Enhancing Government: Federalism for the 21st Century

By Erwin Chemerinsky

Stanford University Press, Stanford, CA, 2008. 299 pages, $65.00 (cloth), $19.95 (paper).

Reviewed by Matthew J. Dowd

In *Enhancing Government: Federalism for the 21st Century*, Erwin Chemerinsky, dean of the University of California Irvine School of Law, offers a bold and novel interpretation of how principles of federalism should be applied to promote effective government. His view of federalism is not the traditional view that federalism places substantial limits on the federal government's authority to legislate. Rather, Chemerinsky's "federalism as empowerment" seeks to expand significantly most powers of the federal government. But with respect to one federalism issue—federal pre-emption of state laws—he takes the opposite approach and would expand the states' powers. Chemerinsky summarizes his innovative proposal as follows:

> [W]hen it comes to federal authority, I am simply advocating a return to the law that was followed from 1937 until the 1990s. But when it comes to preemption law, I am urging for significant change, in order to lessen the instances in which state and local government action is forestalled. That, of course, would enhance state and local power, not diminish it.

Chemerinsky recognizes that "many, even among those sympathetic to my goals, will be skeptical of federalism as empowerment." As our nation faces unprecedented change in both its political realities and economic foundations, *Enhancing Government* provides insight into how our nation's legal arena may change. Indeed, Chemerinsky's views may embody the approach favored by the Obama administration.

Chemerinsky begins with a discussion of what he calls the "paradox of post-1937 federalism," which preceded the Rehnquist Court's revival of federalism. From after the New Deal until 1992, he writes, the Supreme Court used federalism to limit federal *judicial* power but not federal *legislative* power. In the 1990s, however, the Supreme Court started to limit federal legislative power through more restrictive interpretations of constitutional provisions such as the Commerce Clause, § 5 of the Fourteenth Amendment, and the Tenth Amendment.

Chemerinsky details this revival of federalism by analyzing key cases, including *New York v. United States*,[1] *United States v. Lopez*,[2] *Seminole Tribe of Florida v. Florida*,[3] *Printz v. United States*,[4] and *City of Boerne v. Flores*.[5] He uses these cases to highlight what he considers a highly formalistic and ultimately flawed approach to federalism. He argues that the formalistic analyses in these cases do not promote the traditional values of federalism, which he identifies as "reducing the likelihood of federal tyranny; enhancing democratic rule by providing government that is closer to the people; allowing states to be laboratories for new ideas; and protecting and advancing individual liberty."

Explaining his unconventional concept of federalism, Chemerinsky asserts that "[t]he central thesis of federalism as empowerment is the genius of having multiple levels of government; that is, an array of alternative actors equipped to deal with society's problems and needs." Thus,

> If one level of government fails, another is there to take over responsibility. For example, if state governments can't or don't require the clean up of radioactive waste, the federal government can act to ensure its safe disposal. If states fail to provide adequate remedies to deter gender-motivated violence and to compensate victims, the federal government can create a cause of action in federal court. If the federal government decides not to require insurance companies to disclose their Holocaust-era policies, state governments can implement this rule within their boundaries.

The reader familiar with the pertinent case law will recognize the specific examples in this quotation as referring to cases that Chemerinsky sees as wrongly decided, namely *New York v. United States*,[6] *United States v. Morrison*,[7] and *American Insurance Association v. Garamendi*.[8] Developing his vision of how federalism, except with respect to pre-emption, should expand Congress' role, Chemerinsky asserts that the proper interpretation of the Commerce Clause is that offered by the four dissenting justices in *Lopez* and *Morrison*, namely that Congress may regulate any activity "so long as there was a reasonable basis for believing that the activity, looked at cumulatively across the country, had an effect on commerce." Likewise, Chemerinsky contends that "the Tenth Amendment is not a separate constraint on Congress." He also writes that "[p]rinciples defining federal court jurisdiction should be modified so as to maximize the ability of litigants to choose whether to have their claims heard in federal or state court." This change, according to Chemerinsky, would address what he views as the faulty assumption that "state courts are on parity with federal courts in their ability and willingness to enforce federal rights." With respect to pre-emption, however, Chermerinsky believes that "[c]ourts should find preemption only when a law expressly preempts state and local action, or if there is a direct conflict between federal and state law." Chemerinsky seems to prefer a broad involvement of government, whether at the federal or state level.

Over the course of the book, Chemerinsky steers the discussion squarely toward the political underpinnings of the Supreme Court's jurisprudence. He is convinced that "[t]he new Supreme Court, with Chief Jus-

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tice John Roberts and Justice Samuel Alito, is likely to be even more aggressive in limiting federal power in the name of states' rights." At certain points, Chemerinsky seems to go out of his way to emphasize that a particular case was decided 5-4, with the majority comprising the "conservative" justices. His criticism in certain areas is understandable and warranted. The Court's approach to sovereign immunity, for example, is highly formalistic, with justices frequently aligning themselves along ideological grounds. In both *Seminole Tribe of Florida v. Florida*[9] and *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*,[10] the Court split 5-4, with Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas in the majority, and Justices Stevens, Souter, Ginsburg, and Breyer in the minority. Indeed, as Judge Richard Posner observed in *How Judges Think*, "[e]vidence of the powerful influence of politics on constitutional adjudication in the Supreme Court lies everywhere at hand," and Chemerinsky provides such evidence in his book.

Notably, however, Chemerinsky's attempt to reduce the Court's pre-emption decisions to right-versus-left politics seems to fall short. He notes that, "[o]ver the same time period in which the Rehnquist Court has revived federalism as a limit on Congress's power, the Court repeatedly has ruled for the preemption of important state laws. ..." As an example, he offers *Lorillard Tobacco Co. v. Reilly*,[11] which was a 5-4 decision with Rehnquist, O'Connor, Scalia, Kennedy, and Thomas in the majority. Chemerinsky notes that those same justices "were in the majority in the 5-4 decisions limiting the scope of Congress's commerce power, reviving the Tenth Amendment, and expanding the scope of sovereign immunity." But, even though, in *Lorillard*, the Court split 5-4 along the conventional conservative-liberal line, it did not do so in other pre-emption cases Chemerinsky discusses. In *Geier v. American Honda Motor Co.*,[12] in which the Court held that a federal motor vehicle law regulating passive restraint systems, such as airbags, pre-empted a state common law tort action, Justice Breyer wrote for the Court and was joined by Rehnquist, Scalia, Kennedy, and O'Connor. The *Geier* dissent comprised Stevens, Souter, Thomas, and Ginsburg. In *American Insurance Association v. Garamendi*,[13] the Court held that the dormant foreign affairs power of the President pre-empted a California law requiring insurance companies to disclose information about all insurance policies sold in Europe during the Nazi regime. Chemerinsky mentions that *Garamendi* was a 5-4 decision, yet omits to note its unusual lineup. Souter wrote for the majority, which included Rehnquist, O'Connor, Kennedy, and Breyer; Ginsburg wrote for the dissent, which included Stevens, Scalia, and Thomas. Of all the areas of constitutional law, the Supreme Court's pre-emption jurisprudence is probably the last that should be criticized for being fractured along traditional conservative-liberal lines.

Additional cases also belie any simple right-left political analysis for many pre-emption cases. As Chemerinsky notes, *Crosby v. National Foreign Trade Council*,[14] which invalidated a state law that restricted the state from purchasing goods and services from companies that did business with Burma, was a unanimous decision written by Justice Souter. Other unanimous decisions include *United States v. Locke*,[15] in which the Court invalidated Washington state regulations governing certain maritime activities, and *Sprietsma v. Mercury Marine*,[16] in which the Court held that the Federal Boat Safety Act of 1971 did not pre-empt a common law claim.

The Court's recent pre-emption decision, *Wyeth v. Levine*,[17] which held that the Food and Drug Administration's labeling regulations did not pre-empt state tort law, resulted in a more familiar split among the justices. Chemerinsky would probably approve of the decision because it strengthened the validity of "state and local laws that ensure desirable effects, such as creating liability for injured consumers ... ." Nevertheless, the alignment of votes highlights the degree to which pre-emption issues are complex and not simply political. Although Stevens, joined by Kennedy, Souter, Ginsburg, and Breyer, wrote the majority opinion in *Wyeth*, Thomas concurred.

Any prediction as to how the Roberts Court will shape pre-emption jurisprudence would be premature. In *Watters v. Wachovia Bank, N.A.*,[18] Alito joined Ginsburg's majority opinion, holding that the National Bank Act pre-empted certain state laws intended to provide oversight of banks, whereas Roberts and Scalia joined Stevens' dissenting opinion. Indeed, Chemerinsky's proposal—that "preemption should be found only if a federal law expressly preempts state and local action, or if there is a direct conflict with federal law"—is perhaps most similar to Thomas' conception, as stated in his *Wyeth* concurrence, in which he expressed his concern with "the vague and 'potentially boundless' doctrine of 'purposes and objectives' pre-emption." When Chemerinsky and Thomas agree, it is a sign that pre-emption cases produce strange bedfellows.

In certain respects, *Enhancing Government* is the antithesis of *An Entrenched Legacy*, by Patrick Garry, which I reviewed in the Sept. 2008 issue of *The Federal Lawyer*. The message of *An Entrenched Legacy* is that the Constitution's structural provisions, namely federalism and separation of powers, can provide sufficient safeguards to personal liberty. Whereas Chemerinsky favors a strong role for the federal government in addressing—and redressing—individual liberty rights, Patrick Garry argues that issues concerning individual liberties (physician-assisted suicide, for example) should be left primarily to the states, in accordance with concepts of federalism and separation of powers. The two books differ, however, in that Chemerinsky limits his discussion mainly to the role of the balance of power between the federal and state governments and does not address separation of powers, although he has written extensively on that topic as well.

Considering Chemerinsky's impressive scholarship and renown as a constitutional law scholar, one should not dismiss his innovative approach to

federalism. Any lawyer who has taken a Barbri bar review course in recent years certainly remembers Chemerinsky's unique discourse on constitutional law, in which he recounts his detailed outline almost word-for-word, heading-for-heading, without a single recourse to written notes. Presumably the product of a photographic memory, his uncanny ability to recite verbatim a 50-page constitutional law outline leaves one with a lasting impression.

Enhancing Government, however, contains a surprising number of typographical errors, including defining "U.S.C." (as in "42 U.S.C. § 1982") to mean "United States Constitution." Such errors detract from the book's readability, and readers have a right to expect more from the editor and publisher of the book.

Whether or not one agrees with Chemerinsky's views, *Enhancing Government* is an important book for several reasons. First, Chemerinsky superbly details the weaknesses of the Rehnquist school of federalism. Second, given the likelihood of vacancies on the Supreme Court and on the federal courts of appeals in the next few years, we can expect to see a shift in the role of federalism—a shift toward Chemerinsky's view rather than Rehnquist's. Finally, Chemerinsky is a brilliant constitutional law scholar whose perspective on federalism, preemption, and separation of powers should be studied carefully. Despite its minor shortcomings, *Enhancing Government* is worth reading for those interested not only in the state of legal relations between state and federal governments, but also in how those relations might evolve in the next few years. **TFL**

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Endnotes

[1]505 U.S. 144 (1992).
[2]514 U.S. 549 (1995).
[3]517 U.S. 44 (1996).
[4]521 U.S. 898 (1997).
[5]521 U.S. 507 (1997).
[6]505 U.S. 144 (1992).
[7]529 U.S. 598 (2000).
[8]539 U.S. 396 (2003).
[9]517 U.S. 44 (1996).
[10]527 U.S. 666 (1999).
[11]533 U.S. 525 (2001).
[12]529 U.S. 861 (2000).
[13]539 U.S. 396 (2003).
[14]530 U.S. 363 (2000).
[15]529 U.S. 89 (2000).
[16]537 U.S. 51 (2002).
[17]129 S. Ct. 1187 (2009).
[18]550 U.S. 1 (2007).

The Ride: A Shocking Murder, and a Bereaved Father's Journey from Rage to Redemption

By Brian MacQuarrie

Da Capo Press, Cambridge, MA, 2009. 275 pages, $26.00.

Reviewed by Thomas Holbrook

"The reason we created a judicial system was because we wanted justice, not revenge."

– Marian Walsh, Massachusetts state senator

Perhaps no single criminal act is more monstrous than the rape and murder of a young child. Complicity is impossible: the child's innocence is absolute, the perpetrator's guilt almost limitless by contrast. By the same measure, such a crime appears truly unforgivable: an eye for an eye would seem leniency.

On Oct. 1, 1997, 10-year-old Jeffrey Curley was lured from his neighborhood in East Cambridge, Mass., by two men with the promise of a new bicycle, was driven away in their car ("the ride" of the book's title) and was murdered. His body was repeatedly violated and his face was disfigured by lime, then his remains were put in a weighted rubberized container and dumped into a Maine river.

When Jeffrey's father, Bob Curley, a Cambridge firefighter, learned of the violation and murder, his reaction was unequivocal. Aware that his son's killers could not be put to death in Massachusetts, Curley promised his neighbors, and his community at large, that he would help to reinstate capital punishment in the state. He told them, "we'll work to change the laws. We'll work to keep maggots like this away from our children."

The laws would have to be changed, because there had been no death penalty execution in Massachusetts since 1947, and in 1951 life in prison legally replaced the death penalty in the state. Because of the heinous acts associated with the death of his son, Bob Curley became the "undisputed champion" of reinstatement of the death penalty in Massachusetts. "I feel that it's God's way of ridding society of vermin like this," Bob concluded. "Being in the spot that I was in, I just couldn't see how anybody could be opposed to the death penalty."

Bob, in fact, threatened to exact the penalty in person. "You fat motherf[***]-er!" he screamed at one of the killers in the courtroom. "I'll f[***]ing carve you up like a turkey, you fat piece of s[***]. You're dead! Dead!" His vengeful rage was unbounded, and to him it seemed appropriate.

Although *The Ride*'s narrative covers the details and progression of the crime well, it is less a documentary of a legal case than a sort of pilgrim's progress—the journey of everyman Bob Curley, the victim's father, from murderous hatred of his son's killers to something more complex—as well as more psychologically stable and morally satisfying.

The book's author, *Boston Globe* reporter Brian MacQuarrie, guides us clearly through the necessary factual data and dicta, though some purpling of his prose here and there is unfortunate. The killers' car is a "hulking gray Cadillac," leaving the reader to wonder how a low-slung automobile can "hulk." Worse, early in the book there are flashback re-enactments in clotted and cloying prose:

> Just after a confusing slalom of twists and turns through Union Square, Bob rose from his bicycle seat, legs pumping like pistons, to scale a short, tough incline beside the commuter-rail tracks. Atop the crest, breathing hard, Bob cruised through a cheek-by-jowl neighborhood of modest, two-story, wooden homes, a well-tended place of front-yard

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Madonnas and corner stores that had yet to fall victim to the gentrification creeping through Greater Boston's blue-collar core.

But, once his scenario is set, MacQuarrie gains his sea legs and his narrative strides along steadily and forcefully. Bob Curley is an ordinary blue-collar guy living an ordinary blue-collar life until his son's murder. Thereafter, MacQuarrie shows with clarity and skill how this unsophisticated, inarticulate firefighter becomes an effective spokesman—first locally, then nationally—for individuals and families dealing with their trauma as the relatives of victims of heinous crimes.

Bob's initial—one has to say natural—reaction is to exact vengeance, the carving up like a turkey of his son's killer that he threatens. However, common though he may seem, Curley is a complex and resourceful man, who, during his extreme grief and rage, searches for a more satisfying resolution of his own murderous impulses. He comes to realize that more has died in his family than just his unfortunate young son.

For, in the end, shockingly to his family and neighbors, Bob Curley becomes an outspoken and articulate *foe* of the death penalty, moving from vengeance to merciful insight. It is not a smooth path: the way is littered with alienation, alcoholism, and depression.

The reasons he succeeds are many. An important one is his Roman Catholic background: the Church is doctrinally opposed to the taking of life. Bob is also influenced by people he seeks out and meets who have visited the same sort of victim hell he inhabits. One is Marian Walsh, a Massachusetts state senator, whose legal colleague and close friend was gunned down. She admits that "I can't say that revenge has not visited my heart." But her respect for the law rises above animosity: "The reason we created a judicial system," she says, "was because we wanted justice, not revenge."

Bob meets and becomes the friend of Bud Welch from Oklahoma City, whose daughter had been killed in the bombing of the Murrah Federal Building there by Timothy McVeigh in 1995. Welch also spent months of sorrow in an alcoholic daze, until he realized that executing the killers wouldn't help *him*: "I wasn't going to gain anything from an act of hate and revenge. And hate and revenge ... were the very reasons that [my daughter] and 167 others were dead." Welch also comes to oppose the death penalty: he meets McVeigh's father and sister (the same age as his daughter when she died) and, holding hands and sobbing together, they realize that the "three of us are in this for the rest of our lives. We can make the most of it we choose."

Welch also speaks what has to be the last word in this tragic litany, though it comes before the conclusion of Bob Curley's story: "I cannot see how in the world we can cage up a human being, and kill him, and teach our children that it's wrong to kill by killing."

The Ride has flaws. They do not begin to cancel its merits. If you have an interest in the question of putting people to death, read it. **TFL**

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The Economy of Renaissance Florence

By Richard A. Goldthwaite

Johns Hopkins University Press, Baltimore, MD, 2009. 672 pages, $55.00.

Reviewed by Christopher C. Faille

Roughly two-thirds of the way through this book about a distant time and a distant place, Richard A. Goldthwaite says something that reads as if it came out of last week's magazines. He reminds us that the institution known as a bank serves three functions, each of which involves the stimulation of the broader economy: (1) it channels savings from those who have them to those who demand them for purposes of investment or consumption; (2) it facilitates payments from one party to another, thereby increasing the velocity of the circulation of money; and (3) it enlarges the money supply through the magic of fractional reserves.

To say that banking, in the Renaissance as well as today, is a "fractional reserve" activity is to say that banks keep only a fraction of their deposits in the form of cash at hand while maintaining an obligation to pay all of it upon demand. Depositors do not all demand their money at once, so most of it can be taken out of the vaults and invested—which, after all, is how banks earn the income that they use to pay interest to the depositors. If (just by way of random example) custom or law dictates that a bank will hold one-sixth of the value of its demand-deposit accounts on hand, then the broad money supply for the surrounding economy is six times the amount of the base money.

Properly functioning banks, then, are useful things. Dysfunctional banks can be disastrous things, as both 20th- and 21st-century Americans and 14th- and 15th-century Florentines had the opportunity to discover.

From the Vatican to the Pawn Shop

Renaissance Florence had three sorts of banks. We might think of them as high-, medium-, and low-market banks. On the grand scale, there were the merchant banks, the elite institutions that did the wheeling and dealing that offered liquidity to landed nobles and greased the skids of commerce from London to Constantinople. The great merchant bankers of the 14th and 15th centuries worked with or on behalf of distant kings and princes and all-too-proximate popes.

In the middle ground were those banks that Goldthwaite calls local or deposit banks. Characters such as Lippo di Fede del Sega (c. 1285–1363) began as simple money changers, but over time they took on other functions—dealing in precious metals, supplying the mint with same, using security facilities to attract deposits for safekeeping, and finally keeping current accounts with transferable credits. These deposit banks had their own guild, the Arte del Cambio, a fact that indicates that their status in the city was protected by law despite periodic waves of revulsion

against their alleged usury.

Then there were the low-market banks: in essence, pawn shops. In 1367, the Arte del Cambio adopted a regulation forbidding its members from lending against a pawn. A market demand abhors a vacuum, however; so some Cambio bankers abandoned guild membership in order to continue accepting pawns, and other Florentines without guild affiliation entered the pawn business, such as Bartolomeo di Bartolo Cocchi Compagni, who was sufficiently esteemed by the masses that he received a knighthood during the government of the Ciompi—the working-class rebels who took over the city briefly in summer 1378. As Goldthwaite says, Compagni's receipt of this honor during that period indicates the considerable popular esteem that he may have acquired not despite, but because of, his occupation.

Eventually, long after the defeat of the Ciompi, the government decided that it was better to have Jews do the low-market banking. In 1437, the city made a contract with Abramo da San Miniato for the organization of a consortium of fellow Jews who would open four pawn shops with a total capital of 40,000 florins. Over time, these shops took on other banking functions, and the line between the pawn banks and the deposit banks blurred, although the fact that Christian depositors in the banks owned by Jews sometimes arranged to have their names kept secret surely indicates a continuing stigma attached to these banks.

Mountains of Compassion

The pawn banks' borrowing clientele was not necessarily as distressed as it has been made out to be. The extant journals of one successful example of such a bank show that only 3.5 percent of its clients defaulted on their obligations, resulting in the sale of the valuables they had put up as security. Goldthwaite remarks, "The success of this pawn bank testifies to the economic importance of these institutions in meeting liquidity problems of the lower classes, just as the low renewal and default rates on their loans, especially in view of the high interest rates, testify to how temporary those problems were in the lives of its borrowers."

By the second half of the 15th century, a move was under way in many central Italian locales to drive the pawn banks out of business, replacing them with a "compassionate mountain" (Monte di Pietà) of money collected from generous Christians and lent out to the needy on terms that were not usurious. These Monti were established with the relevant city government's sponsorship, although generally without the use of public funds. As to ecclesiastical politics, the creation of such Monti was a project often sponsored by the Franciscan order and opposed by the Dominicans.

Until the rise of Girolamo Savonarola, though, there was little interest in the creation of such a Monte in Florence. Lorenzo de Medici, in particular, was not hostile to the pawn banks. Although his family famously occupied the high end of the banking market, Lorenzo seems to have thought that the low-end pawn bankers were useful folks to have around, and he was not interested in sponsoring a project to drive them out.

But Florence entered a new world just when Columbus did. Lorenzo died in 1492 and Savonarola (who, despite being a Dominican, favored the Monte project) was in ascendancy for the next five years. The Monte opened in 1495, but it was not a success. It was subject to a high turnover of depositors, Goldthwaite tells us, and accordingly "lacked the financial stability to make much headway and limped along at a very modest level of activity." As to its desired effect, Goldthwaite writes that "Jewish pawn banks remained in business alongside the Monte di Pietà, a testimony to their essential role in the urban economy as a credit institution serving the general population, as well as, undoubtedly, a source of revenue for the state."

Forty Years of Limping Along

After almost 40 years of limping along, in 1533, the bank abandoned its originating ideology and began offering interest to would-be depositors in order to attract the necessary funds to continue. Beyond this point, it becomes a state-controlled bank under Duke Alessandro de Medici: a savings and loan institution on one hand and an instrument of government policy on the other.

Let us contemplate the "mountain." There is a valuable lesson on its slopes: The time value of money is a reality. Money right now is worth more than the "same" sum a year from now will be worth. This is true even if the value of the applicable currency remains constant over the interim, although the point is, of course, even more valid if one must account for inflation. If I'm going to give you my money for a year, I will expect some compensation for its time value at the end of that period. This is a reality and any ideology that blinds us to it—piously or otherwise—does us a disservice.

How the United States and the rest of the industrialized world will, in the end, resolve the present credit and banking crisis is not known to me. But it will be resolved only by recognizing reality, not by evading it. Even those of us without Goldthwaite's commendable erudition are aware that Savonarola came to a bad end. **TFL**

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Presidential Constitutionalism in Perilous Times

By Scott M. Matheson Jr.

Harvard University Press, Cambridge, MA, 2009. 235 pages, $45.00.

Reviewed by Charles S. Doskow

The U.S. Constitution is unlike constitutions adopted by most nations in recent years in that it has no specific provisions granting the government extraordinary temporary powers in national emergencies. The sole reference to the nation's peril is in Article I, Section 9, which provides that the writ of habeas corpus may be suspended in the event of rebellion or invasion. That provision is not specific as to which

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branch of government has the power of suspension, but its placement in a section limiting congressional power has led to an understanding over the years that the power rests in Congress.

This constitutional lacuna leaves open a plethora of issues to be addressed when the country is faced with situations that require immediate executive decisions and action—situations that may not wait for the coordinated branches of government to perform their normal functions.

Scott Matheson, a professor of law at the University of Utah, analyzes these constitutional issues as they have arisen in the past and been dealt with by various Presidents. Placing past crises in the framework of the separation of powers, he examines the reactions of each of the branches of government to these crises. The executive branch has the means to react immediately, and each crisis has found the President taking action as he saw necessary. Congress and the courts are left to pick up the pieces and perform their functions as secondary players.

In a chapter entitled "Presidents and Constitutionalism," Matheson's analysis flows from executive branch supremacy to political branch partnership to judicial review to retroactive judgment. Matheson then characterizes presidential reactions as having constituted either extraconstitutionalism or executive constitutionalism; he considers only the latter to be the proper use of emergency presidential power.

Lincoln was inaugurated on March 4, 1961, as the nation was being divided in two. Congress was out of session and would not return until July 4. There was danger that Maryland secessionists would cut off the nation's capital from the troops arriving from the Northeast that were vital for the defense of the district. Lincoln suspended habeas corpus to neutralize the Maryland turncoats, and he expended funds that Congress had not appropriated.

Lincoln defended his action by citing sections of the Constitution that provide the following:

- "The President shall be Commander in Chief of the Army and Navy" (Art. II, § 2);
- "he shall take Care that the Laws be faithfully executed" (Art. II, § 3); and
- "The United States shall guarantee to every State in this Union a Republican Form of Government" (Art IV, § 4).

In his message to a special session of Congress on July 4, 1861, Lincoln argued that preventing a state's secession was an "indispensable *means*, to the *end*, of maintaining the guaranty mentioned" in this last provision. As the Civil War raged, Lincoln saw to it that Congress continued to meet, the courts remained open, and the election of 1864 went forward as scheduled.

Most important, Lincoln submitted all his early unilateral actions for ratification by Congress. He was adhering to the concept of "adequacy constitutionalism," which holds that the Constitution contains sufficient flexibility to allow necessary steps to be taken in an emergency.

Matheson reviews Lincoln's actions in detail, finding that Lincoln at all times believed that he was acting in accordance with constitutional mandates and that his respect for the Constitution assured its continuing place in our history.

Shorter sections of Matheson's book are given over to Woodrow Wilson (who comes off very badly), Franklin D. Roosevelt, and Harry Truman.

But you can guess where all this is heading.

In the second half of the book, Matheson applies his constitutional framework to three aspects of the Bush administration: torture, surveillance, and detention. The author traces each through the analytical model developed in the book's opening chapter.

Matheson finds the Bush administration's torture and surveillance policies to have "crossed the extraconstitutional border" and the President's detention policies to be "a grab for unchecked executive power as an end in itself" and "the antithesis of executive constitutionalism." According to Matheson, Bush operated initially "without a legislative or constitutional safety net." Only after the U.S. Supreme Court intervened in 2004 did the administration go to Congress to bolster its positions. Congress complied, resulting in passage of the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006. Thus, unlike Lincoln, Bush did not seek congressional approval at an early date, but only after the Supreme Court forced him into it. And Bush never said, as Harry Truman did when he seized the steel mills, that Congress could "reject the course of action I have followed in this matter." Both the Authorization for the Use of Military Force in 2001 and the USA PATRIOT Act in 2001 gave President Bush tools he requested, and he used both in pursuit of the executive supremacy that was a hallmark of his administration.

As noted, Matheson considers executive constitutionalism—as opposed to extraconstitutionalism—to be a proper use of emergency presidential power. Executive constitutionalism, he writes, "calls for consultation with Congress and consideration of and concern for individual rights in formulating wartime strategy." Among the 14 principles of executive constitutionalism that Matheson sets forth as embodying the concept, perhaps the key one is that the President should fulfill his or her responsibilities "within the structure separation of powers and checks and balances."

Executive constitutionalism involves balancing the need for emergency action with the roles of each of the branches of government in our constitutional system. Matheson contrasts the "constitutional consciousness" of Abraham Lincoln with what might be called the "constitutional unconsciousness" of George W. Bush.

This short book presents military, legal, and constitutional history, law, and theory with superb organization and readable prose. It is a remarkable work and an important contribution to understanding the processes that can keep our Constitution viable even in perilous times, when its basic framework is challenged. **TFL**

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