

“Holy Shit, I’m Going to Write the Law of the Land”

EDWARD LAZARUS
CLOSED CHAMBERS
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Gideon Kanner

FOR ME AT LEAST, reading Edward Lazarus’ controversial book, widely promoted as a kiss ’n tell exposé of behind-the-scenes skullduggery at the U.S. Supreme Court, was sort of like going to see the *Titanic*. The Oscar-studded *Titanic* was supposed to be the movie to end all movies: a stirring tragedy, a touching story of young love, and a reenactment of a dramatic historic event that had captured and held public interest for decades. But in the event, it turned out to be more like watching *Joanie and Chachi Meet the Poseidon Adventure*. The insight into the roots of the *Titanic* tragedy was superficial and ten-

dentious, the main plot – if that is what it was – was a tale of two horny teenagers, and its depiction of turn-of-the-century society was pure agitprop. And if all that weren’t enough, the movie ended with the “message” that throwing away a treasure that might have been used to do much good, was a loving and noble thing. Still, the last part of the movie was indeed a spectacle that probably justified the price of my movie ticket.

Closed Chambers is sort of like that; it promises much but delivers little.¹ What it delivers is the author’s uncompromising liberal ideology that at its core refuses to confront the fact that

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¹ The dust jacket of Lazarus’ book modestly proclaims it to be “the first eyewitness account of the epic struggles inside the Supreme Court.” But the picture the book paints is not so much of epic struggles

the primary job of the Supreme Court is to resolve fairly issues tendered from competing points of view. But Lazarus presents the contest before the Court as largely one between the forces of goodness (read, liberalism), and those of darkness (read, conservatism). Yet before he is done, Lazarus also complains that the Court is given to reaching conclusions – at times by a razor-thin 5–4 vote – in a way that pays insufficient attention to collegiality among the Justices and to the losing side’s arguments. Given his view of the Court as an ideological forum, why is he complaining?

Much of the book’s factual content, far from being the revealing exposé it was touted to be, is a rehash of facts about the Court and its high-profile decisions that are well known, particularly to lawyers who have earned their quills. To be sure, Lazarus sprinkles his story with enough details, insider insights and occasional betrayals of confidences to make the stew piquant, but it’s hardly what you might call the stunning tell-all it was supposed to be. The notable exception is the story about Justice O’Connor changing her mind in conference with the other Justices, and then instructing her clerk to come up with something to justify her change of position – just the sort of story that is unverifiable, yet certain to feed the paranoia of Court bashers.

Most of Lazarus’ “exposés” seem rather paltry. Even one of his more eyebrow-raising stories, the one about the dreaded conservative clerks “spoon feeding” stuff to Justice Kennedy, fails to inform the reader to what extent, if any, Justice Kennedy swallowed it – a minor detail without which the story becomes little more

than a tale of youthful wishful thinking. His is mostly a saga of a “cabal” of right-wing clerks and their judicial masters who are out to trash constitutional jurisprudence and destroy America as we know it. The possibility that there might be merit to at least some of the conservative positions, that the liberal jurisprudence of the past half century may have gone a tad too far, or at least that the conservatives are advancing their positions in good faith and in the country’s perceived best interest, does not appear to penetrate Lazarus’ consciousness except on the very last page of his book, far too late to leaven the preceding 517 pages’ worth of liberal partisanship.²



Probably the most remarkable feature of *Closed Chambers* is that in spite of the hype surrounding it, it simply does not depict the work of the U.S. Supreme Court fairly. Woe betide the intelligent, English-speaking Martian who might wish to learn about earthling institutions by reading this book. He, she, or it (no sexist I, not even when it comes to Martians) would learn that there is a prestigious, tradition-laden judicial institution in Washington, D.C., called the United States Supreme Court that concerns itself with three subjects: the death penalty, the law of race and gender relations, and of course abortion. Apart from these topics – which are gone into in at times nauseating detail – Lazarus’ Supreme Court doesn’t do much of anything else. No antitrust decisions. No environmental law. No Fifth Amendment taking controversies.³ No visible

as it is of petty backbiting by ideologically driven clerks snarling at each other, behind the Justices’ backs.

2 If I were as nasty and vicious as the other conservatives depicted in Lazarus’ book, I might suspect that he was told by his editors to end the book on an even-handed note, and that this is what inspired his use of a Nathaniel Hawthorne quotation about the wisdom of considering the bona fides of competing points of view. But what do I know?

3 Because the law interpreting the Taking Clause of the Fifth Amendment happens to be of special interest to me (after all, somebody has to deal with that wretched intellectual mess), I note that the

trace of the “ripeness mess.” No procedural matters. No business regulation decisions. No administrative law. No interpretations of the contours of 42 U.S.C. § 1983. Our Martian would have to work through the book to page 282 before finding a clue that the U.S. Supreme Court does deal with other topics after all.

Lazarus tends to confirm Kenneth Starr’s charge made a while back in *The Wall Street Journal*, that Supreme Court clerks exercise an undue degree of influence in case selection (with their recommendations to grant or deny certiorari⁴), because they bring to bear on their case selections their own ideological predispositions that simply do not see as important controversies that may in fact have

an enormous impact on business practices affecting entire industries. Starr charges that they tend to concentrate on ideologically “sexy” issues and on familiar areas of the law that were stressed in their law school education. Starr’s view is reinforced by an insightful article by U.S. Circuit Judge Andrew J. Kleinfeld. He too takes note of the clerks’ undue influence and rampant politicization,⁵ and concludes that this growing phenomenon is attributable in large part to the recent sea change in the composition of law school faculties that increasingly stress philosophy and liberal ideology, and deem legal doctrine and its practical applications to be of lesser importance.⁶ David Margolick, the former law reporter for *The New York Times*, aptly captured this phenome-

word “takings” is mentioned in the book once – count ‘em, once – at p. 282 as part of the following sweeping sentence: “Although the Court was narrowly divided, and despite the liberals’ hope of an occasional defection of White, O’Connor, or Kennedy (depending on the issue), there was an overwhelming sense that from *Roe* to *Miranda* to affirmative action, the death penalty, free speech, separation of church and state, federal-state relations, separation of powers, and the ‘takings’ clause, no doctrine, no matter how well entrenched, was beyond repeal. Radical change seemed no more than one case – one cert. – away.”

Say what?! Isn’t Lazarus aware that the threatened “radical change” in inverse condemnation law was promoted not by conservatives but by liberals, starting with the influential 1973 book *THE TAKING ISSUE* by Fred Bosselman, David Callies and John Banta, who urged the overruling of Justice Holmes’ landmark opinion in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922)? Doesn’t he understand that when the conservative Supreme Court rejected these importunings and continued to adhere to the doctrinal principle of *Pennsylvania Coal* in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), and in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), it was rebuffing, not promoting, “radical change” in the interpretation of the Taking Clause?

4 This occurs by virtue of operations of the “cert pool.” Eight out of the nine justices (Justice Stevens is the lone holdout) designate a clerk who reviews a cert petition on behalf of all of them. Thus, what the Justices know about the case of the certiorari-seeking litigant is what that clerk tells them in his or her memo, and the clerk thus becomes the Court’s *de facto* gatekeeper. The Justices can, of course, review petitions themselves, and no doubt some do so in “blockbuster” cases. But the sheer number of cert petitions – 6,000 per year – makes certain that, even making allowances for the fact that most of these petitions are not certworthy, this can be at best a rare and sporadic event.

5 Andrew J. Kleinfeld, *Politicization: From Law School to the Courts*, *ACADEMIC QUESTIONS*, Winter 1993-94, at 9.

6 An interesting confessional confirmation of this perception came from Professor Peter Irons, director of the Earl Warren Bill of Rights Project at the University of California at San Diego, when he wrote that “people who teach civil rights (like me)” tend to limit their teaching emphasis to “First Amendment, criminal law, and due process and equal protection cases,” at the expense of other constitutional provisions. Michael M. Berger, *The Fifth Amendment: Now You See it, Now You Don’t*, *LOS ANGELES DAILY JOUR.*, Dec. 1, 1994, at 7.

non when he observed, after attending an AALS convention, that these days law professors would rather teach anything but law.

Lazarus thus accurately reflects the existing academic/judicial culture that increasingly sees the Supreme Court as an ideologically minded institution that prefers governance to dispute resolution. Here too, he is not alone in that view. As the late Professor Paul Bator critically put it, the Court no longer seems interested in serving consumers of the law by providing them with clear, usable guidelines for their conduct, and their lawyers with readily applicable doctrinal principles that can be reliably invoked in litigation.⁷



Lazarus' ideological slip is showing throughout the book. Nowhere more so than in his depiction of alliances among groups of Justices trying to work out a consensus on issues before the Court. Thus, when Lazarus tells the tale about Justice Stevens communicating privately with Justice O'Connor and securing her assent to his position, that is depicted as commendable collegiality. But when it comes to Chief Justice Rehnquist doing the same with Justices congenial to his views, Lazarus sees it as working "deceitfully and surreptitiously," no less, "to engineer [a] legal revolution in a secret caucus behind the backs of those Justices who would most strongly oppose his plan." Needless to say, Lazarus does not criticize the Warren Court for the legal revolution that it wrought. It all seems to depend on whose ideological ox winds up turning on the spit.

To Lazarus, the conservative clerks are not just bonded by a common albeit competing *Weltanschauung*; instead they are seen as evil and are consistently referred to as the "cabal" even though Lazarus acknowledges that this term was coined by the conservative clerks them-

selves in jest. To make matters worse, Lazarus concedes that the "libs," the liberal clerks, no less than the "cabalists" "were possessed of an attitude" of "overbearing self-righteousness." So what made them morally superior to the "cabalists"? Quote: "... the libs were not nearly so self-coordinated as the conservatives." Which is pretty much what Will Rogers said when he observed over a half-century ago that he was not a member of any organized political party, he was a Democrat. *Plus ça change, plus c'est la même chose.*

Of course, there is no way of knowing which parts of Lazarus' tales are accurate, which are juvenile boasting (by him, or the other clerks, or both), and which parts – life being what it is, and verification being impossible – might be outright fabrications. At least some of these stories have to be dubious hearsay (such as, to take an obvious example, what the Justices may have said to one another in conferences to which the clerks are not admitted).



But all these juvenile capers only lead to graver concerns. And it is for that reason that I prefer to look to objective facts that emerge from consideration of the Court's statistics. The grim fact is that for better or worse, whether "libs," "cabalists," or plain ol' vanilla-flavored good-guys, the clerks have become the indispensable intellectual sinews of the U.S. Supreme Court. Gone are the days when Justice Brandeis could accurately say that he and his colleagues enjoyed the respect they did because they were the only people in Washington who did their own work. What Lazarus depicts vividly and probably accurately, is quite another image – one of an intellectual equivalent of an assembly line tended by bright but immature and inexperienced youngsters in hot pursuit of their own

⁷ Paul Bator, *What's Wrong With the Supreme Court?*, 51 U. PITT. L. REV. 673, 697 (1990).

ideological agendas, and given to conspicuous displays of bad judgment in the process.⁸

Though nominally produced by Justices with the assistance of clerks working under their supervision, the sheer volume of the Court’s output suggests that the Justices, at least some of them, are by degrees being reduced to the role of editors of the clerks’ handiwork.⁹ The sheer bulk of the Supreme Court’s annual intake and output tends to support that thesis. Lazarus candidly recognizes the hazards in this practice, particularly when he rightly notes that when doctrinal difficulties arise in the decision making process, there is a world of difference between a court opinion that “won’t write,” and one that “won’t edit.” Worse, the inflow of cases can speed up unpredictably like the runaway cake-wrapping assembly line in the familiar “I Love Lucy” episode. One is entitled to wonder how the Justices, all of mature years, and as of the time Lazarus writes about, including three octogenarians, could bear up under that kind of workload. They can’t, and Lazarus says as much in his interview by the *National Law Journal*.¹⁰

At the time of Lazarus’ service, the Court was deciding on the merits some 150 cases per year, or three per calendar week, with opinions running to some 3000 pages per term. If you

consider the fact that no opinions are filed during the three months of the year when the Court is not in session, that the Justices also have to spend time hearing arguments, meeting to consider certiorari petitions, motions and other requests for relief, and attending administrative and ceremonial judicial functions at home and abroad, and that being human, they are entitled to vacations and to some time off for illnesses and various personal and social reasons, the number of decisions per available working week is more like four or five.

If a recitation of these self-evident facts does not quite convey to you the flavor of the burdens facing the Justices, you should try this exercise: every week, week in and week out, read four to five (a) lower court opinions reviewed by the Supreme Court, (b) the Supreme Court opinions disposing of each such matter, and (c) the briefs filed in the Supreme Court in connection with each such decision. No skimming and no cherry picking – you have to read ’em at random even if they deal with subjects alien to your practice. Your mission, should you choose to undertake it, would be to do so with such concentration and intellectual involvement as to enable you to say honestly at the end of each

8 I hope there can be no rational dispute when I conclude that fisticuffs over the Court’s work, that land the *dramatis personæ* in the Court fountain, cannot possibly be viewed as exercises of good judgment. Query why the participants in that display were not escorted to the Court’s door post haste. *O tempora, O mores!*

9 The danger in this practice was spotlighted and correctly forecast a quarter century ago by California Court of Appeal Justice, and later U.S.C. Law Professor, Robert S. Thompson in his article *Mitigating the Damage – One Judge and No Judge Opinions*, 50 CAL. ST. BAR JOUR. 476 (1975). For further discussion of judicial use and misuse of clerks in the California appellate courts, see Gideon Kanner, *Book Review (Manual on Appellate Court Opinions, by B.E. Witkin)*, 25 UCLA L. REV. 893, 894-900 (1978). At least at the state intermediate appellate level the Justices’ workload contains a large number of what a California jurist once called “junk appeals” – appeals that, though not frivolous, present no substantial legal issues, and can be quickly disposed of with minimal judicial involvement. See *id.* at 898, n. 23. That, of course, is not true of the U.S. Supreme Court’s cases, particularly those being considered on the merits.

10 “I do believe during the term I was there, justices frequently hadn’t had the opportunity to review the papers for emergency death stays and were dependent on clerk assessments. At times, some clerks abused that influence.” NATIONAL LAW JOURNAL, JUNE 1, 1998, at A10.

week that you truly understand the issues and the subtleties of the law expounded in each opinion. You think you could do it? If so, how many weeks do you think you could last at that pace? Now add one more factor: you don't get opinions in all those cases, in one out of nine (that's roughly one every three weeks) you get only the briefs and the opinions below. With the help of your clerk(s), it is now your job to create the missing opinion every other week or so and to be responsible for its content. Obviously, you will need to read at least some of the authorities cited in the briefs and in the opinion below, and coordinate the contents of your proposed opinions with eight other people who are rightly noted for possessing – shall we say? – substantial egos and strongly held views as to what you should say in your opinion. Naturally, even with your trusty clerks' assistance you have to write the lion's share of each of your own opinions' reasoning. Oh, and did I mention that as you do all that, you may also be inspired to say something by way of agreement or disagreement with the substance of the three or four opinions written by others and placed on your desk every week? And how about those thousands of cert memos that are piling up on your desk at a rate of more than twenty per day, every single day? Still think you could do it? Indefinitely? Perhaps, being the wonderful specimen you are, you could do it, but do you think that your septuagenarian senior partners could do it as well?

And that isn't all. Opinions are not filed at a uniform rate. Apart from the last-minute death penalty petitions that descend on the Court regularly but at unpredictable intervals

and preempt normal work, there is the notorious end-of-the-term crush when the clerks routinely “pull all-nighters” and the Court spews out opinions in rapid fire fashion. As Lazarus describes it, during the “dog days” of March and early April the clerks perform the following functions: drafting majority opinions, drafting dissents, drafting concurrences, writing bench memos, writing post-oral argument memos (which amend the views set forth in the bench memos), commenting on draft opinions, dissents and concurrences circulated by other Justices' chambers, recommending certiorari grants, and advising on emergency applications, often including last-minute requests for stays of execution. And the crunch worsens in May and June when the docket has to be cleared and opinions completed so they can be filed in all cases that were argued during the preceding part of the term.

Many of those last-minute efforts decide the most difficult cases on which a judicial consensus could not be worked out earlier in the term. Lazarus' depiction makes clear that changes in these opinions, some requiring substantial rewriting, occur down to the wire (in one case he describes, on 24-hours' notice). Thus, the crafting of their final, exact language takes place under hectic circumstances that are the antithesis of thoughtful reflection. As Lazarus put it in his *National Law Journal* interview: “Every word counts in a Supreme Court opinion, and too many of those words are clerk words.” He should have said “hastily written clerk words.” Not surprisingly, the end product can produce outright bewilderment.¹¹

It is at best unlikely, and probably impossible, for men and women of an age of Supreme

11 “[A]ll too often, when the Supreme Court decides a case, instability, uncertainty and confusion are not alleviated, but rather reinforced.” Bator, *supra*, n. 7, 51 U. PITT. L. REV. at 686. My personal favorite is the Court's out-of-the-blue reference to “distinct investment-backed expectations” (whose severe frustration by legislation may amount to a taking of property) that made its appearance in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 127 (1978). The Court has repeated that phrase or its variant “reasonable investment-backed profit expectations” (now known in the trade as RIBE) a number of times in later opinions, even though no one really understands what it means or how it

Court Justices to maintain such a backbreaking pace consistently.¹² The proverbial bottom line of it all is that even with proper clerical assistance it is unlikely that the Justices can produce 150 workmanlike, doctrinally consistent opinions per year, complete with dissents and concurrences. It is even less likely that they can do so with the degree of sophisticated involvement in their crafting, and with sensitivity to their legal and factual subtleties, and of their impact on the practices in the various fields of law under consideration, that their importance requires. Even at today’s pace of some 90 opinions per term, it’s still quite a task to do the job right. It is difficult to resist the conclusion that the bulk of the Court’s output (in all but choice of results and formulation of major principles) may not be in the Justices’ full control, and the clerks who produce the expositive parts of opinions, for all their booklearning smarts, simply lack the experience, the judgment, and the knowledge of the law’s nuts-and-bolts to produce a consistently competent product, particularly in areas of the law with which they are unfamiliar.¹³

As all practicing lawyers know, lower court judges confronted with legal issues want to be

cited, not to Supreme Court philosophy, but to its exposition of legal doctrine and to the specific language of rules that will enable them to address the legal issues before them correctly so they can bridge the gap between the facts of the case and its outcome. Yet, in many Supreme Court decisions such clear language is hard to come by. High court law may be contradictory, or consist of an invitation to engage in a multi-part balancing test that *de facto* enables trial judges to reach pretty much whatever results they want. And at the end of this road there lie cases in which the U.S. Supreme Court admits that it rules by making factual, *ad hoc* decisions.¹⁴ That may facilitate dispositions in particular cases but it does not enlighten other litigants, to say nothing of lower court judges. Not surprisingly, doctrinal incoherence is common and in some fields of law no one can really tell how the parties ought to conduct themselves in future transactions without having to go through years of costly *ad hoc* litigation in each dispute.

I recognize, of course, the possibility that Dirty Harry’s wisdom notwithstanding, the Justices are made of sterner stuff than I, and also that both Lazarus and his sources may

differs from the land-use legal concept of “vested rights.” For a humorous treatment of the subject see Bruce W. Burton, *Post-Lucas Regulatory Takings and the Supreme Court’s Riddle of the R.I.B.E.: Where No Mind Has Gone Before*, 25 U. TOLEDO L. REV. 155 (1994).

No one has yet improved on the observation of Dwight Merriam, a distinguished Connecticut land-use lawyer, who has opined that the appearance of a new phrase in a “big” U.S. Supreme Court land-use case means that each land-use lawyer will be able to buy a new car in the next three years.

¹² For whatever this may be worth, I look to my own experience. I have been an appellate lawyer for over 30 years and have throughout made my living writing legal prose to court-imposed deadlines. Though I harbor the conceit that my work is as good as it ever was (better perhaps because of the experience and the judgment engendered by it), there is simply no question that as a holder of a Medicare card, I now find that my output requires more time and effort to produce. I may lack the towering intellectual qualifications of Supreme Court Justices, but I can say without fear of rational contradiction that our respective intellectual and physical stamina cannot be all that different, “Whizzer” White’s impromptu basketball games notwithstanding. In short, we geezers (at least the lucky ones among us) may be pretty cool dudes mentally, but physically we are subject to Dirty Harry’s inexorable dictum that a man has got to know his limitations – and so does a woman.

¹³ For an exploration of some of the resulting gaffes, see Gideon Kanner, *Hunting the Snark, Not the Quark: Has the U.S. Supreme Court Been Competent in Its Effort to Formulate Coherent Regulatory Takings Law?* 30 THE URBAN LAWYER 307, 328-331, 344-345 (1998).

¹⁴ See *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

have deliberately or subconsciously inflated their roles in the Court's decision making process. That would be only human. It must be intoxicating for fledgling law school graduates to have United States Supreme Court Justices about to make an important decision that will affect the country for years to come, ask them to draft the opinion. The phrase "playing God" flows trippingly from one's pen at this point, and it's quite understandable that the young people in question – and even more mature mortals – would perceive their role in the enterprise of fashioning landmark Supreme Court opinions with an inflated sense of personal accomplishment. Bernard Witkin, California's late legal guru, once characterized the status of clerks involved in such enterprises as the Justices' junior partners, but partners nevertheless.

But even allowing for all that, there is enough evidence to suggest that the process is getting out of hand. The Court would be well advised to heed the counsel of Justice Scalia that to have a rule of law we must first have a law of rules.¹⁵ The law is in urgent need of being pruned, reconciled and systematized so that it becomes a more usable judicial product whose application will tend to reduce, not inspire, future litigation. The Court would benefit from an effort to return to the law's roots, and to embrace the process of judging as a means of resolving, rather than compounding, issues that bedevil parties to litigation.

Governance, the Court's evidently preferred mode of operation, is messy and has to be unprincipled at times, as Machiavelli taught us. That is why in a democratic society those who would govern are accountable to the electorate via the ballot box. Law, on the other hand, must be highly principled and consis-

tently applied if it is to enjoy citizens' respect – which in the long run is indispensable to the maintenance of the Court's prestige and of public perception of the legitimacy of its decision-making. This is not to say that the Court should try to return to some mythical "good old days" of merely interpreting, not making law, as conservative polemicists like to put it. It's just that the other extreme which now appears to hold sway is rapidly becoming even more undesirable. There comes a point beyond which a bad rule may be better than no rule at all. As Confucius put it: "If the judgments are not clear, the works are not accomplished. If the works are not accomplished, then rites and music do not flourish.^[16] If rites and music do not flourish, punishments are not equitable. If the punishments are not just, the people are at a complete loss."¹⁷

A complex society that for better or worse has chosen to be guided by a welter of complex laws and regulations, has no choice but to look to the judiciary for its laws' interpretation, and for practical guidance in their application. That judiciary's retreat from readily discernible and consistently applied legal doctrine, and its venture into governance with undue reliance on the intellectual contributions of immature but stridently partisan young people is not likely to achieve greatly by way of giving us either justice or good law. It is a process whose cost – social, political and economic – bids fair to exceed its benefits. Before we emulate the last scene in *Titanic* and sacrifice a priceless jewel that is the American legal system at its best, to contentious ideologies, we should at least think about it long and hard and ask ourselves whether making such a momentous decision for a democratic society is a legitimate function of the courts. 

¹⁵ Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

¹⁶ May the record show that by thus invoking Confucius' ancient wisdom, I do not mean to suggest that American judges are responsible for rock 'n roll.

¹⁷ Richard Wilhelm, *CONFUCIUS AND CONFUCIANISM* (Harcourt Brace 1931), at 50-51.