



LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY

BY JOHN FABIAN WITT

Free Press, New York, NY, 2012. 502 pages, \$32.00.

Reviewed by Burrus M. Carnahan

John Fabian Witt believes that the law of war has played a crucial, but neglected, role in United States history. In *Lincoln's Code*, which is a well-written book, based on impressive research, he redresses that neglect, concentrating on the period between the Revolutionary War and World War I.

The "code" referred to in the title is the U.S. Army's General Orders No. 100, "Instructions for the Government of Armies of the United States in the Field," dated April 24, 1863. Drafted principally by Dr. Francis Lieber of Columbia University, it was a summary of the laws and usages of war as they existed at the time, and is commonly referred to as the "Lieber Code." For reasons explained later in this review, Witt believes it should more properly be called "Lincoln's Code," hence the title of the book.

From the Revolutionary War to the Civil War, American diplomats, politicians, and lawyers urged international acceptance of rules intended to protect civilians and prisoners of war from mistreatment. Witt demonstrates, however, that they concentrated most of their efforts on protecting private property from seizure or destruction in both land and sea warfare. Protecting neutral property in naval warfare was of particular concern to American politicians and jurists, and was a purported basis for the War of 1812.

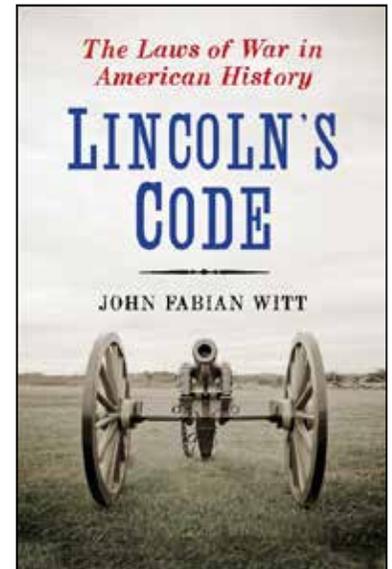
The dark side of this policy was its application to protecting slave property. During the negotiation of the Treaty of Ghent, ending the War of 1812, the head of the U.S. delegation, John Quincy Adams, argued that British commanders had acted improperly when they promised freedom to American slaves who fled their masters and took refuge with the British. Adams insisted that the peace

treaty include a clause requiring the return of the slaves, and later, as secretary of state and President, Adams sought compensation from Great Britain for the slaves' owners. Witt accuses Adams of doing more than anyone else "to associate the United States with the view that civilized nations sheltered slavery from war's destruction" and then reversing course while serving in Congress. This is a bit unfair, since it was Adams' duty, when serving as a U.S. official, to represent the interests of all American citizens, including slaveholders, whatever his personal views on slavery and the law of war.

According to Witt, a great reversal of America's positions on the law of war came in April 1863, when the U.S. War Department issued General Orders No. 100. In 157 articles (set forth in an appendix to *Lincoln's Code*), this General Order summarized the law of land warfare for the guidance of U.S. officers and soldiers. And guidance was needed. At the end of 1860, the United States Army consisted of slightly more than 16,000 officers and men. By 1865, almost a million men would be serving under arms. Almost all the officers in the Civil War had been appointed from civilian life, and had no knowledge of the laws and customs of war. General Orders No. 100 would fill this gap in their knowledge.

Witt, however, sees more radical motives behind General Orders No. 100. He believes there is a tension in American thought on the law of war between humanitarian idealism, on the one hand, and the desire for justice, on the other. This tension arises, he argues, from the temptation to discard humanitarian principles in order to fight more effectively for causes believed to be just, most notably the abolition of slavery, during the Civil War. Witt argues that Dr. Lieber succumbed to that temptation in drafting General Orders No. 100, although the "humanitarian" principle he discarded was the right to property—specifically, property in slaves.

President Lincoln had issued his final Emancipation Proclamation on Jan. 1, 1863, thereby recognizing the immediate



freedom of all slaves held in territory controlled by the Confederacy. In drafting the General Orders, Lieber reversed the pre-war U.S. policy of protecting slave property in war and instead codified the Emancipation Proclamation as permanent policy in Articles 42 and 43 of the orders. In response to the Confederacy's refusal to treat African-American soldiers as prisoners of war, but instead to send them into slavery or to execute them, Lieber declared that international law "knows no distinction of color," and that it was a violation of the law of war to deny prisoner of war status on the basis of race (Articles 57 and 58). In Witt's opinion, therefore, "it was Lincoln's Emancipation Proclamation that required [the General Orders'] production," and "once we see the Union's instructions as arising out of the crucible of slavery, the order is better thought of as Lincoln's Code" than as Lieber's code. The demands of justice for slaves and colored soldiers had triumphed over the previous generation's ideal of protecting property.

Witt also argues that the Union's pursuit of justice triumphed over the customary usages of war in much of the rest of General Orders No. 100 as well. It was not really a codification of existing rules and state practice, he believes, but rather an "unsettling critique of the orthodox laws of war" that approved General Sherman's

indiscriminate artillery bombardment of Atlanta in 1864. Witt repeatedly refers to General Orders No. 100 as a “fierce” document.

This view of General Orders No. 100 centers on Lieber’s adoption of military necessity as a legal principle. Witt notes Lieber’s admiration for his fellow Prussian Carl von Clausewitz, who viewed war as a means to gain political ends, and Witt believes that this influenced Lieber’s treatment of military necessity. Article 14 of General Orders No. 100 defined military necessity as “the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.” Critics of Article 14, including Confederate officials during the Civil War, often fail to understand the significance of the final clause in Lieber’s definition. If there is an existing rule or usage forbidding a practice, then “military necessity” will not justify violating that rule. Military necessity, for example, could not justify torture, or “the infliction of suffering for the sake of suffering or for revenge,” or the use of poison (Article 16). Military necessity thus serves as a gap-filling legal principle, to be applied only where established rules and usages do not exist.

Perhaps Witt is correct, and Lieber deliberately drafted a document that put fewer restraints on the U.S. Army than other legal scholars would have recognized, because he believed that the United States government was fighting a just war to end slavery and restore the Union. Witt is certainly right that Lieber stretched the contemporary usages of war when he asserted that “if a person held in bondage ... be captured by or come as a fugitive under the protection of the military forces of the United States, such person is immediately entitled to the rights and privileges of a freeman” (Article 43). Earlier in the Civil War, Union commanders had often returned slaves to their owners or refused to grant them sanctuary. It is true that during the Napoleonic Wars and the colonial wars of the 18th century, Great Britain, France, and Spain had frequently granted freedom to enemy slaves, but the practice was not universal and a slave’s right to freedom depended on specific declarations issued by the military authorities concerned.

However, as to the remainder of General Orders No. 100, Lieber may have done little more than what the War Department asked of him—restating the contemporary laws and usages of war based on empirical evidence of belligerent practice. If the order was really a “fierce” and “unsettling critique of the orthodox laws of war,” it is hard to understand why, as Witt himself points out, “humanitarian reformers” in Europe welcomed it as heralding “a new epoch of moral progress” that would “ameliorate the horrors of war.”

Lieber wrote at a crucial time in the development of Western international law. Legal philosophy was turning away from the natural law tradition of the 18th century towards positivism, the theory that law could be based only on rules issued or recognized by sovereign states. For international law, positivism meant reliance on treaties and customary rules.

Lieber was ideally suited to write a concise, positivist, restatement of the law of war based on the actual practice of belligerent states. Born in Prussia, he was a combat veteran of the final campaign of the Napoleonic Wars, and was badly wounded at the battle of Namur. His oldest son died fighting for the Confederacy, while his two younger sons joined the Union army, and one lost an arm at the battle of Ft. Donelson. The law of war was not a purely academic matter for Lieber.

Earlier in his academic career Lieber had written a work called *Manual of Political Ethics*, part of which dealt with the law of war. In preparation for this work, Lieber amassed a vast file of international state practice, which he used again to draft General Orders No. 100. If that document was “fierce,” it may be because in the mid-19th century the accepted laws and usages of war were fierce, and not because Lieber deliberately altered them to help the Union army.

Nor did Lieber need to consult Clausewitz in order to conclude that military necessity should be measured by the purpose of a war. Twenty-five years earlier, Henry Wheaton, the first American to write a treatise on international law, began his chapter on the law of war with the following language:

In general, it may be stated, that the rights of war, in respect to

the enemy, are to be measured by the object of the war. Until that object is attained, the belligerent has, strictly speaking, a right to use every means necessary, to accomplish the end for which he has taken up arms.¹

This sounds very much like Article 14 of General Orders No. 100, which defined military necessity as “the necessity of those measures which are indispensable for securing the ends of the war.”

General Orders No. 100 remained the Army’s official guidance on the law of war for the next 50 years. It even had some impact on the Army’s practices during the Indian wars. Its influence broke down during the Philippine Insurrection in the early 20th century, when many officers resorted to torturing Filipino guerrillas for information. Witt notes, ironically, that when the Army finally issued a new manual on the law of war in 1914, it was drafted by an officer who had actively used torture in the Philippines.

Whether or not one agrees with all of Witt’s conclusions, he has clearly proven his central thesis, that law of war issues had a significant impact on 19th-century American history. This is a major work that deserves to be read by anyone interested in the origins of the modern law of war and its role in U.S. history. ☉

Burrus M. Carnahan is a professorial lecturer in law at the George Washington University in Washington, D.C. His J.D. degree is from Northwestern University (1969), and he holds an LL.M. from the University of Michigan (1974). From 1969 to 1989 he served as a Judge Advocate in the U.S. Air Force, specializing in international legal issues.

Endnote

1. Henry Wheaton, *ELEMENTS OF INTERNATIONAL LAW: WITH A SKETCH OF THE HISTORY OF THE SCIENCE*, 249. (Reprint of the 1836 edition by The Law Book Exchange, Ltd., 2002).

LINCOLN'S HUNDRED DAYS: THE EMANCIPATION PROCLAMATION AND THE WAR FOR THE UNION

BY LOUIS P. MASUR

The Belknap Press of Harvard University Press, Cambridge, MA, 2012. 358 pages, \$29.95.

Reviewed by Henry Cohen

Abraham Lincoln always hated slavery, but he believed that the Constitution protected it in the states where it existed. On March 4, 1861, in his first inaugural address, he said that “the only substantial dispute” between the North and the South was whether slavery ought to be extended into the territories. “I have no purpose,” he said, “to interfere with the institution of slavery in the States where it exists.” Nevertheless, the Southern states seceded, announcing in their secession documents that they were doing so to protect the institution of slavery. On April 12, 1861, the South fired on Fort Sumter, starting the Civil War. Later that same month, an anti-slavery activist wrote, “The first gun fired at Fort Sumter rang out the death-knell of slavery.” “The conviction is permeating the mind of the North,” noted another writer, “that in some way or other Slavery is to go down in this struggle to its final death.” Lincoln’s secretary John Hay observed, “What we could not have done in many lifetimes the madness and folly of the south has accomplished for us. Slavery offers itself more vulnerable to our attack than at any point in any century. ...”

Whether these men revealed foresight or wishful thinking, they were right, and slavery started to fall even before Lincoln issued the Emancipation Proclamation on Jan. 1, 1863. In May 1861, three slaves who were being transported to aid secession forces in Virginia escaped to Union lines. General Benjamin Butler decided that the Fugitive Slave Act of 1850 did not apply to foreign countries, which Virginia considered itself to be. In addition, the law of war allowed the capture of contraband property, and Virginia considered these three men to be property. Butler, therefore, hoisting the slave holders on their own petard, would not return the slaves, and his ingenious idea became Union policy. Congress codified Butler’s policy in the Confiscation Acts of 1861

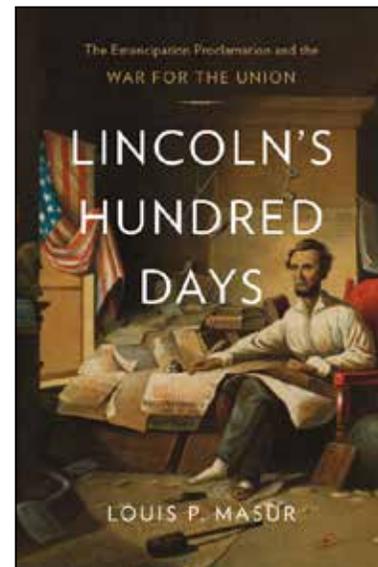
and 1862, and many more slaves turned themselves into contraband.

“Through the summer and fall of 1861,” writes Louis Masur in *Lincoln’s Hundred Days*, “discussions of emancipation saturated newspaper columns, lecture halls, and Congress. ... [I]ntellectuals and activists ... seized on the issue of war power and military necessity to try to persuade Lincoln’s administration that it could legally take action against slavery.” One reformer wrote that, when a proclamation of emancipation “has been widely scattered and proclaimed, and the slaves understand it—as they would marvelously soon—we have a nation of allies in the enemies ranks. There is a foe in every Southerner’s household.”

Through the first half of 1862, however, Masur writes, “Lincoln was willing to accept slavery ... in order to end the war and preserve the Union.” At this point, the only step that he took toward emancipation was to offer the border slave states that had remained in the Union—Delaware, Maryland, Kentucky, and Missouri—compensation if they would gradually free their slaves. Even this, however, was recognized as, for the first time, placing the federal government on the side of freedom. Persuading the border states to begin to emancipate their slaves would also help to win the war, because it would end the danger of their seceding.

Even the abolitionist senator Charles Sumner was willing to support compensated emancipation, although he viewed it as ransom. “Never,” he said, “should any question of money be allowed to interfere with human freedom.” But the border states rejected Lincoln’s proposal, causing him to realize that “emancipation of the slaves in the rebel States must precede that in the border States.”

Sumner and other abolitionists urged Lincoln to emancipate the slaves regardless of the Constitution. “The Rebels have gone outside the Constitution to make war upon their country,” Sumner said. “It is for us to pursue them as enemies outside the Constitution. ...” Secretary of the Navy Gideon Welles believed that the rebels “could not at the same time throw off the constitution and invoke its aid.” But Lincoln never recognized the legality of secession. He considered the Confederate states to be in the Union and



entitled to the protections of the U.S. Constitution.

Lincoln finally decided, however, that, under his power as commander in chief of the Army and Navy, he could, as a military necessity, free the slaves in the states that were in rebellion. After all, the slaves were being forced to assist the Confederate war effort, and many of them would be willing to fight for the Union. On Sept. 22, 1862, Lincoln issued the preliminary Emancipation Proclamation, which stated that, on Jan. 1, 1863, all persons held as slaves within any state then in rebellion, “shall be then, thenceforward, and forever free.”¹ Lincoln did not realize at the time that Jan. 1 was exactly 100 days after Sept. 22, but that fact gives Louis Masur’s book its title. *Lincoln’s Hundred Days*, however, is divided into three parts, with only the second part devoted to those 100 days. The first part discusses the period leading up to the preliminary Emancipation Proclamation, and the third part discusses the reactions to the final Emancipation Proclamation, which Lincoln did sign on Jan. 1, 1863.

What distinguishes *Lincoln’s Hundred Days* from other books on the Emancipation Proclamation is that it does not focus on Lincoln or his cabinet so much as on other people’s views of and reactions to the preliminary and final Emancipation Proclamations: soldiers, lawyers, clergymen, diplomats, members of Congress, slaves, newspaper editorialists, foreigners, and others. Masur has done an impressive amount of research in digging up obscure sources, and he has deftly organized it into a gripping narra-

tive. We read of the opinions of, among many observers, Polish emigré Count Adam Gurowski (whose diary survives), former Supreme Court justice Benjamin Curtis, Harvard professor Theophilus Parsons, New York attorneys including George Templeton Strong (another diarist), and Boston lawyer John Codman Ropes. We also hear from more famous personalities, including Karl Marx and Ralph Waldo Emerson, both of whose remarks during the 100 days Masur quotes.

In an article for the Viennese daily *Die Presse* published on Oct. 12, 1862, Marx noted that Lincoln's "most redoubtable decrees ... all look like, and are intended to look like, routine summonses sent by a lawyer to the lawyer of the opposing party. ... His latest proclamation, which is drafted in the same style, the manifesto abolishing slavery, is the most important document in American history since the establishment of the Union, tantamount to the tearing up of the old American Constitution." Thus, Richard Hofstadter was not entirely original when he compared the Emancipation Proclamation to a bill of lading.

Emerson recognized that the preliminary Emancipation Proclamation changed the purpose of the war from mere reunion of the states to a moral crusade: "This act makes that the lives of our heroes have not been sacrificed in vain. It makes victory of our defeats. Our hurts are healed; the health of the nation is repaired." As Masur notes, union was a restorative idea, but emancipation was a transformative one. The Emancipation Proclamation "made the abolition of slavery a means, and, in doing so, it became an end."

Emerson added that the preliminary Emancipation Proclamation "is not a measure that admits of being taken back," but he need not have feared, because Lincoln said that "he would rather die than take back a word of the Proclamation of Freedom." As Masur discusses, Republican defeats in the 1862 elections did not deter Lincoln. On Dec. 12, 1862, Harriet Beecher Stowe reported to Charles Sumner that "Everybody I meet in New England says to me with anxious earnestness—Will the President stand firm to his Proclamation?" But a Philadelphia newspaper reminded its readers that "Mr. Lincoln is a man of

deliberate mind, slow to form a judgment, patient in hearing all sides and investigating facts; but once having arrived at a conclusion, and convinced himself of its rectitude, no power can swerve him from it."

"For many soldiers," Masur writes, "the experience of war turned them against slavery." When their units moved into the South, many of them witnessed slavery for the first time, "[a]nd the flood of contrabands into Union lines certainly helped to humanize slaves for the soldiers. ..." Even though some soldiers deserted rather than fight for the slaves, most of them, even those who were unhappy with the Emancipation Proclamation, understood that "the army was not a democracy and it was their job to support the orders of the commander-in-chief." Some did not care to fight side by side with freed slaves, but concluded, "if Old Abe thinks it's the best thing to do, all right; we will stand by him. Lincoln is solid with the boys all right." Masur writes, "In many cases the soldiers, black and white, literally carried the Emancipation Proclamation with them," to distribute to slaves. Abolitionist and railroad magnate John Murray Forbes, his son reported, "had 1,000,000 copies printed on small slips, one and a half inches square, put into packages of fifty each, and distributed among the Northern soldiers at the front, who scattered them among the blacks, while on the march."

Silas Shearer, a private with the 23rd Iowa, wrote to his wife, "Since I have got down here and seen what Slavery was ... it has changed me considerable. ... When I was at home I was opposed to the meddling of Slavery where it then Existed but since the Rebls got to such a pitch and it became us as a Military needsisity ... to abolish Slavery and I say Amen to it and I believe the Best thing that has been done Since the War broke out is the Emancipation Proclamation." Lincoln said exactly the same thing, if in a more polished manner. As Lincoln grew, so grew the nation. ©

Henry Cohen is the book review editor of The Federal Lawyer. He reviewed other books on the Emancipation Proclamation in the September 2004, September 2006, March/April 2010, and June 2012 issues of The Federal Lawyer.

Endnote

1. In the June 2012 issue of *The Federal Lawyer*, in the second paragraph of my review of *Emancipating Lincoln*, by Harold Holzer, I mistakenly wrote that the preliminary Emancipation Proclamation was an implementation of the Confiscation Act of 1862. In fact, like the final Emancipation Proclamation, it was based on the President's power as commander in chief of the Army and Navy.

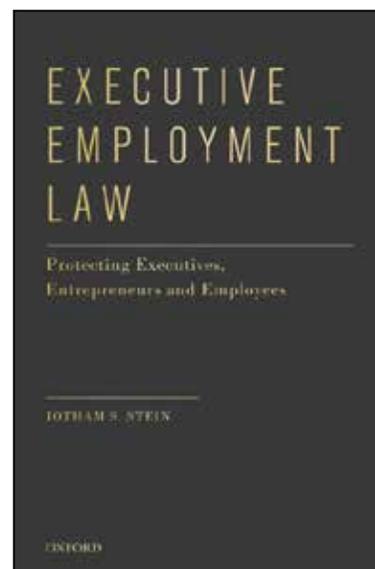
EXECUTIVE EMPLOYMENT LAW: PROTECTING EXECUTIVES, ENTREPRENEURS AND EMPLOYEES

BY JOTHAM S. STEIN

Oxford University Press, New York, NY, 2011. 274 pages, \$225.00.

Reviewed by V. John Ella

According to an article in the Sept. 18, 2000, issue of *Lawyers Weekly*, "there are three types of entities in the workplace—employers, employees, and executives." Since reading the article, I have consciously devoted part of my law practice to "executive law," including the negotiation of executive contracts, restrictive covenants, and severance agreements. I therefore found myself searching Amazon.com on my I-pad late one night to see if any recent books had been written on the topic of executive employment law. Jotham S. Stein's treatise seemed to fit the bill. The \$225 price tag being almost shockingly steep, I



found a pristine used copy for less than half that amount and decided to take a chance.

I really enjoyed this book. If you work in this niche area of the law you will appreciate Stein's anecdotes and observations of the executive species in its native environment—in this case Silicon Valley. Stein started as a lawyer at the Palo Alto office of the Wilson Sonsini firm, which has been ground zero for the California high-tech industry. Although his views on executive law have a California patina, he cites case law and examples from around the country and does not skimp on his chapter about non-compete agreements, which are generally prohibited in California.

Unlike some employment law attorneys, Stein does not shy away from the intellectual property, securities law, and tax aspects of representing executives. Instead he tackles these complex and technical areas of the law head-on, in a comprehensive, yet easy to understand, fashion. His summary of 409A of the Internal Revenue Code is the best I have read, and his knowledge of Securities and Exchange Commission regulations is impressive. At the same time, he has a keen eye for the human story in employment law, which is helpful because even the highest paid and most successful business people sometimes have difficulty separating their emotions from their legal needs. He tells his stories through a series of examples with names changed to protect the wealthy, and he shows how most executive law disputes can be steered to a win-win outcome with good counseling and advocacy.

Even though I have practiced executive law for almost 15 years, I discovered several new concepts in this book, including a new spin on anti-dilution provisions, indemnification "expense advance" provisions, and "no mitigation" clauses (none of which I have seen in any Midwestern executive contracts), as well as negotiation tips. Stein also provides helpful sample contracts and even sample letters.

Executive Employment Law is current in areas such as the Dodd-Frank Act clawback provisions. I recommend it highly not only to practitioners, but to executives and entrepreneurs as well.¹ ☉

V. John Ella is of counsel to the nation-

al workplace law firm Jackson Lewis LLP in its Minneapolis office.

Endnote

1. The algorithms at Amazon.com also thought I might want to buy *Executive Employment Agreements Line by Line*, by Arthur F. Woodward, a partner at Kaye Scholer LLP in New York City, so I did. This is a slimmer volume, which breaks down a typical agreement (as promised in the title) line by line, but I discovered no particular insights in its pages.

THE 10 STUPIDEST MISTAKES MEN MAKE WHEN FACING DIVORCE AND HOW TO AVOID THEM

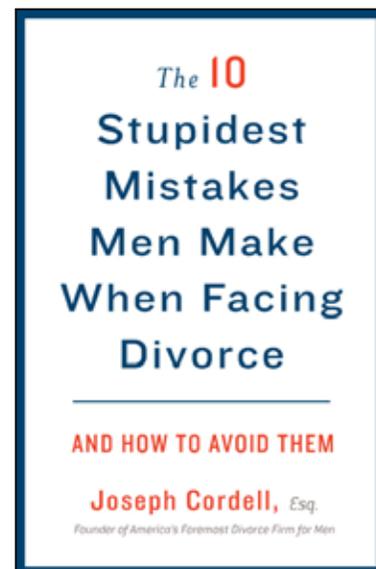
BY JOSEPH E. CORDELL

Three Rivers Press, New York, NY, 2010. 230 pages, \$15.00.

Reviewed by Caroline Johnson Levine

The 10 Stupidest Mistakes Men Make When Facing Divorce and How to Avoid Them is written in a caring and empathetic manner to the man who is facing divorce. Its advice, however, could apply to either gender, as it is, essentially: protect your legal rights! That can be difficult to remember at a time when emotion tends to prevail over logic and good old-fashioned business sense.

One wonders why Cordell has devoted his entire practice to representing men in divorces, thereby losing 50 percent of his potential clientele. But this book is not an autobiography; it is a "how to" book for men who seek a divorce—particularly those who need an aggressive attorney to protect their rights. Cordell advises, for example: "Sometimes the advantage in filing [for divorce] first, as any number of classic texts about real military battles agree, comes from surprise. She intends to file for divorce. She never anticipates that her husband—the poor schmuck—will file first." In this book, every husband is a saint and every wife a sinner, and men are advised to approach divorce with a military-style strategy designed to defeat the enemy. Cordell believes that the law tends to assume that mothers are better custodians of children and that they require perpetual financial support after the dissolution of a marriage. His goal in this book "is to undercut those assump-



tions and take away her advantages."

Cordell provides many stories of his clients, whom he portrays as successful professionally but kindly dunces in their personal lives. One such client was an architect who provided his college sweetheart with a comfortable lifestyle. He woke the children every morning, dressed them, made breakfast, packed lunches and backpacks, chauffeured them to school and made sure to read them bedtime stories. The sweetheart wife, by contrast, spent her time "playing tennis and shopping and having lunch with her friends," while leaving the children at grandma's house and disappearing for hours. One night, the sweetheart announced that she wanted a divorce because the architect simply did not make her happy anymore. She insisted that the architect move out immediately, because, if he did not, she would "call the police. I'll tell them you hit me. They'll take you away in handcuffs. And I will get a restraining order that keeps you out of the house anyway. I'll keep you away from the kids, too."

Cordell insists that mistake number one is to move out of the family residence. In the architect's circumstances, Cordell acknowledges that "moving out may be necessary, at least for a few days until things calm down." But Cordell makes a compelling case that, if the husband pays the mortgage, then he should be allowed to stay in the house and not pay for his wife to enjoy a better lifestyle than he does, in a studio apartment that cannot accommodate visits from the children. In fact, a husband's remaining in the marital

residence may defeat a wife's otherwise powerful argument: "He moved out and left us." Cordell advocates that, if a man does move out, he should move back in immediately. One wonders how the wife will react when she arrives home to find her husband relaxing in the recliner in his boxer shorts with a bag of cheese puffs.

Cordell lists important actions that a husband must take in order to survive the divorce process with some shred of dignity. In addition to filing for divorce first, he should maintain positive contact with the children, keep accurate financial records, refuse to speak to his wife, refrain from revealing too much on the Internet, and meticulously prepare his testimony. The husband should also itemize the property at home—"the longer and more valuable the list, the better for you when negotiating a financial settlement." He advises husbands that, if your wife goes to court saying that she needs money from you to buy furniture or dishes, but "you have an inventory, with photos, showing ... a well-stocked house ... , she won't get far with those arguments."

Cordell advises that a man should hire a lawyer "the very second that the thought of divorce first occurs. ... Maybe it's the first time they have an argument and she says 'I can't live like this anymore.' Maybe it's before she actually says or does anything," but he realizes that they're drifting apart. Cordell advocates this aggressive approach so that a man and his attorney can begin to formulate a strategy if the divorce ever begins. Given the fees of a divorce attorney, however, this advice may reveal more concern for the family law bar than for the husband, who might have difficulty explaining to his wife the disappearance of thousands of dollars from a joint bank account. If a husband should hire a divorce attorney every time that his wife complains or seems unhappy, then it might be best to do so immediately after the vows are exchanged!

To do the most damage control, Cordell should consider offering this book at courthouse offices issuing marriage licenses or on wedding websites. Perhaps naïve lovebirds should be required to read this book prior to receiving a marriage license. Of course, that might result in the end of marriage in our nation. This book would certainly scare the proverbial pants

off of any affianced male.

Although Cordell illustrates well the problems and frustrations that men may face if they wait too long to retain a divorce attorney, he should recognize that marriages waver and vacillate through the seasons. Like a tree in autumn, whose leaves turn brown and fall gradually, divorce is a slow process, laden with the memory or promise of its glorious springtime greenery. The frequently slow evolution from marriage to divorce prevents people from aggressively and single-mindedly chopping down a tree that took many years to grow.

I have two criticisms of this book: its promotion of Cordell's law firm and its unrelenting bitterness to women in divorce cases. As for the first, the book occasionally appears to be an advertisement for the Cordell & Cordell, P.C. Cordell offers excellent advice to a man in choosing a divorce lawyer: consider the lawyer's experience, price, empathy, availability, and exclusive dedication to representing men in family law cases. In doing so, however, Cordell skillfully weaves in comments such as, "Our firm offers our clients an online calendaring program that they can access from anywhere—home, work, on the road—to record events." He leads the reader to believe that, in order to have a fighting chance, one must hire Cordell's firm.

The 10 Stupidest Mistakes Men Make When Facing Divorce and How to Avoid Them views a wife as an exotic creature who is cute and loveable when you first meet her, but who turns into a mischievous reptile with sharp teeth and claws. Cordell tells so many horror stories of women that he leaves the impression that they perpetually engage in cruelty against unsuspecting and ill-equipped men. It is surprising that the book's cover does not portray Linda Blair in "The Exorcist."

It is possible that Cordell's myopic view developed from his long experience in protecting the legal rights of men. It is one thing to warn in the book's title that men can make stupid mistakes when facing divorce, but it is quite another to write an entire book portraying women as aggressively attempting to destroy men so that there is nothing left for the buzzards to pick over. A better title for this book might have been: *The 10 Stupidest Mistakes Men Make*

When Divorcing a Woman, Who Will Surely Become an Enemy Combatant. In fairness, though, one should note that Cordell employs many female attorneys because he believes that there can be a psychological advantage in the courtroom to having a female attorney representing men in divorce cases.

These criticisms aside, *The 10 Stupidest Mistakes Men Make When Facing Divorce and How to Avoid Them* conveys Cordell's passion for family law and does an excellent job of presenting the issues that anyone contemplating or engaging in divorce should consider. ☉

Caroline Johnson Levine is a graduate of the Florida State College of Law. She worked as a criminal prosecutor for 10 years and now practices civil litigation trial and appellate work in Tampa, Fla.

AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY

BY AKHIL REED AMAR

Basic Books, New York, NY, 2012. 615 pages, \$29.99.

Reviewed by Jon Blue

All of us in the legal trade know that there's more to constitutional law than the Constitution. The foundation stones of the modern constitutional edifice—from *Marbury v. Madison* to *Brown v. Board* and beyond—could not possibly have been created by reference to the four corners of the constitutional text alone. History, policy considerations, and judicial precedent have all played vital roles in building the law. Virtually every constitutional decision, major or minor, made by every judge in the land, requires reference to some extratextual source.

But once a judge leaves the constitutional text, what sources should guide his or her decisions? There, as Hamlet would say, is the rub. Confine yourself too tightly to the four corners of the document, and you'll never be able to decide anything. Stray too far from those confines, and you'll be making a decision based on your personal preferences—which no judge wants to do (and certainly no judge wants to be seen as doing).

Of course, if you're a lower-court

judge, you can do your best to read the tea leaves of Supreme Court decisions. But what if you're on the Supreme Court? There things are a little different. You work against the backdrop of more than two centuries of Supreme Court jurisprudence. You have eight colleagues nominated by different Presidents and a squadron of clerks to consult if you're so inclined. But the Constitution is ultimately in your hands to construe as you see fit. So, once again, exactly what authority should guide you?

This is the great question that Akhil Reed Amar seeks to address in his ambitious work, *America's Unwritten Constitution*. He gives it a good try, but it is not clear that he succeeds, and it's less clear that he *could* succeed. One problem facing any scholar attempting to capture our "unwritten constitution" is that constitutional law has been shaped by so many forces over so many years that a comprehensive description becomes impossible.

Amar's new book is a sequel to his well-received *America's Constitution: A Biography* (2005). At the end of that book, he noted, "I ... do not believe that all of American constitutionalism can be deduced simply from the document. At key points the text itself seems to gesture outward, reminding readers of the importance of unenumerated rights above and beyond textually enumerated ones." Amar picks up on this theme in the introduction to *America's Unwritten Constitution*: "[T]he written Constitution itself invites recourse to certain things outside the text—things that form

America's unwritten Constitution. When viewed properly, America's unwritten Constitution supports and supplements the written Constitution without supplanting it."

The notion that constitutional law has been shaped by extratextual forces is hardly new. Amar's great contribution is to relate some of the great thematic developments of constitutional history to the words of the Constitution itself. The scope of his work is almost as broad as the Constitution itself, but his technique can be illustrated by discussing a couple of representative (and controversial) chapters.

Chapter 6, entitled "Honoring The Icons: America's Symbolic Constitution," provides a good example of Amar's ambitious agenda. "America's symbolic Constitution," he contends, "surely includes (but is not limited to) the Declaration of Independence, Publius's *The Federalist*, the Northwest Ordinance, Lincoln's Gettysburg Address, the Warren Court's opinion in *Brown v. Board*, and Dr. King's 'I Have a Dream' speech."

Four members of this remarkable catalogue will strike most legal analysts as intuitively obvious, while two others appear, at first blush, to be admirable but misplaced. The Declaration of Independence, *The Federalist*, and the Northwest Ordinance all, to some degree, reflect the views of the founding generation, and *Brown v. Board* is one of the most celebrated Supreme Court decisions of all time. To say that these documents are integral parts of the fabric of our unwritten constitution makes perfect sense. But what about the Gettysburg Address and the "I Have a Dream" speech? Everyone admires these icons, but how are they part of our unwritten constitution?

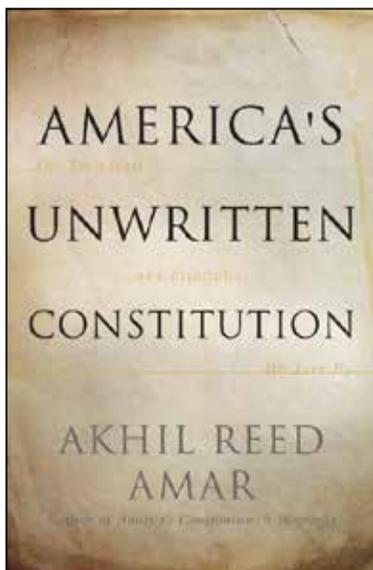
Amar provides a series of textual answers. He points out that the Gettysburg Address explicitly invokes the Declaration of Independence. ("Four score and seven years ago.") Similarly, Dr. King explicitly rooted his dream in the Declaration's creed "that all men are created equal." But Amar also grounds these iconic speeches in the words of the Constitution itself. Lincoln's vision of a "new birth of freedom" was realized five years later in the Fourteenth Amendment, which granted citizenship

to "all persons *born* ... in the United States." Dr. King's famous quotation from the Declaration of Independence—"all men are created equal"—also reflects the Fourteenth Amendment's central vision of birth equality.

Chapter 7, entitled "Remembering the Ladies: America's Feminist Constitution," provides another example of Amar's creative approach. The Nineteenth Amendment, ratified in 1920, famously granted women the right to vote. But does the amendment implicitly extend beyond the realm of suffrage itself? Its text grants no more than "[t]he right ... to vote," and a proposed amendment explicitly designed to invest women with broader constitutional rights (the Equal Rights Amendment) later failed of ratification. But Amar views the Nineteenth Amendment as representing what he calls "The Suffrage Revolution." That revolution, which extended the franchise more than any preceding amendment, provides the occasion for the courts and the people to realize broader gender rights inherent in the broader constitutional text. Amar points out that the principle of popular sovereignty underpins the entire constitutional document. The First Amendment says nothing about voting, but the freedom of speech is designed for a democracy in which citizens have the right to vote. The Fifteenth Amendment was deemed necessary because it was unthinkable that men (at least) could be free yet excluded from the franchise. We know that the First Amendment and the Reconstruction amendments have had effects going far beyond suffrage itself. Why not the Nineteenth Amendment?

Amar argues that the Nineteenth Amendment had "surprising ramifications for women's personal lives." For example, a married woman could vote differently from her husband. She could have different ideas and even a different domicile. In addition—here Amar echoes John Hart Ely—the Nineteenth Amendment had clear implications for the legitimacy of previously enacted legislation affecting the lives of women. The Connecticut anti-contraception law invalidated in *Griswold v. Connecticut* and the Texas anti-abortion law invalidated in *Roe v. Wade* were enacted prior to the

Reviews continued on page 103



South Florida Chapter

†Annery P. Alfonso
 †Raudel Alfonso
 †Hon. Cecilia M. Altonaga
 *Brett A. Barfield
 *Anthony B. Borrás
 †Francis L. Carter
 †Hon. Marcia G. Cooke
 *David A. Coulson
 †Hon. A. Jay Cristol
 †Ileana Cruz
 *Melanie E. Damian
 *Jorge R. Delgado
 *David M. DeMaio
 †Katherine W. Ezell
 †Wilfredo Fernandez
 *Adam M. Foslid
 †Hon. Barry L. Garber
 *Martin B. Goldberg
 †Hon. Jonathan Goodman
 *Merrick L. Gross
 *Kenneth R. Hartmann
 †Hon. Paul C. Huck
 †Hon. Laurel M. Isicoff
 †Edward Jesson
 *Robert C. Josefsberg
 †A. Nicole Kwapisz

†Hon. Chris McAiley
 *Brian P. Miller
 †Lauren Morse
 *Anna T. Neill
 *Edward R. Nicklaus
 †Hon. John J. O’Sullivan
 *Robert E. Pershes
 †Michael A. Pineiro
 †Ramon A. Rasco
 *Dr. Amy D. Ronner
 *Stephen F. Rosenthal
 *Hy Shapiro
 †Steven D. Weber
 †Andrew B. Zelmanowitz

Southwest Florida Chapter

*Joseph G. Viacava
 †Peter L. Wechsler

Tallahassee Chapter

†Michael P. Bist
 *Jennifer Sullivan Davis

Tampa Bay Chapter

*Timothy A. Andreu
 *Kimberly A. Bald

†Amanda E. Ballard
 *Bjorn E. Brunvand
 *Michael B. Colgan
 *James E. Felman
 *Marion Hale
 *John P. Harllee
 *Marcos E. Hasbun
 *Dominique E. Heller
 †Laura H. Howard
 †Kimberly A. Koves
 *Latour Lafferty
 *Edmund J. McKenna
 †Daniel F. Molony
 †Dana L. Robbins
 †*Angela E. Rodante
 *Thomas D. Roebig
 *Timon V. Sullivan
 †*Dale M. Swope
 *Michael L. Walker
 †Dineen P. Wasylik
 *Morris Weinberg
 *Robert V. Williams
 *Jason Wise
 *Mamie V. Wise

D.C. CIRCUIT

Capitol Hill Chapter

*Mark A. Weinberger

District of Columbia Chapter

†Robert Alinsky
 *Vincent S. Antonacci
 *Charlotte M. Bahin
 *Barry P. Barbash
 *F. Douglas Birdzell
 †Jonathan B. Bolls
 †Kyle G. Chandler
 †Leonard N. Chanin
 †John Collins
 †Ronald L. Frampton
 *Jose A. Fuentes
 †*Anna Marie Gallagher
 †Lisa A. Harig
 *Benjamin J. Haskin
 †Elina Y. Hum
 †Andrew M. Klein
 †Dominic A. Labitzky
 *Kenneth A. Lechter
 *Linda L. Lord
 *Donald Mooers

†Xin Nie
 †Veronica Norman
 *Richard A. Schaberg
 *Hon. Richard L. Sippel
 *Catherine A. Stevens
 *David F. Stover
 †Patrick Sullivan
 †Kathryn C. Vouri
 †Diana Wielocha
 †Kristi Williams

Pentagon Chapter

†Capt. Majella C. Pope
 *Capt. J. A. Roach
 Phoenix Chapter
 *Hilary L. Barnes
 *Steven A. Hirsch
 *Lawrence I. Kazan
 *Melinda J. Kovacs
 †Julia L. Matter
 †*Suzanne R. Nunn
 †Daniel R. Ortega
 †Allyson Thomas
 †Ray A. Ybarra Maldonado

REVIEWS continued from page 97

Nineteenth Amendment by legislatures in which women were entirely unrepresented. Add to this the fact that the key command of the already existing Fourteenth Amendment is that of birth equality. If we take these considerations seriously, Amar asks, should we not use the Nineteenth Amendment as the occasion to make constitutional amends to women?

Perhaps Amar’s questions are rhetorical. His conclusions are certainly open to question.

For example, the fact that the Gettysburg Address and the “I Have a Dream” speech may reflect constitutional ideas does not by itself insert them into the constitutional pantheon. These speeches are particularly famous, but many speeches—just like many books and law review articles—reflect constitutional ideals, and no one would claim that, by virtue of that fact alone, they become part of our unwritten constitution.

As for the “feminist Constitution,” Amar is undoubtedly on to something when he contends that the Nineteenth Amendment resulted in cultural change. But some of his examples appear to be a stretch. The Nineteenth Amendment hardly created the concept of sepa-

rate domiciles for married women. The Supreme Court had allowed separate domiciles more than 60 years earlier, in *Barber v. Barber* (1859), at least for women “under a judicial sentence of separation from bed and board.” In addition, Amar argues that *Roe v. Wade* can be justified by the fact that the law it struck down was passed prior to the Nineteenth Amendment by an all-male legislature. But this argument fails when one considers that *Roe’s* companion case, *Doe v. Bolton*, struck down a George abortion law enacted in 1968, decades after ratification of the Nineteenth Amendment. And, of course, plenty of women today oppose *Roe*, just as many men today support it.

Notwithstanding these quibbles, the idea of an unwritten constitution should not itself be controversial. Eight decades ago, in *Principality of Monaco v. Mississippi* (1934), the Supreme Court told us that, “Behind the words of the constitutional provisions are postulates which limit and control.” The trick of applying the Constitution in any era is to identify and articulate just what those postulates are. In his rooted explanation of grand constitutional themes such as

birth equality, feminism, and fundamental fairness, Amar does a commendable job.

Amar contends that his work explains, among other things, “how to make proper constitutional arguments—how to think constitutional law and how to do constitutional law.” In spite of this claim, it is not clear that his book will find its most natural home in the libraries of practitioners. Attorneys litigating constitutional cases will want to read it but, to actually win your cases, it will probably be more productive to cite the latest Supreme Court precedents than the Gettysburg Address.

America’s Unwritten Constitution is not a treatise intended to guide legal practitioners or political scientists. Its aim is the more majestic one of articulating some of the grand underlying themes of American constitutional law and grounding them in the constitutional text. It aspires to be what Thucydides called “a possession for all time,” and it succeeds. Readers today, as well as those of future generations, will read it to their profit. ☉

Jon Blue is a judge of the Connecticut Superior Court.