IS EATING PEOPLE WRONG?: GREAT LEGAL CASES AND HOW THEY SHAPED THE WORLD

BY ALLAN C. HUTCHINSON

Cambridge University Press, New York, NY, 2011. 247 pages, $97.00 (cloth), $27.99 (paper).

Reviewed by Jon M. Sands

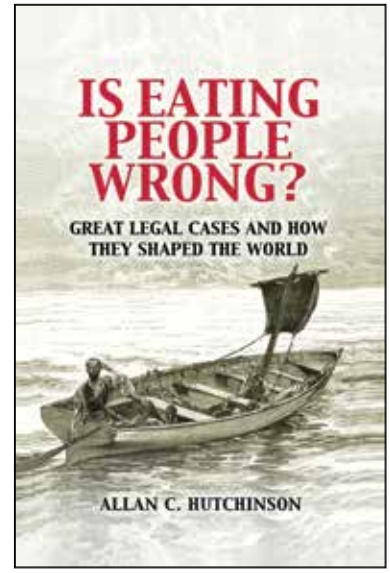
Let's start with the title. You have to admit it is catchy and gives you something to chew on, even if it is somewhat grisly. The subtitle, though, promises a bit more than one can swallow. Allan Hutchison sets out to tell what he considers eight interesting stories of cases that, in his view, changed the law. Whether they actually "shaped the world" is debatable. Hutchinson does tell captivating tales, covering matters arising in the United States, Great Britain, Canada, and Australia, and is to be commended for such a wide global sampling. Readers planning to go to law school may believe that interesting cases like these are what legal education is about. If so, they will be sadly disappointed.

Hutchinson believes that these cases exemplify the evolution of the common law. He believes that too many people regard law "as an impenetrable thicket of rules and principles." To Hutchinson, the law is a "living, breathing, and down-the-street experience." The beauty of the cases he describes is that they present litigants as flesh-and-blood people. These cases revel in the sheer happenstance, stubbornness, desperation, and biases that are at play in any case. Hutchinson acknowledges that the term "great" as applied to legal cases is hard to define, having to do with a combination of timing, impact, publicity, legal acumen, and the luck of getting cited and taught.

The first case, *R v. Dudley and Stephens*, gives the book its title. In 1884, the yacht *Mignonette* set sail from England to Australia, with a crew of four. A fierce storm caused a sudden abandonment of the ship northwest of the Cape of Good Hope. The foursome found themselves in a lifeboat, with two tins of turnips and no water. Three weeks later, they were near death. When the cabin boy, Richard Parker, fell into a coma, the other three murdered and ate him to survive. When miraculously rescued and returned to England, the survivors freely told what had happened. They thought they had acted according to the law of the sea, and of necessity, but the local police chief thought differently. Of course they were all seeking something. The ship officers, Tom Dudley and Edwin Stephens, reveled in publicity; the police chief wanted advancement. Hutchinson recounts the legal maneuverings, including a judicial "fix" to ensure conviction, death sentences (their just desserts?), and then commutation and release after six months. But the courts, faced with the argument of necessity, retreated from the implication that the ends justified the means.

Nonetheless, the defense arises again and again, recently in mercy killings. As with all the cases he describes, Hutchinson gives the back stories, pens portraits of the litigants and lawyers and judges, reports what happens afterwards (always fascinating), and adds interesting connections. For example, Edgar Allan Poe, in his only novel, *The Narrative of Arthur Gordon Pym*, published in 1838, almost 50 years before *R v. Dudley and Stephens*, tells of a shipwreck with three survivors in a lifeboat, one of whom sacrifices himself so the others might live. The fictional name of the sailor who sacrificed himself: Richard Parker. The name appears again in *Life of Pi*, the recent novel and movie about a shipwrecked boy in a lifeboat shared with a Bengal tiger. The tiger's name is Richard Parker.[1]

In addition to the onboard dining in the first case, eating and drinking make appearances in other cases, perhaps not surprisingly given the necessity of those activities. *Roncarelli v. Duplessis* involved a liquor license, and it stands for the limitations on the arbitrary power of government officials. Quebec in 1946 was stridently Francophile and suspicious of anything that threatened to undermine the province's solidarity. To the premier of Quebec, Jehovah's Witnesses' proselytizing seemed such a threat. When a restaurateur, who was a Jehovah's Witness, bailed out fellow believers upon their arrest, he found his liquor license revoked. The Canadian high court eventually held against the arbitrary nature of the premier's action, although the



judges themselves split according to their background.

When I was in private practice, I defended a case against a plaintiff who alleged finding a mouse in a bottle of soda. I know now that the precedent might have been a snail who allegedly crawled out of a ginger beer bottle. This happened in 1928 to a woman in a Glasgow pub, causing great distress. The case concerned duties, of course, but, before it was resolved, it also raised questions of burdens of proof, procedure, limitations, possibly faulty advice from lawyers and accountants, the mental condition of the plaintiff, and the fiscal health of the bottler. Whether there was an actual snail remains in dispute.

Several cases in the book deal with property rights. We are treated to accounts of the ownership of dead foxes amidst live disputes about property on Long Island. We also learn about the efforts of an Australian aboriginal named Eddie Mabo who sought to regain the native people's title to small islands in the Torres Strait off the north coast. In 1992, after a 10-year battle, the Australian high court held that, even though islanders had been brought under the general sovereignty of Australia, they were entitled to possess and occupy the land under their customary scheme of ownership and inheritance. Alas, as Hutchison explains, the broad right, hailed by other native peoples throughout the world, has been cut

back by enough exceptions to severely limit its reach. Nations cannot be returning prime real estate, after all.

Hutchison discusses two cases under the U.S. Constitution: *Brown v. Board of Education* and *Miranda v. Arizona*. Enough has been written on these cases so that Hutchison can add nothing new, and he does not discuss subsequent cases that have altered the landscape. In any event, these two cases are not in the common law tradition that Hutchinson claims to be writing about. He would have done better to choose other cases that are not as dependent on historical, political, and procedural contexts.

The English case *Hadley v. Baxendale*, a favorite of contracts law professors, works better. A mill needed a crank shift, and a delivery service failed to transport it in a timely manner. Contract formation, foreseeability, and damages are part of the legal grind. Hutchinson here, as with all the cases, proves an adept storyteller. One may wonder whether this case is as important as he believes, but it is hard not to be interested in its outcome.

This brings us to the question of whether we are at the end of the common law. Some may view our age as one in which statutes, rules and regulations, and administrative orders have supplanted the use of cases to develop principles and adapt law to the present. They may cheer this development, eschewing activist courts and creative litigation. But, in trying to reach results deemed fair and just, courts cannot avoid being concerned with the facts of individual cases. Great cases always await us. ⊙

Jon M. Sands is the federal public defender for the District of Arizona.

Endnote

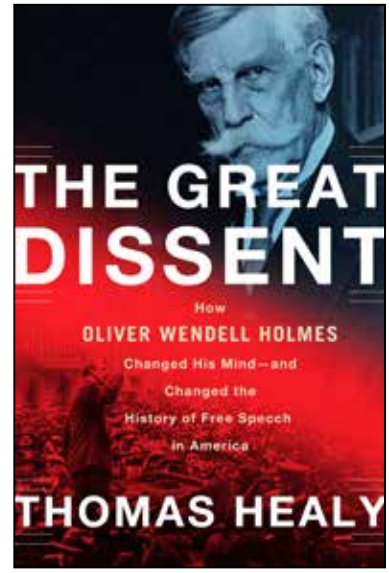
[1]Law students and scholars will recognize this case in the legal literature. *See*, *e.g.*, Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 Harv. L. Rev. 616 (1949); Paul Butler, Alan Dershowitz, Frank Easterbrook, Alex Kozinski, Cass Sunstein, Robin West, *The Case of the Speluncean Explorers Revisited*, 112 Harv. L. Rev. 1876 (1999); Peter Suber, The Case of the Speluncean Explorers: Nine New Opinions (1998).

THE GREAT DISSENT: HOW OLIVER WENDELL HOLMES CHANGED HIS MIND—AND CHANGED THE HISTORY OF FREE SPEECH IN AMERICA

BY THOMAS HEALY

Metropolitan Books, Henry Holt and Company, New York, NY, 2013. 312 pages, $28.00.

Reviewed by Henry Cohen



In *Schenck v. United States*, 249 U.S. 47 (1919), Charles Schenck, the general secretary of the Socialist Party of Philadelphia, had been convicted of violating the Espionage Act of 1917 by circulating a leaflet opposing the draft. In a unanimous opinion upholding the conviction, Justice Oliver Wendell Holmes uttered two of the most famous phrases in any judicial opinion: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic," and the government may punish speech only when it creates "a clear and present danger."

But distributing Schenck's leaflet was not comparable to falsely shouting fire in a theatre: It presented no clear and present danger of prompting any marked draft resistance. So how could Holmes have been in the majority? I had wondered whether Holmes had wanted to overturn the conviction, but, thinking that a dissent would be wasted, had offered to write the majority opinion. That way, he could strengthen the First Amendment by creating the clear and present danger test, even as he sent Schenck to prison. In *The Great Dissent: How Oliver Wendell Holmes Changed His Mind—and Changed the History of Free Speech in America*, Thomas Healy gives me reason to believe that my speculation was false.

For one thing, Healy writes that, after learning that Holmes sided with the government, the chief justice assigned him the opinion. For another, a week later, the Court issued two more majority opinions by Holmes that upheld two more convictions under the Espionage Act of 1917. These convictions were of two other men (Jacob Frohwerk and Eugene Debs) who, like Schenck, had engaged in what today would clearly be protected speech. In these two cases, furthermore, Holmes didn't even mention the words "clear and present danger." Healy suggests that "Holmes had used the phrase casually, without intending to radically change the law. ... Indeed, there was reason to think he was not introducing a new test at all but was simply using a different formula to describe the old test."

It was eight months later, in his dissent in *Abrams v. United States*, 250 U.S. 616 (1919), that Holmes, in the words of the subtitle of *The Great Dissent*, "changed his mind—and changed the history of free speech in America." This was the great dissent to which the title of Healy's book refers. Of course, being a dissent, it didn't change the history of free speech immediately, but, like Holmes' other great dissent, in *Lochner*, it later became the law.

Abrams was the appeal of a Russian immigrant who had distributed two leaflets (one in English and one in Yiddish) that condemned the United States' intervention in Russia after the 1917 revolution. Abrams believed that the intervention was an attempt to destroy the fledgling Bolshevik government, but President Wilson said that it was part of the war against Germany. Abrams was convicted and sentenced to 20 years in prison for violating the 1918 Sedition Act, which made it a crime, while the United States was at war, to utter any "disloyal, profane, scurrilous, or abusive language about the form of government of the United States" (a subject the leaflets had not addressed). Holmes' dissent in *Abrams* is famous for this passage:

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of

> truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution. ... I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.

Holmes had become serious about the clear and present danger test, and Healy explains how his thinking had developed during the eight months between *Schenck* and *Abrams*.

Healy devotes only one 12-page chapter—chapter 13 of 16—to the dissent itself. The 12 chapters that precede it set the stage for it, and the three that follow it describe its aftermath. But the material before and after chapter 13 does much more than that. It describes aspects of Holmes' life and times—his friendships with Harold Laski, Felix Frankfurter, and Louis Brandeis, as well as their careers, opinions, and influence on Holmes' thinking about freedom of speech; Holmes' exposure to the free-speech ideas of Learned Hand and Zechariah Chafee Jr.; the labor strife of the era; the flu pandemic of 1918; and many other things. Healy devotes four pages to an extramarital affair that Holmes had with a married woman in England. Holmes spent time with her during two visits he made to England while her husband was away, but most of their romance was necessarily epistolary. It is fun to read Holmes' intimate remarks to her. ("Oh my dear what joy it is to feel the inner chamber of one's soul open for the other to walk in and out at will. ... Do not cut it off because of a little salt water.") Therefore, I won't ask how these four pages help us understand how Holmes changed his mind about free speech.

The Great Dissent is a popular history, not a scholarly book. This is not to say that Healy's legal analysis is other than insightful, but it constitutes only part of the book. Healy, who is a professor of law at Seton Hall Law School, was a Supreme Court correspondent for the *Baltimore Sun*, and he writes in a fast-paced journalistic style. Early in the book, he seems to think that he is writing a novel, as we read, "One can imagine the arguments that must have played out in his head as the train continued north through the mill towns of the Merrimack Valley, then veered west past the deep waters of Sunapee Lake on its way to Cornish." Healy informs us that, at Holmes' summer home in Beverly Farms, Mass., to which he was headed on the train, "[h]oneysuckle and woodbine shaded the porch, roses and geraniums ran riot in the garden, and tall spikes of purple delphiniums clustered by the split-rail fence." Especially annoying is this sentence: "As the sloops and schooners drifted past and a foghorn wailed in the distance, Holmes took out a thin sheaf of paper. ..." Does Healy have evidence that a foghorn wailed at that particular moment? Perhaps even worse is this: Holmes "glanced at the clock on the mantle, which read 11:35. ... Sighing with regret, he picked up the latest letter from Pollock. ..." How does Healy know that Holmes didn't stare intently at the clock, and how does he know why Holmes sighed? I should give Healy the benefit of the doubt and not assume that he is fictionalizing, but his endnotes do not answer these questions. They do, however, include references to *Yankee from Olympus*, which is a fictionalized biography of Holmes.

One point in Healy's discussion of *Abrams* made me uneasy. In 1919, the Boston police went out on strike, and Laski expressed his view that, despite being public employees, the police had a right to unionize and strike. This led to calls for Laski to be fired from his position as a professor of government at Harvard. Laski wrote Holmes a letter asking Holmes to use his influence to prevent his firing. "At almost the exact same moment" that Holmes received the letter, Healy states, "he began writing his dissent in *Abrams*. ...The face of free speech was no longer Eugene Debs, the dangerous socialist agitator. It was his good friend Harold Laski, and Holmes's views shifted accordingly—and dramatically." Although this is an interesting conjecture on Healy's part, he offers no evidence that the fact that Laski was in trouble for his speech played a role in Holmes' changing his mind about the First Amendment. It may not be solely with respect to foghorns that Healy is overly inventive. Nevertheless, *The Great Dissent* is well worth your time. ⊙

Henry Cohen is the book review editor of The Federal Lawyer.

ACT OF CONGRESS: HOW AMERICA'S ESSENTIAL INSTITUTION WORKS, AND HOW IT DOESN'T

BY ROBERT G. KAISER

Alfred A. Knopf, New York, NY, 2013. 417 pages, $27.95.

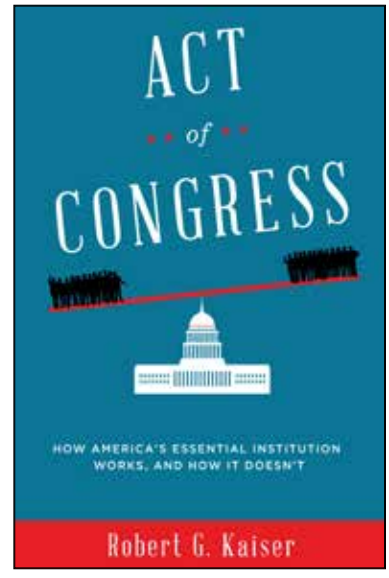
Reviewed by David Heymsfeld

Since 2008, the U.S. Congress has been torn by partisan strife, leaving it gridlocked and rarely able to pass legislation on important issues. A mock headline in *The Onion* says it all: "Congress Fiercely Divided Over Completely Blank Bill That Says and Does Nothing" (July 25, 2013).

One of the few bills to be passed during the years of gridlock is the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203 (2010). Dodd-Frank made significant reforms in the regulation of financial services to protect consumers and prevent a repeat of the 2008 financial crisis.

In *Act of Congress*, Robert Kaiser gives us a detailed and enlightening view of how Dodd-Frank made it through the congressional maze. He presents a fly-on-the-wall picture of how the process really worked—who the important players were inside and outside of Congress, what the key strategic decisions were, what happened at the important public and non-public meetings, and what deals were made with members of Congress and outside groups.

Kaiser has been able to give us a complete picture, because the major leaders of the bill, Sen. Chris Dodd (D-Conn.) and Rep. Barney Frank (D-Mass.), agreed at the outset to give Kaiser access to their thinking as the process unfolded and to disclose the non-public parts



of the process, including the important work of congressional staff. As a result of his access and the insights he developed over his long career covering Capitol Hill for the *Washington Post*, Kaiser has produced a work that compares favorably with Robert Caro's classic accounts of Lyndon Johnson's legislative leadership as Senate majority leader and President.

Kaiser also considers the broader issues of the causes of the recent gridlock, and of what the passage of Dodd-Frank tells us about the possibility of enacting major legislation if gridlock continues. Was Dodd-Frank an anomaly, or does it suggest a path to a more productive Congress?

Kaiser gives much of the credit for the passage of Dodd-Frank to the two chairmen: Chris Dodd, chairman of the Senate Committee on Banking, Housing and Urban Affairs, and Barney Frank, chairman of the House Committee on Financial Services. These are the committees with primary jurisdiction over financial services. The challenge that Dodd and Frank faced was the same as that faced by leaders for any bill in any Congress: they needed to develop a bill that would gain the support of a majority in the House, and, because of the possibility of a filibuster, of 60 of the 100 senators.

The environment in which Dodd and Frank were working had some positive and some negative features. On the plus side was public opinion. Outrage over the financial crisis of 2008 created strong support for legislation that would punish Wall Street and prevent crashes in the future.

On the negative side, Dodd and Frank could not expect any significant support from Republicans, who showed little interest in working with the Obama administration or congressional Democrats to develop bipartisan compromise legislation. Kaiser demonstrates that, as Dodd-Frank went forward, the focus of the Republican leadership was on messaging—on opposing the legislation developed by the administration and congressional Democrats by evocative slogans that would play well with the Republican voter base. For example, in debates, Republicans constantly called the Dodd-Frank bill a program for bailing out big Wall Street banks, without being able to point to any provision that did that.

As an aside, I can confirm from personal experience the dramatic increase in partisanship in the Congress. When I joined the professional staff of the House Transportation Committee in 1975, all major transportation bills were developed on a bipartisan basis. Compromises were reached on issues about which the two parties differed, such as those concerning labor, safety, and the environment. The Democratic and Republican professional staffs not only worked together, but they socialized. Often a committee member did not know which party a staff member worked for.

By the 2000s, however, even the relatively popular and non-controversial transportation bills (the catch phrase was "there is no such thing as a Democratic or Republican bridge") became the victim of increasing partisanship. This partisanship extended to the staff level, and there was little interaction across the aisle, outside of formal meetings.

When authorizations for the major highway and transit programs expired in 2009, there were no bipartisan discussions about a new bill. For the first time, the House was unable to pass its own bill. The programs were in limbo for three years, during which they had to be temporarily extended nine times. Fortunately, the Senate was able to pass a bipartisan bill, which became the basis for a reauthorization in 2012.

Kaiser believes the primary explanation for the growth in partisanship and gridlock is that, over the past 30 years, there has been a basic change in the perception that members of Congress and their parties have of their roles. Thirty years ago, more members cared about developing public policy and governing. They were willing to work on a bipartisan basis to solve complex problems. Since then, the emphasis has shifted, with members now knowing and caring less about policy issues than about politics. The primary focus is on developing debating points and procedural tactics that discredit the opposition party.

Kaiser believes that a number of factors have contributed to the replacement of policy by politics and the resulting difficulties in developing bipartisan compromises. First, ever since the Gingrich revolution of 1996, control of the House or Senate has been in question in most congressional elections. This fact creates incentives for members and their parties to demagogue, rather than to develop bills that might bring credit to the opposition.

Compromise has also become more difficult because of the loss of moderates in both parties. Until recently, there were some relatively liberal Republicans from the Northeast and some relatively conservative Democrats from the South. Now, virtually every Democrat is more liberal than the most liberal Republican, and every Republican more conservative than the most conservative Democrat.

In addition, members on both sides have strong personal incentives against supporting centrist compromises. Redistricting has made most House seats safe for one party or the other. In these districts, compromises with the other party will not help a candidate win a general election, and a member who *has* compromised across the aisle may end up in a primary challenge and lose the nomination to a candidate who promises to stick to the orthodoxy of the party.

In the Senate, compromise is also frustrated by Senate procedural rules that give the minority party the power to block or delay most Senate actions so long as they have more than 40 of the 100 votes.

Finally, members find it more difficult to find the time to master policy and to negotiate compromises when, because of the increasing costs of campaigns, they have to devote a substantial portion of their time and energy to fundraising. Kaiser reports that Senator Dodd's first Senate campaign in 1980 cost $1 million. To run a campaign for reelection in 2012 would have required about $5 million. The passage of Dodd-Frank in this difficult environment is a tribute to the legislative leadership of Sen. Chris Dodd and Rep. Barney Frank.

With the Democrats in control of the House, and Republican cooperation unlikely, Frank's task was to keep the Democrats together, by no means a slam-dunk given the diversity in the party and the powerful outside interests that opposed many reforms. The Democrats were divided. A majority were traditional liberals, who favored maximum regulation and consumer protection, and believed that if Wall Street hated a proposal it must be good. But not all Democrats were liberals. The 2006 and 2008 elections in which the Democrats took control of the House created a strong block of Democrats from more conservative districts. Of the 41 Democrats on Frank's committee, 6 were conservative "Blue Dogs," and 16 were New Democratic Coalition centrists. These members, known to the staff as "the News and the Blues," were particularly concerned about the costs of regulation to community banks and other local institutions.

Frank began by cultivating the Democrats on his committee. He attended his members' fundraisers, which was important in giving

potential contributors the sense that the member was close to the center of power. In addition, even though the bill would be largely developed by Frank and his staff, Frank formed working groups of committee members interested in particular issues, thereby giving them an opportunity for input.

In the details of the bill, Frank managed to walk a tightrope and produce a bill that was strong enough for liberals to feel that Wall Street had been punished, but had enough concessions for conservatives to feel that the bill was not too harsh to community banks and other local institutions. Frank correctly perceived that in the post-crisis climate, Wall Street and the large banks would not have power to kill a bill, but small community banks and other institutions, located in every congressional district, would. He managed to develop a package that kept the small bank trade association relatively neutral. The concessions made for community banks and other local institutions included limiting the powers of the new Consumer Financial Protection Agency in auditing and taking enforcement action against small banks, lowering the contributions of small banks to the Federal Deposit Insurance Corporation, and exempting auto dealer loans from new regulations under the act. There were also limitations to satisfy the large national banks, including limiting the powers of states to regulate them.

Frank kept the liberals on board by arguing that in view of public outrage it was critical to the Democrats' reelection prospects to pass a bill.

In the end, Frank was successful. His bill passed the House by a vote of 223 to 202. All the votes for the bill came from Democrats. Only 27 Democrats voted against it.

On the Senate side, Dodd's task was somewhat different. Even if he held all Democrats, he could not move a bill without some Republican support. Although Democrats had a majority of 59 to 41, they needed 60 votes to break a possible filibuster. Dodd worked long and hard to get Republican support. There were extensive negotiations with Sen. Richard Shelby (R-Ala.), the ranking Republican on Dodd's committee. Shelby vacillated. After negotiations in which he suggested a willingness to compromise, he withdrew from further discussions and opposed the bill. Kaiser believes that ultimately Shelby was unwilling to defy his party's leadership and jeopardize his chances to become the next chairman of the Appropriations Committee. However, because the bill included some provisions negotiated with Shelby, he and other Republicans were more cooperative than they might have been in letting the bill go forward.

Dodd had reached agreements with Shelby on some issues despite resistance from Dodd's own leadership to making any deal with Shelby. Dodd attributed this resistance to a belief on the part of the leadership that it would be better for the Democrats to have a fight than a bill.

Ultimately, Dodd succeeded in getting support from the three most moderate Republicans: the two senators from Maine, Olympia Snowe and Susan Collins; and Scott Brown, Ted Kennedy's successor, who would have to stand for reelection in the liberal state of Massachusetts in two years. These votes, combined with votes from almost all Democrats (which required complex deals on some arcane issues), gave Dodd the 60 votes he needed.

In recounting the passage of Dodd-Frank, Kaiser provides some interesting insights on the power structure within the Congress. He concludes that for major bills, such as Dodd-Frank, most members of the House and Senate, including members of the committee that develops the bill, have little understanding of the bill, except for provisions in which they have a particular interest. The chairman of the committee is often the only member who has a broad understanding of it.

Members of the committee handling a bill, other than the chairman, have much less influence on the bill than does the professional staff. The staff develops the actual bill and does most of the work of negotiating with outside groups and individual members and committees involved in the process. Even chairmen as knowledgeable as Dodd and Frank delegate extensively to the staff, and have much less knowledge than do staff members of what the bill does. Kaiser quotes Ted Kennedy as having said that "ninety-five percent of the nitty-gritty work of drafting [bills] and negotiating [their final form] is now done by staff. That ... marks an enormous shift of responsibility over the past forty or fifty years."

As a former staffer, I am delighted with Kaiser's flattering picture of the staff's competence and importance. But implicit in Kaiser's recounting of Dodd-Frank are the limitations of the staff's role. The critical decisions on timing and substance were made by Dodd and Frank themselves, and their access to other members and the respect in which they were held enabled them to reach agreements that staff could not. From my experience, members have much more access than does staff to other members for informal discussions. Many an important understanding has been reached when members of the House run into each other in the members-only House gym. This access is so valuable that, after Rahm Emanuel (D-Ill.) left the House to become President Obama's chief of staff, he maintained his membership in the gym and frequently used it. Members also have a natural bond and respect for one another that comes from their shared experiences, such as standing for reelection and following a grueling travel schedule.

Another good insight of Kaiser's is that legislative issues are sometimes really over which committee will get jurisdiction of a program. With Dodd-Frank, there was great concern over whether jurisdiction over derivatives would remain with the Commodity Futures Trading Commission or be transferred to the Securities and Exchange Commission. If jurisdiction remained with the CFTC, then the House and Senate Committees on Agriculture would continue to oversee the program and members of those committees would continue to get campaign contributions from financial interests that traded in commodity futures and other derivatives. In 2006 through 2008, members of the House Agriculture Committee received $8.7 million in campaign contributions from financial interests compared to $7 million from agribusiness. Not surprisingly, members of the House Agriculture Committee wanted to keep their jurisdiction over derivatives.

In my service with the House Transportation Committee, I witnessed many similar battles, including debates over whether transportation agencies or the Department of Homeland Security would have responsibility for transportation security issues. These decisions would determine whether the Transportation Committee or the Homeland Security Committee would have jurisdiction over the issues and agencies involved.

Returning to the basic question of whether the Dodd-Frank success was an anomaly or whether it suggests a new path to legislating in a gridlocked Congress, Kaiser concludes that Dodd-Frank could be passed only because of extreme circumstances that

are unlikely to recur. There was a strong public demand for action, enough one-party power to enact a bill, and inspired leadership in House and Senate. As Kaiser puts it, Dodd-Frank was enacted because of a "coincidence of historical and political circumstances [that] might never have happened and might not happen again for years. The fact that they all came together this once did not repair our Congress whose many shortcomings appeared again and again during this story."

In the short run at least, Kaiser seems correct in concluding that the historical and political circumstances that permitted the passage of Dodd-Frank are not likely to recur. Indeed, since the passage of Dodd-Frank, changes have occurred in Congress that would make it even more difficult to pass major legislation. Dodd-Frank could be passed because Democrats controlled the House and had close to 60 votes in the Senate. Now, control of the Congress is more equally divided between the two parties, as the Republicans gained control of the House in 2010 and stayed in control in 2012. Any major legislation passed by the Republican House is likely to be unacceptable to the Democratic-controlled Senate, in which the Republicans hold only 46 seats.

Future elections could lead to changes in the control of the House and Senate. But whatever the political alignment, many of Kaiser's observations about how Congress functions are likely to still be relevant and helpful in understanding the Congress. One important thing to take from *Act of Congress* is that, whatever the environment in the future, the chances for legislation will be enhanced if it has managers with the knowledge and political skills of Senator Dodd and Congressman Frank. ⊙

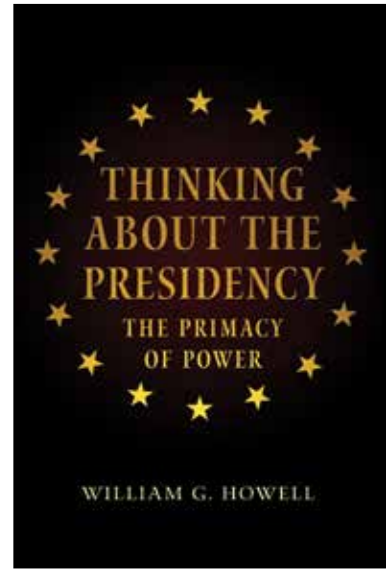
David Heymsfeld retired from the federal service in 2011 after a long career that included service as staff director of the House Committee on Transportation and Infrastructure. He is now a policy advisor to nonprofit organizations.

THINKING ABOUT THE PRESIDENCY: THE PRIMACY OF POWER

BY WILLIAM G. HOWELL

Princeton University Press, Princeton, NJ, 2013. 143 pages, $22.95.

Reviewed by Louis Fisher



Thinking About the Presidency: The Primacy of Power analyzes how Presidents attempt to use political power for public and personal purposes. Although the cover of the book lists only William G. Howell as author, the title page states: "William G. Howell With David Milton Brent," and the preface uses "we." Therefore, instead of referring to Howell alone, I will refer to "the authors."

The preface begins: "Whereas David Mayhew famously argued that members of Congress care first and foremost about their electoral fortunes, in this short book, we argue that presidents care about power: about acquiring it, protecting it, and expanding it." Of course, Presidents also care about electoral fortunes. Being elected is a necessary step to exercising power. Howell and Brent claim there is something distinctive about a presidential commitment to power: "While individual presidents obviously hold many other concerns dear (an interest in shaping policy, building a legacy, strengthening their party, among other things), the primacy of power considerations sets presidents apart from all other political actors." Why is that so? Members of Congress are committed to attaining and using power, both for their own political ends and to satisfy the needs of their districts and states. As the authors observe: "There are plenty of things about Congress that cannot be readily explained by reference to its members' concerns about reelection." Federal judges also have a commitment to power, which they exercise in shaping constitutional values and monitoring the legality of presidential actions and legislative policy.

The authors explain that their book "should not be read as either an attack or defense of a bold, empowered presidency." The position of the book on that fundamental issue is not entirely clear, but primarily it advocates unilateral presidential action and criticizes Presidents who fail to act. For example: "In every policy domain, presidents must not only demonstrate involvement, they must act—and they must do so for all to see, visibly, forthrightly, and expediently. Deliberation must not substitute for action. Presidents are free to think and talk, but they absolutely must do." The public demands "a commander in chief, not a manager in chief," and for that reason such Presidents as Jimmy Carter or Dwight Eisenhower "cannot expect to keep company with the greats."

The prescription by Howell and Brent is far too broad. Presidential greatness is not measured solely by action over inaction. One of Carter's first initiatives was to eliminate from his budget a number of water projects, highly important to Democrats and Republicans, and later to veto an appropriations bill because it contained what he considered wasteful water projects. His purpose was to demonstrate to the public his commitment to budget constraint, but he paid a high political price for alienating lawmakers he needed for his legislative program. He admits in his memoirs that the battle over water projects "left deep scars." As another downside of activity, Carter also realized that he sent far too many legislative proposals to Congress. Presidential action must be guided by judgment and understanding. Carter had little of either. He concluded in his memoirs that it would have been "advisable to have introduced our legislation in much more careful phases—not in such a rush." As he noted, his relations with Congress "would have been smoother and the image of undue haste and confusion could have been avoided."

It is also important to appreciate the value of *inaction*. In 1954, President Eisenhower was under pressure to intervene in Indochina to save beleaguered French troops. He refused to act unilaterally. He told reporters at a news conference: "There is going to be no involvement of America in war unless it

is the result of the constitutional process that is placed upon Congress to declare it. Now, let us have that clear; and that is the answer." Eisenhower told Secretary of State John Foster Dulles that, in "the absence of some kind of arrangement getting support of Congress," it "would be completely unconstitutional & indefensible" to give any assistance to the French.

Are Howell and Brent critical of Eisenhower's choice? They write: "The president's actions also must be decisive and, whenever possible, swift. The less light that shines between an observed challenge and the president's response, the better. Equivocation, particularly in the face of crisis, will never do." In Eisenhower's case, he was decisive and swift: for inaction. In some circumstances, inaction is much preferred to action.

Elsewhere in the book, the authors specifically criticize Presidents who decline to use power available to them. In a section called "Why Libertarians Make Bad Presidents," Howell and Brent define libertarians as those who believe "in constitutionally limited government" and "deeply distrust centralized, unchecked authority." Eisenhower would fall in that category. The authors acknowledge it might be right "to see virtue in respecting constitutional strictures and, when appropriate, relinquishing power." However, they add: "But when it comes to executive politics, libertarian entreaties badly miss the mark. In today's politics, presidents can ill afford to repudiate any power that might enable them to address the onslaught of expectations put before them." If they hesitate, "they suffer mightily for it." To the authors, the framers "did not place any faith in the possibility that an appropriate balance of powers would be achieved through presidential self-restraint. Neither should we."

Howell and Brent provide no citations to support that judgment. It is difficult to think of a single framer who would not have supported a President's decision to refuse to act when it would violate the Constitution and do damage to the nation. Anyone comparing Dwight Eisenhower's inaction in 1954 with Lyndon Johnson's decision in early 1965 to escalate the war in Vietnam would applaud Eisenhower and condemn Johnson. For what purpose do Howell and Brent uniformly champion presidential action over inaction?

Later in the book, they write: "Though politically naïve in their ambition, advocates of a more limited U.S. presidency may nonetheless hold some sway. Presidents, after all, do not usually flaunt their power. Occasionally, in fact, they show signs of restraint." It is not politically naïve to expect federal officials—Presidents, members of Congress, and federal judges—to honor their oath to support and defend the Constitution. Violating laws and the Constitution is cause to impeach and remove Presidents and federal judges and to expel lawmakers or subject them to prosecution.

In their treatment of Abraham Lincoln, Howell and Brent praise his decision in 1864 to run for reelection, even though there was some doubt about his prospects. As the authors note, he "felt a profound moral duty to follow the laws regarding elections—so much so, in fact, that he required his entire cabinet to sign a pledge vowing that 'although it seems exceedingly probable that this Administration will not be re-elected ... it will be my duty to cooperate with the President-elect to ensure a smooth transition.'" Lincoln's commitment to law and the Constitution went deeper than that. When he called Congress back into session on July 4, 1861, to describe his actions during the first three months of the Civil War, he did not claim that they were authorized under Article II. He specifically said he had exercised not only his own constitutional powers but those of Congress under Article I, saying he did not believe his actions were "beyond the constitutional competency of Congress," and that he trusted "that Congress would readily ratify them." If in the midst of the greatest crisis this nation has faced Lincoln could hold fast to the Constitution, certainly Presidents in other periods are capable of doing the same. There is nothing "politically naïve" in adhering to that expectation and standard.

Nonetheless, Howell and Brent advise: "When forced to choose between paying sanctity to the law and steadfastly pursuing the public interest, modern presidents nearly always choose the latter. And when they do privilege the rule of law over the public interest, as we shall soon see, presidents pay a steep political price." Actually, they do not make their case, which I will evaluate shortly. Surely it is clear that Presidents can pay a steep political price when they take action to pursue what they regard as in the public interest, such as the decision of George Bush in 2002 to confront Saddam Hussein. The Constitution does not direct Presidents to pursue the "public interest" (whatever that is) at the cost of legal standards. The authors claim that Presidents "pay a steep political price when they even so much as appear indifferent to the public interest." How would presidential candidates fare at election time with that platform? Imagine: "I pledge at all times to pursue the public interest no matter what the laws or the Constitution provide."

Howell and Brent do not entirely dismiss law as a significant value, even though they say "concerns about the rule of law do not bind especially tight." They counsel that "legal considerations must burrow into the conscience of presidents." Having shown conflicting statements about the value of law, they seem in the end to subordinate it to the President's emergency power: "And we, like the nation's Founders, should be highly skeptical that a principled commitment to the rule of law will reliably and consistently guide presidents as they try, largely in vain, to manage the extraordinary demands and expectations placed before them." They appear to encourage Presidents to violate the Constitution and laws whenever necessary to meet these demands and expectations.

On what evidence do the authors predict that when Presidents "do privilege the rule of law over the public interest, as we shall soon see, presidents pay a steep political price"? They provide three examples in chapter 6, called "What Failure Looks Like." Howell and Brent claim that the public "esteems presidents who break constitutional rules and find ways to exercise their will in the face of institutional checks on their power." The "greatest disgrace a president can commit is to sit idle while the world unravels around him."

Their three examples fall flat. The first is Carter's effort to free the Iranian hostages. Carter never announced that he was at liberty to violate the Constitution and the laws in this endeavor. He attempted a rescue effort and it failed. It is an exaggeration for the authors to say that he "returned to Georgia in disgrace." There were many reasons for his defeat in the 1980 election. He had struggled for four years to exercise presidential power effectively. The public did not want him back. Howell and Brent assert: "In the public's eye, action is nearly always superior to inaction. Action reveals bold and strong leadership, whereas inaction betrays cowardice and debility." First, Carter did act. He did try. Second, the public does not routinely favor action over inaction. Because of Johnson's actions in Vietnam and widespread public revulsion, he withdrew from the presidential race in 1968. Because of Bush's ill-conceived war in Iraq in 2003

and subsequent evidence that he deceived Congress and the public over supposed weapons of mass destruction, Republicans lost heavily in 2006, preparing the stage for Obama's victory in 2008.

The second example by Howell and Brent is George W. Bush's conduct during Hurricane Katrina, particularly his decision to fly over New Orleans and view the catastrophe from the aircraft's window. Reporters on board photographed Bush looking down, and the photo provoked broad criticism. But the authors offer no suggestion of an unconstitutional or illegal act by which Bush might have done some good, and they provide zero evidence that, in this instance, the public would have wanted Bush to subordinate the Constitution and the rule of law to presidential action. The third example also comes up empty. It is the decision by Obama in 2011 not to unilaterally raise the debt ceiling, such as by relying on archaic language in Section 4 of the Fourteenth Amendment. Howell and Brent conclude: "From the public's perspective, Obama failed not because he acted incorrectly but because he did not act with sufficient authority. Past presidents have shown great willingness to claim broad powers for themselves, given even the slightest window to do so. Because of ambiguities inherent in the president's Article II powers, that window is almost always open at least a crack. Certainly it was open to President Obama in this instance." But the argument based on Section 4 of the Fourteenth Amendment is farfetched, and to have relied on it would have subjected Obama to well-deserved ridicule and condemnation. He exercised sound judgment in not invoking that part of the Constitution or some vague Article II argument.

In a concluding chapter titled "Limits," Howell and Brent say that Presidents "have inherited a constitutional—one might even say a cultural—legacy that is deeply ambivalent about concentrated executive authority." The constraint is not "cultural." It is the bedrock system of separation of powers and checks and balances. In a section called "Cultural Misgivings," the authors argue that "the ambiguity of Article II invites presidents to justify even the most audacious power claims in the 'take care' and vesting clauses. Such readings occasionally defy logic and patently violate the most basic understandings of original intent, but no matter." *No matter*! They continue: "Successive presidents offer these readings with straight faces, and frequently the only segment of the American public objecting is constitutional law scholars."

With regard to Iran-Contra, Howell and Brent send conflicting signals. They describe the Boland Amendment's prohibition on the use of appropriations to assist the Contra rebels in Nicaragua as a "blatant check." That implies an encroachment by Congress on presidential power, but they do not explain why. They claim that National Security Advisor Colin Powell, when called to testify before the Iran-Contra Committee, "declined to appear, citing executive privilege." They provide no evidence for this statement; nor is it credible. President Reagan waived executive privilege in its entirety, permitting executive officials to testify in full. Later in the book, the authors say that the actions taken by the Reagan administration "were unquestionably illegal, a gross abuse of executive power, and a violation of even the most basic notions of democratic transparency."

The discipline of political science was at one time coterminous with public law. Beginning in the 1950s, some political scientists began to concentrate more on behavioral studies and ignore the commitment to public law. Fortunately, many political scientists today continue to honor dedication to the Constitution and the rule of law. *Thinking About the Presidency*, however, illustrates how other political scientists do not. Howell and Brent are so far removed from the public law orientation that they write: "Although he is free to veto legislation, the president cannot propose it." An appendix in the book reproduces Article II of the Constitution, Section 3 of which provides that the President shall recommend to Congress "such Measures as he shall judge necessary and expedient." ⊙

Louis Fisher is scholar in residence at the Constitution Project. From 1970–2010, he served at the Library of Congress as a senior specialist in separation of powers with the Congressional Research Service and as a specialist in constitutional law with the Law Library. He is the author of more than 20 books, including The Law of the Executive Branch: Presidential Power, *to be published by Oxford University Press in early 2014. His personal web page can be found at http://loufisher.org.*

WOMAN LAWYER: THE TRIALS OF CLARA FOLTZ

BY BARBARA BABCOCK

Stanford University Press, Stanford, CA, 2011. 373 pages, $45.00 (cloth), $24.95 (paper).

Reviewed by Jon M. Sands

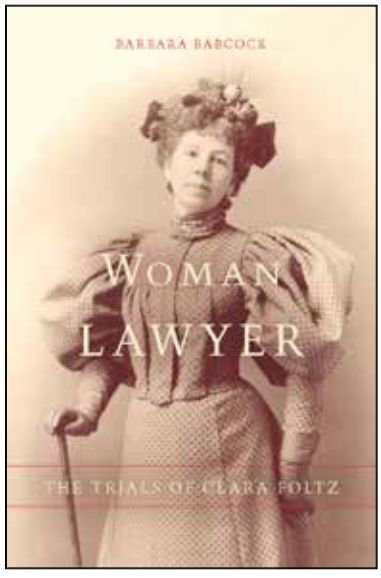
It is a remarkable story. At age 15, a girl elopes with a soldier, becomes a farm wife, quickly bears children, and moves with her ne'er-do-well husband to Oregon and then to California, where he abandons her. Now a single mother with five young children, she rejects pity as well as traditional woman's work. She turns to writing to make a living and develops a knack for paid public speaking on the topics of the day. She becomes a grassroots activist, lobbyist, and then a lawyer—the first woman lawyer in California. She enters practice and surmounts prejudice. Her skills, hard work, and flair for publicity catapult her to fame. She becomes a renowned trial lawyer, prosecutor, successful advocate for national reforms, leader in the women's suffrage movement, and a champion of the public defender system. She practices for more than 50 years and, in her 80s, runs for public office. These accomplishments were amazing for her times. The woman who lived this incredible life was Clara Foltz (1849-1934).

Barbara Babcock's biography of Foltz, one of the first women in the profession, is a significant contribution not only to legal history, but to the history of women's studies, California politics, progressive movements, and indigent defense. *Woman Lawyer: The Trials of Clara Foltz* is not a potboiler, although it could have been, for all the twists and turns in Foltz's life. Nor is it a diatribe against the prejudice that Foltz and other women faced. It is a scholarly, yet fascinating and exciting book. You will finish it admiring Foltz, but chagrined that you were not more aware of her and her achievements.

Although Babcock begins by setting Foltz in her time and in her family, let's start here with when Foltz decides to put her smarts, skills, and interest in current events into a profession in which she could make a living: law. There were no role models for her to follow, but that did not discourage her. To Foltz, law was practical and personally fulfilling. She studied for the bar with a progressive attorney, who believed that women could enter the profession. This was a radical notion at the time, for, by California statute, law was

a white-male-only dominion. Thus, Foltz would not only have to pass the bar, but she would have to get the statute changed. That is exactly what she did. Foltz argued, lobbied, and cajoled the legislators to pass the Woman Lawyer's Act to allow women to enter the profession. In fact, she had the statute changed from "white males" to "persons," thereby seemingly eliminating racial as well as sex discrimination, and she became the first woman admitted to the bar in California. Wanting to enhance her skills, she enrolled in Hastings College of the Law, the first law school in California, only to be told that she could not attend because of her gender. Foltz had the satisfaction of suing the school, arguing the case, winning both at the trial level and on appeal (*Foltz v. Hoge*, 54 Cal. 28 (1879)), and then not attending, because, in the meantime, she had become the first female clerk for the state assembly's judiciary committee. Quite a way to start a career!

Foltz set up practice in San Francisco and quickly made a name for herself as a clever and tenacious attorney. She practiced a wide range of specialties: probate, corporate, family, and criminal law. Yes, she exploited the novelty of being a woman, and reaped the publicity of winning cases with her so-called feminine wiles. Woe to the adversary who underestimated her. Yet, for all her success, she was drawn to causes of equality and justice. She joined the women's suffrage movement, worked for it tirelessly, and rose to a national leadership position. She was instrumental in helping to win women the right to vote in California. She also successfully pushed for women's rights in the legal realm apart from the right to be a lawyer. For example, she helped women achieve the right to be administrators, executors, and notaries.



Foltz's accomplishments include being appointed to the department of corrections, corporate boards, and in 1911, the first female district attorney—a deputy prosecutor in Los Angeles County. As one of the first women lawyers, Foltz had to be a pathbreaker. It is a testament to her that she was so successful in that role. One can easily imagine that many hoped she would fail, but she never did. Her skill and effectiveness were recognized, and success led to success.

As a public defender, I read with gratitude how Foltz became the champion of the public defender movement. Foltz believed in the presumption of innocence. Her arguments foreshadowed *Gideon v. Wainwright*: the right to counsel was essential for other rights to be protected. She believed that a public defender who was as skilled as the prosecutor and had sufficient resources was essential for justice. Foltz first made this radical proposal as a delegate representing California at the Congress of Jurisprudence and Law Reform, held in Chicago in 1893. She subsequently drafted a model bill that proposed that offices be established with lawyers who would devote all or most of their practice to representing indigent defendants—thereby mirroring prosecutors' offices. This was a departure from the practice, where it even existed, of courts appointing lawyers to represent defendants on an ad hoc basis. The public defender would be a county official whose office would represent all who could not afford counsel on any criminal charge.

Foltz pushed for the creation of a public defender's office, incessantly and insistently. She authored bills to that effect that were introduced in the legislatures of 32 states. It would take more than two decades—until 1914—before Los Angeles County would establish the first such office in the nation. Foltz accomplished this in the face of opponents who argued that such an institution was a waste of public funds, unnecessary, and even dangerous, as more people would choose to become criminals because they knew they would be defended. Only the innocent needed lawyers, the opponents huffed. But the public defender's office became successful—crime did not rise, cases were processed, and justice was done. The role of the public defender was accepted and then embraced. California created a statewide public defender agency in 1921. Of course, public defenders were never given the resources to make them equal to the prosecutors. After all, they were representing criminals. This inequality continues to this day. Yet, it was a significant accomplishment. If *Gideon* had a mother, it was Foltz.

Foltz never ceased being a reformer and an activist. In 1930, at the age of 81, she ran for governor of California on a platform of women's issues, with the intent to spotlight pay, rights, and opportunities. She lost in the Republican primary, but she received the coverage she wanted for the issues she cared about, and she gained a respectable 8,000 votes. She could not be ignored.

Babcock subtitled *Woman Lawyer* "The Trials of Clara Foltz." This phrase reflects the thematic approach Babcock uses. She concentrates on subjects—suffrage, trial work, public defending—rather than weaving them into a standard biography. This approach allows Babcock to place Foltz in the time and culture of her "trial," be it her legal practice in San Francisco or New York City, California progressive politics, the suffrage movement, or public defending. Babcock does not neglect the personal. Flotz's commitment to advocacy and activism—her drive—made her successful, but at a personal cost. She lamented not spending more time with her children, bemoaning that "all the pleasures of my young motherhood I sacrificed for woman's cause." Babcock judges this assessment to be too harsh. Foltz kept her family together, succeeded against great odds, and raised her children in a loving environment. She sang lullabies while thinking about Blackstone. She showed by example, not only for her family, but in a phrase with which Babcock closes the book, for all "daughters in the law."

In 1934 Foltz passed away at the age of 85. She died without a will. It was a strange omission for a lawyer who practiced probate, and who was concerned with a woman's right to leave property to whom she wanted. Foltz left not much in personal belongings: her library, a stove, two sewing machines (she had considered being a seamstress when she needed money), 113 pieces of flatware, several oil paintings, and a sterling tea set. Not many material goods, but her accomplishments were lasting. It is fitting that the Clara Shortridge Foltz Criminal Justice Center in Los Angeles is named for the first advocate for a public defender system. ⊙

Jon M. Sands is the federal public defender for the District of Arizona.