requires that former clerks only praise, and never criticize or demean, any Justice, any co-clerk, or the Court. Indeed, why should this duty be limited to just matters concerning that Term of the Court? Kozinski's position is that law clerks are brought into the family of the Court and it is wrong for family members to air dirty laundry in public, even when they have moved away from home.

Here, I find Kozinski's claimed duty of loyalty objectionable. I know of no job for which it is a condition of employment that the employee, after completing his tenure, can say only nice things about the former boss or the institution. I would not dream of expecting that my former research assistants, who at times handled confidential information, feel obligated to speak only kindly of me or of the University that employed them. Kozinski relies on shared experience to support his claimed duty of loyalty, but is it not our shared experience that we may describe our bosses and our co-workers in whatever terms we want, including unfavorable ones?

Kozinski's argument might be that it is permissible for a former clerk to criticize other Justices or former clerks, but not to "demean" them. Even assuming that the line between criticizing and demeaning could be drawn meaningfully, this argument presumes that the entire Court should be considered the clerk's "family" and that there is a duty of loyalty not to demean family members.\textsuperscript{63} This may be Kozinski's sense of what loyalty means, but the problem is that he asserts it as a universal truth applicable to the entire Court and then criticizes Lazarus for not meeting it. Kozinski never explains why Lazarus should feel a duty of loyalty to clerks in other

\textsuperscript{61} Kozinski, \textit{supra} note 4, at 835 n.♯. The description of the former law clerk as a cross between Don Corleone and Freddie Krueger is Kozinski's, not Lazarus's.

\textsuperscript{62} \textit{Id.} at 846.

\textsuperscript{63} \textit{Id.} at 875 (referring to a clerkship as "membership in a family").
chambers or why he should regard them as "family members," especially clerks whom he constantly battled and distrusted. The metaphor of a family is powerful, but inapt to a work environment such as the one Lazarus describes in his book.

I am particularly troubled by the notion that a duty of loyalty, such as the one Kozinski asserts, applies to an important public institution such as the Supreme Court. As I discuss in more detail below, people should know about the Court and how it decides cases. If a Justice’s decisions are a result of improper influences, people should know. More generally, people should know how the attitudes and views of the Justices affect their decisions. For example, in studying the Supreme Court’s race decisions of the 1940s and 1950s, I found it telling that Supreme Court Justice Stanley Reed was so racist that he would not attend the Court’s Christmas party if African-American employees were present.6

In sum, if the claim of a breach of trust is based on disclosure of confidential information, that disclosure did not occur; if it is based on Lazarus’s saying unflattering things about the Court, there is no duty imposed on former clerks only to praise the institution. Alex Kozinski, like all of us, would prefer that his friends not be insulted or criticized in print. But it is wrong to transfer that sentiment into a moral duty used to excoriate the critic.

II. DOES EDWARD LAZARUS DO ANYTHING USEFUL?

As I read Closed Chambers, I was impressed by the wealth of new information that it contained. Although I have been teaching constitutional law for almost two decades and try to read a great deal of what is written about the Supreme Court, I learned much from the book. Because the book is written for a mass audience in a clear and engaging style, I would expect that nonlawyers would learn an enormous amount from it about what the Rehnquist Court has considered and decided in the last decade. As I state in Part III, I disagree with some of the conclusions Lazarus draws. Still, I must recognize the tremendous amount of information contained within the book and the excellent prose style of the author.

I was therefore surprised when Kozinski and others criticized the book for providing little new information. Kozinski says that Lazarus "rehearses arguments developed by others and tries to make his mark by spicing up the story with insider gossip. Nor is it clear that Lazarus tells us anything useful—as opposed to merely titillating—about the Court."65

64. See Bernard Schwartz, Decision: How the Supreme Court Decides Cases 66 (1996).
65. Kozinski, supra note 4, at 873 (citations omitted).
It is possible that, although I try to read the Court’s decisions and what is written about the institution, I just know much less about it than other reviewers and therefore had much more to learn from *Closed Chambers*. It is also possible that those who dislike the book, for the reasons discussed above, find it useful to dismiss the book’s contributions. Although this impulse is understandable, it is unfair. Even if one disagrees with Lazarus’s choice to write the book as he did, it should be possible to recognize its contributions.

I believe that by carefully combing the Marshall papers, as few scholars have had the time to do, and by interviewing the clerks from the Terms considered, as none have done before, Lazarus has provided a wealth of new information. I see two main benefits from the book: opening the Supreme Court to greater public scrutiny and providing new information about particular cases.

A. *Knowledge Is Better than Ignorance*

Kozinski proclaims that the Court’s secrecy is a good thing. He writes:

Even assuming the truth of Lazarus’s worst charges, he does not explain what we are supposed to do with the ‘information’ he provides—except to feel contempt for various Justices. . . .

It is an article of faith among the post-baby boom generation that more information is better than less, and that democracy abhors the vacuum of a secret institution. Lazarus pushes these bromides hard, but he does not pause to consider whether they hold true when applied to the courts.66

Here, too, I disagree with Kozinski. The value of information need not be purely utilitarian; it is not the case that Lazarus’s book is of value only if it leads to impeachment or causes definitive changes. Knowing more helps us to understand and evaluate the Rehnquist Court, and it might, along with other events and writings, cause changes within the Court itself. Moreover, Lazarus’s book provides the occasion for contemplating the degree of secrecy that should surround the Court. Whatever conclusion one draws, there is inherent value in the contemplation.

This is not to say that secrecy never has value; rather, it is to deny Kozinski’s claim that information about government has value only if it has direct utilitarian value. Kozinski’s position is far too limited a view of when knowledge is beneficial. It is good for us to know how the institution operates and how its officials are performing, in part, so that we can judge our government and assess its performance. Even though federal judges

66. *Id.* at 873-74.
have life tenure, we still should be informed about how they are performing in office. If we conclude that they are inadequate in some regard, they can be criticized, and ideally this might inspire improved performance. In the extreme cases, disclosures might reveal impeachable offenses. Much more commonly, information on failings can lead to pressure—even on individuals with life tenure—for change.

Also, information about the Court is useful in understanding and assessing its decisions. An enormous amount of scholarly attention is devoted to explaining these decisions, and knowing how the Court came to its conclusions can be very instructive in appreciating and evaluating them. For example, Woodward and Armstrong's revelations in *The Brethren* about the writing of *United States v. Nixon* are very helpful to understanding the case. The *Nixon* opinion has a disjointed quality; the parts do not quite seem to fit together, and they appear to have been written by different Justices. In fact, Woodward and Armstrong tell of how Chief Justice Burger assigned himself the majority opinion but replaced various parts of his draft with sections drafted by other Justices. According to Woodward and Armstrong, the Justices had a secret lunch meeting at which they divided up the opinion, and several then wrote new sections that were circulated, joined by the others, and ultimately incorporated by the Chief Justice.

Indeed, confidential information about a Justice's thought process might be useful when a future Court reconsiders the issue. For instance, a biography of Justice Lewis Powell by Professor John Jeffries revealed that Justice Powell initially voted to strike down the Georgia sodomy statute in *Bowers v. Hardwick* and then changed his mind. Jeffries reports that Justice Powell told a clerk that he had never met a homosexual and that, after leaving the Court, Justice Powell expressed regret and said that he thought he had made a mistake in *Bowers*. Knowing this may make a future Justice or Court more willing to overrule the decision.

At the very least, knowing about the Court's internal operation has historical value. As historians assess a particular era of the Supreme Court and the performance of individual Justices, detailed inside information—such as comes from Justices' papers and clerk interviews—can be invaluable.

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69. See WOODWARD & ARMSTRONG, supra note 67, at 314-47.
70. See id. at 322-46.
73. See id. at 521.
74. See id. at 530.
Lazarus's book contains much information that is useful in all of these regards. First, overall, his description of the Court should inspire renewed confidence in the institution. Although this is clearly not the conclusion Lazarus draws from his revelations,75 the book portrays a group of hard-working Justices doing exactly what a Supreme Court should do: deciding issues based on their understanding of the law without political pressure or influence. There is not a single instance in Lazarus's book where any Justice is lobbied by interested individuals or entities. There is not a single instance of decisions being improperly influenced in any way.

While Lazarus contends that the Court’s clerks play too great a role in its decisionmaking,76 his description of specific cases belies this criticism. In case after case, Lazarus documents the Justices' personal involvement in their decisionmaking through their attempts to persuade others, their internal memoranda, and their draft opinions. I came away from Lazarus’s book with a sense that virtually all the Justices were fully engaged in their tasks and working hard. The book is a portrait of nine human beings, with strengths and weaknesses common to all human beings, struggling to discharge the role assigned to them by the Constitution.

Moreover, Lazarus offers information that aids in understanding many specific decisions. For example, in teaching Webster v. Reproductive Health Services,77 I often have asked whether there is a difference between the approach in Chief Justice Rehnquist's plurality opinion, which advocates rational basis review for evaluating abortion regulations,78 and Justice Scalia’s call for expressly overruling Roe v. Wade.79 I have also focused on Justice Scalia’s angry, seemingly personal attack on Justice O’Connor. Lazarus offers new information, based on interviews with clerks and internal memoranda never before disclosed, to explain how the conservatives tried to engineer the overruling of Roe and why Justice Scalia was so angry at Justice O’Connor for thwarting this effort.80

Third, Lazarus provides a great deal of information that is useful in the appraisal of particular Justices. For example, Lazarus describes how Justice Thurgood Marshall, in his later years on the Court, was not up to the workload and, in fact, once voted in error at conference.81 Lazarus also describes how Justice Brennan’s choice to assign the majority opinion to himself in Patterson v. McLean Credit Union82 might well have been

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75. See, e.g., LAZARUS, supra note 1, at 7.
76. See id. at 262-71.
78. See id. at 519-20.
79. 410 U.S. 113 (1973); see Webster, 492 U.S. at 532 (Scalia, J., concurring in the judgment).
80. See LAZARUS, supra note 1, at 407-08.
81. See id. at 446-47.
82. 491 U.S. 164 (1989).
responsible for the Court's ruling, which substantially narrowed the protection from discrimination provided by 42 U.S.C. § 1981.83 In addition, Lazarus depicts the tensions between Justices O'Connor and Brennan and suggests how this might have influenced Justice O'Connor to write separately in some important cases.84 All of this information is useful in making an informed appraisal of the Justices, as historians and scholars will and must do.

Finally, and more generally, the Lazarus book provides an excellent vehicle for reconsidering the secrecy that surrounds the Supreme Court. The debate generated by Lazarus's book, even more than the book itself, should encourage careful thought about whether the intense secrecy surrounding every aspect of the Court's work is a good thing. For example, should the oral arguments of the Court be broadcast? Although a full development of the argument is beyond the scope of this Review, after reflection, I see little justification for not televising every Supreme Court argument. There is no jury to be unduly influenced and lawyers are unlikely to direct their arguments to the camera rather than the Court. There seems little risk that the Court will ever lose control over the proceedings. Most importantly, the Supreme Court is deciding crucial social issues and people should have the chance to see and hear the arguments.

To go even further, should the Court's deliberations remain secret? The Court's tradition, of course, is that only Justices attend the conference where cases are deliberated and decided. The assumption is that openness would chill candor and frank discussions. Yet, Lazarus documents that little discussion actually occurs at conference,85 and Kozinski defends this as understandable and acceptable.86 Therefore, it seems that little speech would be chilled. Indeed, open deliberations likely would have the opposite effect: They would encourage more discussion among the Justices. If the Justices knew that their deliberative sessions were being observed, they probably would want to show that they were engaged and meeting the expectation of having serious debate over important legal and social questions.87

I am not making the claim that the Court and its processes should not be surrounded by any secrecy. But I think that the secrecy that has evolved is worth reconsidering and is likely much broader than it needs to be.

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83. See LAZARUS, supra note 1, at 309-14.
84. See id. at 277-78.
85. See id. at 285.
86. See Kozinski, supra note 4, at 865.
87. For the last 20 months, I have served on an elected commission in Los Angeles to rewrite the City Charter. By state law, every meeting—except for a few that dealt with personnel issues—has been open to the public and televised. I know that there are many occasions in which some or all of the Commissioners would have liked to deliberate behind closed doors, but I think that our discussions have been more thorough and more candid because of the openness.
Lazarus's book is an excellent occasion for thinking about the degree of openness that should surround our nation's highest court.

B. Useful Information About Many Specific Cases

As mentioned earlier, I learned a significant amount of new information about particular cases from reading Lazarus's book. Perhaps the easiest way to demonstrate this, and to refute Kozinski's contention that there is nothing useful in the book, is to give examples. I do not claim that none of this information has ever appeared elsewhere; a tremendous amount of research would be necessary to determine that. Suffice it to say that these are things that I, an avid Court watcher who has taught and written about constitutional law for almost two decades, learned from the book. I am certain that many, if not all, of these revelations are new.

1. The Story of Tompkins v. Texas

Tompkins was a death penalty case in which certiorari was granted, briefing was done, oral arguments were held, but no opinion was ever written or published. Instead, the Court issued only the statement: "The judgment below is affirmed by an equally divided Court. Justice O'Connor took no part in the consideration or decision of this case."

Lazarus devotes a chapter to recounting the Tompkins case in careful detail. He persuasively demonstrates that there were serious errors committed in the trial court, including the prosecutor's use of peremptory challenges in violation of Batson v. Kentucky and the judge's failure to instruct the jury as to alternative conviction options in violation of Beck v. Alabama. Lazarus shows the inadequacy of the Texas courts' handling of these issues. According to him, the initial vote on the Court was for reversal, but Justice Kennedy changed his mind and joined with the conservative bloc of Chief Justice Rehnquist and Justices White and Scalia. Because Justice O'Connor did not participate, apparently because her husband had recently been a partner in the law firm that was handling the case pro bono, the Court split 4-4.

The 4-4 split was also the result of another interesting switch. Justice Stevens initially had drafted an opinion affirming on the Beck issue and reversing on the Batson question. Justice Kennedy's switching sides would have made the Court's decision 5-3 to affirm on Beck and 4-4 on Batson.

89. Id.
92. See LAZARUS, supra note 1, at 61-69.
Rather than cast the deciding vote to affirm, Justice Stevens switched sides to make the *Beck* issue 4-4 and thus to scuttle his own majority opinion. Lazarus quotes Justice Stevens’s memorandum indicating his change and his conclusion: “In all events, I am now persuaded that the best disposition of the entire case . . . is a simple affirmance by an evenly divided Court.”

Lazarus concludes:

In the 200-year history of the Court, I very much doubt that the author of an opinion has changed his vote even a handful of times to assure that the Court does not issue his own opinion . . . Yet Stevens scuttled his opinion, even while agreeing with the legal principle it expounded, rather than put his imprimatur (as well as the Court’s) on Tompkin’s sentence of death.

The *Tompkins* case illustrates how the desire of several members of the Court to pave the way for executions caused them to overlook very serious errors of law. As I have argued elsewhere, it even causes them, at times, to misstate and misapply the law.

2. *The Account of Justice Douglas’s Actions in the Rosenberg Case*

The executions of Julius and Ethel Rosenberg were important political and legal events in the McCarthy-era hysteria of the early 1950s. The couple was convicted and sentenced to death for their alleged involvement with a Communist spy ring organized to funnel atomic secrets to the Soviet Union.

I have read a great deal about the case, but I never knew, until reading *Closed Chambers*, of Justice Douglas’s erratic behavior in its handling. Lazarus recounts how the Court denied direct review of the Rosenbergs’ conviction by a 6-3 vote, with Justices Black, Frankfurter, and Burton favoring review. Subsequently, the Court also denied review of the Rosenbergs’ first habeas petition, and after Justice Frankfurter decided not to write a dissent, Justice Douglas “abruptly reversed himself” and decided to write an angry dissent to the denial of certiorari and condemn the government for “reprehensible” prosecutorial actions. Justice Jackson was angry at this and thought that Justice Douglas was grandstanding. Lazarus quotes a memorandum from Justice Frankfurter, found in the

93. Id. at 69 (quoting Memorandum from John Paul Stevens, Associate Justice, Supreme Court of the United States, to William H. Rehnquist, Chief Justice, Supreme Court of the United States).
94. Id.
96. LAZARUS, supra note 1, at 136.
Jackson papers, in which Justice Frankfurter recounts how Justice Jackson described Justice Douglas’s actions as “the dirtiest, most shameful, most cynical performance that I have ever heard on matters pertaining to law.”  
Justice Jackson decided to call Justice Douglas’s bluff and cast a fourth vote for granting certiorari, “rather than have the Court deny cert. with one Justice (Douglas) publicly casting doubt on the Rosenbergs’ convictions.”  
As the Court discussed the schedule for hearing the appeal, Justice Douglas backed down and withdrew his proposed dissent from the denial of certiorari.  
Five days before the scheduled executions, the Court refused even to hear oral arguments as to whether a stay should be granted. The Court’s vote was 5-4 against the petition, with Justice Douglas providing the crucial fifth vote. After denying relief on yet another habeas petition, the Court concluded its Term and the Justices “pledged that this would be their last decision respecting the Rosenbergs. No Justice would act on his own to reopen the matter, and the Rosenbergs’ execution would go forward.”  
A day later, two new attorneys presented a new legal theory to Justice Douglas—that the Rosenbergs had been prosecuted under the wrong statute—and Justice Douglas granted a stay of execution. The Court held oral arguments on this issue a day later and within twenty-four hours announced their 6-3 decision to overturn Justice Douglas’s stay of the Rosenbergs’ execution. Nine hours later the Rosenbergs were executed.

Lazarus presents this story based on information gained from published sources, Justices’ papers, and oral histories. From an historical perspective, it is important in understanding the Rosenberg case and in assessing Justice Douglas. It is also revealing history about the Court’s behavior in high-profile death penalty cases.

3. The Detailed Presentation of the Facts and Legal Issues in the McCleskey Case

Lazarus devotes two full chapters and part of another (over sixty pages) to the Supreme Court’s handling of Warren McCleskey’s case. This litigation produced two landmark Supreme Court rulings. In *McCleskey v. Kemp*, the Supreme Court ruled, 5-4, that statistics proving racial disparity in the imposition of the death penalty were not sufficient to demonstrate an equal protection violation. In *McCleskey v. Zant*, the Court held, 6-3, that

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97. Id. at 137.
98. Id.
99. Id. at 138.
individuals may present only one habeas corpus petition and that successive petitions are permissible only if (a) there is proof of good cause and prejudice would result from not being heard; or (b) there is a showing that actual innocence is likely.\textsuperscript{101}

Lazarus provides a more detailed account of the factual background of the case than I have seen anywhere else, and he also gives us an insightful account of the Court’s internal discussions concerning it. Most striking is a memorandum Lazarus found in the Marshall papers that Justice Scalia wrote to the other Justices.\textsuperscript{102} While Justice Powell’s majority opinion points to the inadequacy of the proof of discrimination, Justice Scalia wrote: “‘Since it is my view . . . that the unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial decisions is real, acknowledged in the decisions of this court, and ineradicable, I cannot honestly say that all I need is more proof.’”\textsuperscript{103} In other words, Justice Scalia says that he was convinced that the death penalty is administered in a racially discriminatory fashion, but he still voted to affirm McCleskey’s death sentence. Even more troubling, Justice Scalia says that additional persuasive proof of systemic discrimination would make no difference for him.

Lazarus marshals the evidence to show that there was substantial doubt as to McCleskey’s guilt and that serious legal errors were subsequently discovered in the handling of the case. When these were presented to the Court, it announced a new rule that habeas petitioners were barred from subsequent petitions, except in extraordinary circumstances, and denied McCleskey relief. He was then executed by the State of Georgia.

Lazarus devotes over ten percent of his book to the McCleskey saga. Although I have taught the McCleskey decisions countless times in my Constitutional Law and Federal Courts classes and have also written about them, I learned a great deal of new information from Lazarus’s account. This information, presented clearly and forcefully, suggests that McCleskey may have been innocent of the crime for which he was executed and that his execution was founded on serious violations of the law by police and prosecutors.

\textsuperscript{101} 499 U.S. 467 (1991).
\textsuperscript{102} Lazarus is not the first to find this memorandum. See, e.g., Chemerinsky, supra note 99, at 528; Dennis D. Dorin, Far Right of the Mainstream: Racism, Rights, and Remedies of Justice Antonin Scalia’s McCleskey Memorandum, 45 MERCER L. REV. 1035 (1994).
\textsuperscript{103} LAZARUS, supra note 1, at 211.
4. *The Court's Handling of Webster v. Reproductive Health Services*\(^{104}\)

*Webster* was an important abortion case decided in 1989, in which Justice Scalia expressly urged the overruling of *Roe v. Wade* and three other Justices implicitly called for its overruling by advocating rational basis review for the evaluation of government abortion regulations.

Lazarus provides much new information about the Court's internal handling of the case. For example, Lazarus describes the Justices' discussion at conference and recounts that Chief Justice Rehnquist, who had dissented in *Roe*, recanted that position and "stated that he now thought *Roe v. Wade* had reached the right result given the specific facts of that case. Texas had banned all abortions except in the narrow circumstance where the life of the mother was at stake. In Chief Justice Rehnquist's revised view, that was too restrictive."\(^{105}\) According to Lazarus, the vote at conference was 5-4 to uphold all aspects of the Missouri law that was being challenged, and the disagreements among the five in the majority over how to handle *Roe* were to be "'worked out in the writing.'"\(^{106}\)

Lazarus reveals a secret memorandum that Chief Justice Rehnquist circulated exclusively to his conservative colleagues, Justices White, O'Connor, Scalia, and Kennedy. In it, the Chief Justice urges them to stick together: "'Because of the "media hype" that this case has received . . . and because we are cutting back on previous doctrine in this area, I think it more than usually desirable to have an opinion of the Court if we possibly can.'"\(^{107}\) Lazarus describes the draft opinion Chief Justice Rehnquist circulated to these Justices and how it would have instituted rational basis as the standard for judicial scrutiny of abortion regulations and at the same time proclaimed that the government has a compelling interest in protecting fetal life from the moment of conception. Although the Chief Justice disavowed overruling *Roe*, that result would obviously have followed from such an opinion.

Lazarus then describes how Justice O'Connor refused to join Chief Justice Rehnquist's opinion, favoring a narrower approach that would leave the future of *Roe* for later cases to decide. Lazarus also recounts the reactions from other Justices, including Justice Kennedy's request for a relatively minor change and Justice Scalia's "barbed" reply to Justice O'Connor.\(^{108}\) After describing in detail the Court's internal debate and the various drafts and memoranda circulated, Lazarus reveals—and this, too, I

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105. LAZARUS, supra note 1, at 399.
106. Id. at 400 (quoting Chief Justice Rehnquist).
107. Id. at 402 (quoting Chief Justice Rehnquist's cover letter for his first *Webster* draft).
108. Id. at 408.
have never seen before—that Justice Stevens drafted a strongly worded response to Justice Scalia’s harsh attack on Justice O’Connor, though he later omitted this rebuke from his dissent.\textsuperscript{109}

Although the Court’s subsequent decision in \textit{Planned Parenthood v. Casey} has lessened \textit{Webster’s} significance, I still teach \textit{Webster} to my students. From now on, I will use Lazarus’s account to describe how the opinions emerged from the Court. At the very least, his account offers a fascinating glimpse of how the Court handles controversial cases.

5. \textit{The Story Behind the Discussion of the Methodology of Judicial Review in Michael H. v. Gerald D.}\textsuperscript{110}

\textit{Michael H. v. Gerald D.} is an important case that substantially narrowed the rights of unmarried fathers. The Court held that a state may create an irrebuttable presumption that a married woman’s husband is the father of her child and use this presumption to deny all parental rights, including visitation, to an unmarried father. \textit{Michael H.} is much discussed for Justice Scalia’s articulation of the view that in protecting rights under the Due Process Clause, the Court should consider the relevant tradition at the most specific level. For example, Professors Tribe and Dorf wrote a book largely devoted to responding to this view.\textsuperscript{111}

Lazarus describes how Justice Scalia initially circulated a draft opinion that did not include the discussion of the appropriate method of judicial analysis. Several months later and two weeks before the oral argument in \textit{Webster}, however, Justice Scalia circulated a new draft that argued that “the Court should \textit{always} conduct its inquiry into tradition in the narrowest possible manner.”\textsuperscript{112} Lazarus explains how a law clerk in Justice O’Connor’s chambers spotted this addition and how both her conservative and liberal clerks tried to persuade her about whether to join that part of Justice Scalia’s opinion. Ultimately, Justice O’Connor did not join, and that part of Justice Scalia’s opinion did not gain majority support. But as Lazarus points out, it is likely that Justice Scalia wrote this passage to influence the handling of \textit{Webster}, and its support by a majority would have had potentially important implications for all future cases involving substantive due process claims.

I have selected five examples of interesting and important information that I learned from Lazarus’s book. I could have given many, many more.

\textsuperscript{109} See \textit{id.} at 417.
\textsuperscript{110} 491 U.S. 110 (1989).
\textsuperscript{112} LAZARUS, \textit{supra} note 1, at 389.
The abundance of such examples demonstrates, I think, the book's significant contributions to understanding the Court and its rulings.

III. DOES EDWARD LAZARUS JUSTIFY HIS NORMATIVE CONCLUSIONS?

Although I do not agree with Judge Kozinski's criticisms of Closed Chambers, I have serious reservations of my own about the book. My concern is not over the descriptive aspects of the effort, but rather over Lazarus's normative criticisms of the Court. Lazarus is not content merely to describe the decisions and how they came about; his book is filled with his own opinions and judgments. His central thesis is that the Court is deeply divided ideologically and that this is undesirable. He proclaims that the Court is violating the "rule of law" and ignoring what he regards as the crucial distinction between law and politics.

It is this aspect of the book that I wish to criticize. First, Lazarus's book is premised on a normative vision that he does not detail or defend. His judgments are presented as conclusions, and nowhere does he explain what he means by the "rule of law," why his should be the proper definition, or what separation between law and politics should exist. Second, I strongly disagree with Lazarus's normative premises. Ideological division on the Court is inevitable in handling socially divisive issues like abortion, affirmative action, and the death penalty, and it is not inherently undesirable. I believe that Lazarus relies on a false distinction between law and politics, and indeed, his book fosters a destructive image of constitutional law. Moreover, he fails to show that the Court's ideological divisions have caused it to act improperly.

A. Lazarus's Failure To Defend His Normative Vision

Throughout the book, Lazarus offers normative criticisms of the Court and its approach to constitutional law. In his introduction, he describes the current Court as a "nightmare" and writes that:

[T]he severity of these divisions [within the Court] has corroded the Court's institutional culture and driven the Justices to disregard the principles of decisionmaking—deliberation, integrity of argument, self-restraint—that separate the judicial function from the exercise of purely political power. [This book] is about a Court whose inner workings are dangerously at odds with the source of its authority within our constitutional scheme.113

113. Id. at 7.
This distinction between law and politics recurs throughout the text. In criticizing the Senate's rejection of Robert Bork's nomination, Lazarus says that the political battle "ate away the thin but crucial divide between law and politics . . . ." \(^{114}\) In describing the Court's decisionmaking in *Patterson v. McLean Credit Co.*, Lazarus concludes that "*Patterson* exposed and advanced a corruption in the process by which the Justices defined the law." \(^{115}\) In condemning the Court's opinion in *Roe v. Wade*, Lazarus writes of "the incalculable damage that *Roe* inflicted on the idea that there is such a thing as constitutional law ruled by neither the hands of long-dead Framers nor the personal biases of sitting Justices." \(^{116}\) Lazarus says that "the *Webster* saga dramatized the expanding and inappropriate politicization of the Court and the judicial process." \(^{117}\) In his conclusion, Lazarus writes of "corruption in the judicial process." \(^{118}\) He says that "[i]n *Webster*, what passed for judging was mostly pretense." \(^{119}\) There, he adds, "the reach of politics into the province of the Court had jumped these natural bounds. In our many political factions outside the Court, we have come to see and to treat the Court as but yet another purely political, indeed, quasi-legislative institution for forwarding our respective agendas." \(^{120}\)

Lazarus not only says that the Court has failed to adhere to the line that he sees between law and politics, but that this failure will have dire consequences for the Court's institutional integrity and legitimacy. He writes: "In light of such pervasive and continuing internal division, the question for the Court, as for the rest of government, has been whether the institution's own integrity can withstand the corrupting force of bitter disagreement. And the answer, thus far, is dismal." \(^{121}\) He speaks of the Court as being in "crisis." \(^{122}\)

Other normative judgments are scattered throughout his book. He often shifts abruptly from being purely descriptive to openly normative. After describing the Court's decision in *Furman v. Georgia*, he declares that "the political views of the liberal Justices outstripped the logic of legitimate legal argument" and that the Justices "betrayed the very rule of law they claimed to be upholding." \(^{123}\) Similarly, he says that *Patterson* showed a "growing disregard for the interests of the Court as an institution and for

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114. *Id.* at 248.
115. *Id.* at 321.
116. *Id.* at 371.
117. *Id.* at 420.
118. *Id.* at 517.
119. *Id.* at 422.
120. *Id.* at 421.
121. *Id.* at 8.
122. *Id.* at 516.
123. *Id.* at 109.
the duties of that institution in American public life. . . . By the time of Patterson, the Justices had all but forsaken this obligation to their own community and to the nation at large.” 124 He says that Roe and Furman “shared the flaw of exercising the greatest measure of judicial power on the least defensible justification.” 125 He speaks of the battles against Bork’s and Thomas’s nominations for the Supreme Court as a “corruption of the appointment process.” 126

On and on, his book offers judgments about the Court, its proper role, and the desirability of its decisions. I certainly do not question the propriety of Lazarus, or anyone else, making such judgments, but I do criticize his failure to do more than assert them in passing. The very thesis of his book is that the Court has ignored the rule of law and overstepped the proper line separating law and politics. Yet, he never defends the normative vision that underlies this criticism. The “rule of law” is a phrase with great power, and condemning the Court for violating it is a serious matter. But what, precisely, does Lazarus mean by this phrase, and why should readers accept his as the proper definition?

Lazarus continually invokes a distinction between law and politics, but he never spells out this difference or explains why we should agree with this vision. This is not incidental to his book; it is the basis for the judgments he proclaims throughout its chapters. As one who believes that Roe was correctly decided and that the fights against the Bork and Thomas nominations were proper and essential, 127 I find Lazarus’s passing normative judgments to be irritating. I would not mind if he presented an argument with which I could disagree, but he gives little more than his opinion as a pronouncement that all should regard as self-evident.

Lazarus, of course, is not writing for an audience of constitutional law professors. But this fact increases, not decreases, his burden of justification. In particular, readers unfamiliar with the jurisprudential scholarship that struggles to define the rule of law, or the critical legal studies attacks on distinctions between law and politics, should realize that his pronouncements rest on premises that are disputable. Lazarus has a normative vision of the proper role of the Court and how it should decide cases. But he never details or defends it.

124. Id. at 324.
125. Id. at 369.
126. Id. at 456.
B. Why I Disagree with Lazarus's Vision

Perhaps if I agreed with Lazarus's normative premises, I would not see the need for him to defend them. However, I do not share his vision about the Court and its appropriate decisionmaking process. In four crucial regards, I disagree with Lazarus.

First, I do not agree that ideological splits on the Court are to be decried or that they are harmful. A central aspect of Lazarus's book is its complaint about the deep ideological divisions in the Rehnquist Court. At the very least, his conclusion is greater than his evidence supports. He draws his conclusions from an examination of three of the most controversial areas of contemporary constitutional law—abortion, affirmative action, and the death penalty. Moreover, he focuses primarily upon the earlier years of the Rehnquist Court. In contrast, a review of the last Supreme Court Term reveals little evidence of significant ideological divisions. Perhaps that is because there were no cases concerning abortion or affirmative action and no major death penalty decisions.

Last Term, there were some 5-4 decisions where the majority comprised Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas. But there also were 5-4 decisions where it comprised Justices Kennedy, Stevens, Souter, Ginsburg, and Breyer. There even was one major case decided by a 5-4 margin where the majority was Justices Thomas, Stevens, Souter, Ginsburg, and Breyer. Most of the more significant cases of the Term were decided by lopsided margins, including the major First Amendment case, which had an 8-1 split, and two significant cases concerning sexual harassment that were decided 7-2.

128. Kozinski also notes that Lazarus focuses only on these three particularly controversial areas. See Kozinski, supra note 4, at 857.


131. See United States v. Bajakajian, 118 S. Ct. 2028 (1998) (holding that punitive forfeiture violates the Eighth Amendment's Excessive Fines Clause if it is grossly disproportionate to the defendant's offense).

132. See NEA v. Finley, 118 S. Ct. 2168 (1998) (holding that the requirement that the National Endowment of the Arts consider whether artistic work shows "decency and respect for the diverse values of the American public" when awarding grants is not unconstitutionally vague and does not violate the First Amendment rights of grant applicants).

133. See Faragher v. City of Boca Raton, 118 S. Ct. 2275 (1998) (allowing vicarious liability for discrimination, but permitting an affirmation defense based on the employer's efforts to
More importantly, ideological division seems inevitable on a Court that must deal with controversial issues. A Court with Justices such as Brennan, Marshall, Rehnquist, and Scalia will be deeply split on the same legal questions that divide the nation. There is as much point in complaining about that as in bemoaning the time the sun rises or sets. Not surprisingly, a deep ideological division might be accompanied by a measure of distrust and even, at times, a lack of respect.

Such divisions have existed on the Court throughout American history. Indeed, they might be seen as an intentional feature of the American system for choosing federal judges. The Supreme Court almost always is composed of Justices selected by many different Presidents over a relatively long period of time instead of nine Justices selected in each new President’s ideological image. This is what produced a Court with a Thurgood Marshall, appointed by President Lyndon Johnson, and an Antonin Scalia, appointed by President Ronald Reagan. Justices Marshall and Scalia shared little in their life experiences, world views, or conceptions of constitutional law. An ideological divide was inevitable.

Second, Lazarus does not make a persuasive case that the Court’s ideological division is harming it. He shows no ethical violations by any of the Justices. Although he describes great hostilities among the clerks, including a Term-ending fistfight, there is much less indication that this affected the Justices’ relationships.

Many of the transgressions of which Lazarus complains—such as Chief Justice Rehnquist’s circulation of a draft in Webster to his conservative colleagues, but not the whole Court—seem minor. And while Lazarus criticizes particular cases as presenting arguments that he regards as specious or hypocritical, one could lodge this complaint against countless decisions, from Marbury v. Madison on; this does not prove the systematic deficiencies of the Rehnquist Court. Likewise, he is correct that the Rehnquist Court is inconsistent in how much weight it gives precedent; but this undoubtedly has been true of the Court in all eras. When Lazarus objects to decisions such as Furman v. Georgia as lacking “the logic of legitimate legal argument,” he is advancing a particular

134. See LAZARUS, supra note 1, at 419.
135. See, e.g., id. at 205-09 (criticizing McCleskey); id. at 364-69 (criticizing Roe).
136. 5 U.S. (I Cranch) 137 (1803).
139. LAZARUS, supra note 1, at 109.
view of what counts as appropriate legal argument, without ever defending this view.

Lazarus criticizes the Court for its occasional splintering and its willingness to produce decisions without a majority opinion, but he also criticizes the Court when Justices attempt to produce majority opinions by, for example, changing positions or circulating drafts to only some chambers. How much a Justice should compromise his or her views to produce a majority opinion is a fascinating question, but Lazarus does not address it. The propriety of internal lobbying also raises interesting issues, but Lazarus never develops or defends his standards with respect to that matter either.

Third, I strongly disagree with his repeated claim that the Court ignored or breached the wall that separates law and politics. As I have explained herein, after reading the book, I am left unsure about how the Court's actions are improper. Lazarus's claim is based on a particular conception about the relative proper roles of the Court (law) as compared to the legislature (politics). It is a charge that the Court is making value choices of the sort that more properly belong in the legislative process.

The Court, however, must make value choices in deciding constitutional cases. The difference between the Supreme Court and a legislature is not that only the latter makes value decisions. The difference is in how each body arrives at and justifies its conclusions.

The political process allows for direct lobbying and attempts to influence votes based on interest-group pressure. Vote trading is an accepted part of legislation. The legislature is never required to produce a written justification for its choices. In contrast, the judicial process eschews lobbying and insists that all arguments be presented in the highly formalized structure of briefs and oral arguments. The Supreme Court must explain all of its rulings in written opinions. In this sense, I believe that there is a difference between "law"—the Supreme Court's processes—and "politics"—the legislature's processes. Lazarus, however, finds no judicial improprieties whatsoever in this regard; there is not a single instance in his book of improper political influence within the Court.

Phrased slightly differently, the distinction between the Court and the legislatures lies in the procedures each follows, not in the substantive value choices each must make. Inescapably, constitutional law requires normative analysis about which values should be protected from majoritarian decisionmaking. Because the Constitution states values at an extremely high level of abstraction, and because there are no definitive sources for determining specific meanings, the Court must make value choices. These will always reflect the identity and ideology of the Justices. Justices Brennan and Scalia disagree not because one has a better understanding of constitutional law or an inherently better method of interpretation, but
because their values are so divergent. Ultimately, I believe that society is made better by having an institution like the Court, largely insulated from majoritarian pressures and political accountability, deciding which values are so important that they cannot be left to the political process.

Thus, attempting to separate law and politics, except in the procedural sense, is misguided. It is also destructive. The quest for value-neutral judging is disingenuous. During the Term that Lazarus clerked, the Court frequently proclaimed the need to avoid making value choices. For example, the Court concluded that to reject the Kentucky legislature’s choice to allow capital punishment for sixteen- and seventeen-year-olds would be to follow “the preferences of a majority of this Court” improperly and “to replace judges of the law with a committee of philosopher-kings.” In Michael H. v. Gerald D., Justice Scalia, writing for the plurality, said that recognizing the rights of unmarried fathers would make “the only limits to...judicial intervention become the predilections of those who happen at the time to be members of [the] Court.”

But in allowing teenagers to be executed and in denying the right of the biological father to visit his child, the Court made value judgments, no matter how much it pretended otherwise. It is hardly surprising that the cases were decided 5-4, with the five more conservative Justices in the majority and the four more liberal Justices dissenting. The Court is thus disingenuous when it declares that it is not making value choices. The more commentators invoke the distinction between law and politics, as Lazarus does, the more the Court is encouraged to hide these normative choices behind a misleading rhetoric of value neutrality.

Moreover, I fear that Lazarus’s use of “the rule of law” and his law-politics distinction fuels public misunderstanding about the Court and its role. It supports the simplistic notion that constitutional law is just there to be found and that value choices by the Court constitute undue judicial activism. The reality is that no matter what the Court does with regard to abortion, affirmative action, and the death penalty, it must necessarily make value choices, as is proper. Lazarus, however, never acknowledges this and therefore lends support to misguided attacks on the judiciary.

Finally, I disagree with Lazarus’s view that the Supreme Court is a fragile institution whose legitimacy can easily be lost. There is no evidence for Lazarus’s claim that the Court is an institution in danger of losing its credibility and compromising its role in American government. Despite all the events of the last decade, public respect for the Supreme Court remains high.

The institutional credibility of the Supreme Court, as with any institution, is a product of many factors and is not easily changed. As John Hart Ely explains:

"[T]he possibility of judicial emasculation by way of popular reaction against constitutional review by the courts has not in fact materialized in more than a century and a half of American experience." The warnings probably reached their peak during the Warren years; they were not notably heeded; yet nothing resembling destruction materialized. In fact, the Court's power continued to grow, and probably never has been greater than it has been over the past two decades.\(^{143}\)

There is just no reason to believe that anything Lazarus describes will significantly harm the Court's long-term institutional credibility.

IV. CONCLUSION

Like Lazarus, I am very critical of the Rehnquist Court. My criticisms, however, are for the substantive choices it has made in so many areas of constitutional law. The Court has dramatically narrowed the scope of some constitutional rights, such as the Free Exercise Clause;\(^{144}\) it has created seemingly insurmountable obstacles to achieving racial equality by crippling affirmative action;\(^{145}\) and it has greatly lessened protections for criminal defendants, especially in death penalty cases.\(^{146}\)

Lazarus, however, focuses not on the substantive problems with the Rehnquist Court, but on its internal procedures. Here he misses the mark. The internal machinations he describes seem relatively minor. The Court unfailingly operates without improper political influences and without ethical violations. Its closed chambers should be opened for public scrutiny, but what most needs exposure is the Rehnquist Court's practice of hiding its conservative value choices under the cloak of judicial neutrality. Criticizing the Rehnquist Court requires unmasking its value choices and explaining why these choices are wrong. I only wish that Edward Lazarus had done much more of this.


\(^{146}\) The post-McCleskey decisions, described by Lazarus in detail, are illustrative in this regard. See Lazarus, supra note 1, at 166-217.