INSIDE THE CASTLE: LAW AND FAMILY IN 20TH CENTURY AMERICA

BY JOANNA L. GROSSMAN AND LAWRENCE M. FRIEDMAN

Princeton University Press, Princeton, NJ, 2011. 443 pages, $35.00.

Reviewed by Michael Ariens

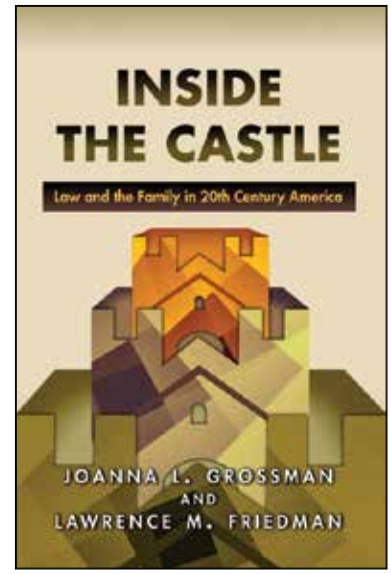
Inside the Castle: Law and Family in 20th Century America, by Joanna L. Grossman and Lawrence M. Friedman, is an entertaining and occasionally frustrating history. In the book's introduction, the authors offer two big ideas. Their first idea promotes the instrumental explanation of law: "Family law follows family life. ... Law is not autonomous; it does not evolve according to some mysterious inner program; it grows and decays and shifts and fidgets in line with what is happening in the larger society." The authors adopt as well as ignore this idea as they survey what they accurately and insightfully call their study of "middle-class family law." They distinguish middle-class family law from the law dealing with poor families, the history of which studies "the way in which the state, in exchange for welfare payments, has claimed and exercised rights to meddle with the family lives—even sex lives—of poor mothers and other women. ..."

The authors' second big idea is the rise in the last part of the 20th century of what the authors call "individualized marriage," the successor to "companionate marriage." Companionate marriage was marriage between two equals, replacing a more patriarchal form of marriage. Individualized (or expressive) marriage—terms they take from the sociologist Andrew Cherlin's *The Marriage Go-Round* (2009)—is "an intensely individual matter, a road to self-realization, to personal fulfillment."

Both these ideas have been long promoted by Lawrence M. Friedman, one of the nation's foremost legal historians. Friedman's *The Republic of Choice: Law, Authority, and Culture* (1990) and *The Horizontal Society* (1999) both emphasized the rise of the expressive self in American history and law. In the earlier book, he stated that an understanding of individualism has developed that focuses on the right "to *choose* oneself," one "in which *expression* is favored over *self-control*." His well-known general histories of American law, *A History of American Law* (3d ed. 2005) and *American Law in the Twentieth Century* (2002), reject any claim of the autonomy of law from society. Friedman instead argues in the latter book that "changes in the world bring about, inevitably, corresponding changes in the law."

These ideas course throughout *Inside the Castle*. In many respects, the evidence adduced by the authors confirms both big ideas. Grossman and Friedman are persuasive that law has followed culture in the many varieties of marriage-like relationships. And they persuasively demonstrate the shift to individualized marriage from companionate marriage through the 20th century. By comparison, the authors' case that their two big ideas are proven by the historical events they record is occasionally weak, but, even so, they take the reader on an enlightening journey.

Inside the Castle is divided into four parts: marriage; sex outside of marriage (which part they title "Anything Goes: Love and Romance in a Permissive Age"); divorce and its consequences, including issues of child custody and support; and relational duties and rights of family members, from inheritance and adoption to the rights and duties of parenthood. This division is largely successful, though some sections of chapters seem shoe-horned (particularly the chapter on the rise and fall of "heart balm" tort claims, a subject given much more coverage than needed, and that seems largely disconnected from other chapters), and other sections are summarized too quickly (particularly the authors' study of the end of intra-spousal tort and criminal immunity for marital rape). *Inside the Castle* alights on issues large and small, discussing cases, statutes, and other material from a large number of states (though the authors rely too heavily on the *New York Times* for historical exemplars). It provides a wide-ranging synthesis of the dramatic changes in family law during the past century.



Two areas in which further development would have bolstered their overarching claims are the legal changes to both marital rape and intra-spousal tort immunity. The authors spend three pages discussing the abolition of the "notorious doctrine that a man could not be guilty of raping his own wife." They briefly speak of the well-publicized 1978 Oregon case in which John Rideout was accused of raping his wife, as well as the case of John and Lorena Bobbitt. They conclude that marital violence may be a symptom of "modern marriage—companionate or expressive marriage." This seems right to me, but I wish that the authors had pursued more thoroughly any evidence supporting this conclusion. They cite a clipping service study of prosecutions for marital rape from 1978 and 1985, and tell us that there exist "no decent records of marital rape." I accept that statement, but wonder why the authors decided not to attempt to update the clipping service study, as relying on a study that ended a quarter-century before publication of this book is insufficient. In regard to the end of intra-spousal tort immunity, the authors provide only the barest outline, concluding that "[m]ost states have gone this route; but a surprising number still cling to the original doctrine." In a society in which individualized marriage is becoming the norm, the fact that a "surprising number" of states still bar tort claims by one spouse against the other

seems astonishing. Indeed, that brute fact might suggest that individualized marriage is not always the touchstone for courts and legislatures. And if family law follows family life, why hasn't intra-spousal tort immunity been abolished by all (or nearly all) states?

The small section on marital rape also offers an example of a constant if minor irritation in the book. The authors provide plenty of anecdotes, but it is unclear whether these are telling anecdotes or are merely entertaining. The lurid details of the case of John and Lorena Bobbitt generated weeks of jokes for late night talk show hosts, but such events fail to provide a platform for understanding the transformation of family law in the 20th century. A similar anecdote is found in the chapter on the demise of "heart balm" claims, such as breach of promise to marry and alienation of affection. The authors tell the story of the "filthy rich" John Bernard Manning, then 84, defendant in a suit brought by 29-year-old Honora O'Brien in 1917. The jury found that Manning had breached his promise to marry O'Brien, and awarded her the munificent sum of $200,000. The New York appeals court reduced the award to $125,000, and determined that she could recover damages even if her decision to marry was based on "mercenary motives." Although interesting, the story of Manning and O'Brien seems to tell us little, for the paragraph following that story recites other instances in which such suits were dismissed.

Another constant though minor irritation is the recurrent discussion of how "traditional gender roles" required that "[w]ives were supposed to be chaste, loyal homemakers." The authors join this trope with occasional references to Victorian morals, but they do not cite court decisions or other authorities reflecting these views, and it appears that they insert such statements in order to make changes in family law appear more transformative than one might otherwise believe they are.

Grossman and Friedman thoroughly and convincingly trace the history of divorce law, including the rise of collusive divorces and the reason that many made trips to Nevada. (Here, the anecdote involving Eddie Fisher's divorce of his wife Debbie Reynolds in order to marry Elizabeth Taylor is both entertaining and telling.) They also note that, by the middle of the 20th century, "a kind of creeping no-fault system began to emerge," and they give New Mexico credit for first adding "incompatibility" as a ground for divorce in 1933. But did divorce law change for reasons having to do with either the emergent expressive marriage or because law follows culture? I'm not sure that the authors have made either case. In Texas, the only place whose divorce law reform I have studied, lawyers were at the forefront in urging the legislature to change the law, for law reformers believed that the integrity of the legal system was at stake, given the prevalence of perjury and artificial technicalities in the law of divorce. One mid-century study indicated that 85 percent of divorces in Texas were given on grounds of cruelty, well above the national average of 55 percent. This interest by lawyers in the integrity of the legal system was one driving factor in the 1969 statute allowing Texans to divorce for the no-fault reason that the marriage was insupportable, as well as to divorce for reasons based on fault. The other reason driving the reform of Texas divorce law was instrumental: Women were gaining new legal powers in Texas community property law in the mid-1960s, and divorce law reformers framed marriage more starkly as a partnership requiring equitable distribution of assets in cases of dissolution. The story of divorce reform in Texas suggests that the law may, on some occasions, be autonomous from society.

A section titled "Education and Religion" discusses the rise of compulsory education laws, which gave states more control over children as against parents. That section briefly discusses the rise of home schooling, but this brevity short-circuits a possibly fruitful line of inquiry, namely changes to the triadic relationship of parent, child, and state over the course of the 20th century. Compulsory education laws were a favorite of early-20th century progressives. Oregon tried to take such laws to another level by prohibiting private schools, an effort rejected by the Supreme Court in *Pierce v. Society of Sisters* (1925). But many states made mandatory the education of children in either private or public schools. Compulsory education may cleave parental authority, and allow (or encourage) a child to form his or her own self, even if that self is contrary to the person whom parents wish to raise. In an age of expressive individualism, how did parents manage to transform compulsory education laws so dramatically between 1980 and the early 21st century? Around 1980, some parents who taught their children at home were prosecuted for violating compulsory education laws, and most states either outlawed or barely tolerated home schooling, sometimes requiring parents to prove their teaching credentials to teach their children at home, or requiring children to pass standardized tests if parents wanted to continue schooling at home. But today, as the authors note, "[a]s many as 4 percent of children nationwide are home schooled." Is the triumph of home schooling consistent with expressive individualism? It seemed to arise at the same time (the 1970s) as other trends that focused on expressive individualism, but home schooling reflects less the fear of another person who may impinge on one's "self-realization" than a fear of the totalizing state. It may suggest the value of families as civic entities that provide a buffer between the individual and the state.

As a historical study of 20th-century family law, *Inside the Castle* properly abjures any predictions, noting that "there is no ending. … The story of life goes on, into the void. And so too the story of the law." ⊙

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MAPPING THE NATION: HISTORY AND CARTOGRAPHY IN NINETEENTH-CENTURY AMERICA

BY SUSAN SCHULTEN

University of Chicago Press, Chicago, IL, 2012. 246 pages, $45.00.

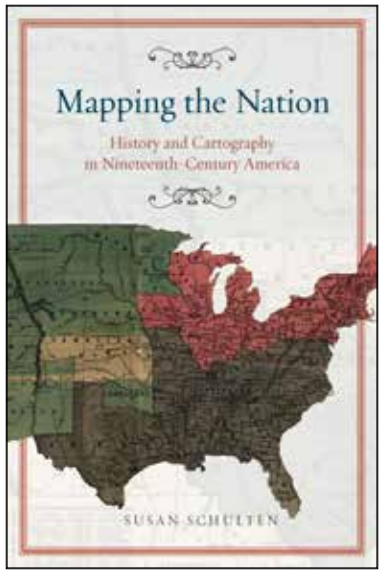
Reviewed by Henry S. Cohn

University of Denver history professor Susan Schulten points out that, in the 21st century, the term "map" often refers to a "thematic" rather than a "directional" document. For example, we speak today of "mapping" the genome or the human brain (last April, President Obama announced a project to do the latter). Schulten's excellent book, *Mapping the Nation*, seeks the 19th-century roots of today's maps, which have moved away from mere cartography.

Schulten divides her book into two parts: "Mapping the Past" and "Mapping the Present," both from the perspective of the 19th century. In other words, "Mapping the Past" refers to mapping what was already the past in the 19th century, and "Mapping the Present" refers to what was then the present in the 19th century. Mapping the past was exemplified by Emma Willard's textbooks, illustrated by her maps, which became bestsellers and standard educational tools. One of her products was the "American Temple of Time," a diagram of a temple with Doric columns that included a timeline of history by which students "could integrate the geographic and historic dimensions of American," and "plot the important men—statesmen, theologians, warriors—according to their place across the centuries." She also produced a "Chronographic Plan" of the history of the United States in the shape of a tree, dividing time in a "logical" and "linear" fashion.

Other creative people in the 19th century were issuing maps of westward expansion and suggesting routes for a transcontinental railroad. German cartographer and geographer Johann Georg Kohl drew a series of maps on the history of American exploration and discovery, and, in 1888, John F. Smith's map, "audaciously titled 'Historical Geography,'" showed how the nation had been divided into free and slave states. Above the slave states, Smith's map portrayed a banner that read, "God's Curse Slavery," and above the free states was a banner reading "Blessings of Liberty."

Schulten discusses a map that the Coast Survey produced in 1861, drawn by German cartographer, Edwin Hergesheimer, who had fled his homeland during the upheavals of 1848. Hergesheimer based his "Map Showing the Distribution of the Slave Population of the Southern States of the United States" on data gathered by the 1860 census. This map was the first effort to translate data from a census into map form.



Lincoln obtained a copy of the map and pored over it as he prepared the preliminary Emancipation Proclamation, which he issued on Sept. 22, 1862. The map showed that the greatest concentration of slaves was in states not occupied by the Union army, and those were the states in which Lincoln announced in the preliminary Emancipation Proclamation that, on Jan. 1, 1863, the slaves would be free if the rebellion continued. On that day, Lincoln issued the final Emancipation Proclamation, providing the Union army a legal basis on which to liberate the slaves when it entered Southern territory.

One of the most significant paintings of the Civil War years was Francis Bicknell Carpenter's 1864 group portrait of Lincoln reading the preliminary Emancipation Proclamation to his cabinet. Carpenter received permission in 1863 from Lincoln to spend time in the White House to paint a re-creation of the cabinet meeting at which the proclamation was first discussed. At the lower right, Bicknell depicted the Hergesheimer map.

The Hergesheimer map and another issued by the Coast Survey at the same time, "Map of Virginia Showing the Distribution of its Slave Population from the Census of 1860," played a role in showing the stark difference between the slave population of eastern and western Virginia. The slave population was centered in the cotton-growing east, and was sparse in the mountainous west. This was a factor in the creation of West Virginia as a separate state in 1863.

In the "Mapping the Present" part of the book, Schulten turns to the origins in the 19th century of mapping for specific purposes, such as ecology, medicine, or public policy. The earliest maps concerned weather, addressing the climate, rainfall, and temperature in regions of the United States. In the later part of the 19th century, maps were issued showing areas of the country with public health problems, such as syphilis and epidemics of cholera and yellow fever, and maps also showed places for cures, such as resorts and asylums.

Several of the scholars who helped support this thematic mapping were located at Johns Hopkins University. This was the case because Daniel Coit Gilman, who became the university's first president in 1876, had trained at Yale as a geographer and prior to 1876 had served at the Yale library and taught geography at Yale.

At Johns Hopkins, Gilman lobbied Congress to develop an archive for maps and was successful in helping to develop the Library of Congress' map division. He urged a history professor at Johns Hopkins, Herbert Baxter Adams, to develop a curriculum that combined history and geography. He influenced Frederick Jackson Turner, whose Turner thesis, or frontier thesis, asserted that traits of the American character, such as democracy and materialism, derived from the frontier experience. John Franklin Jameson, an important geographer at the University of Chicago, trained under Gilman, as did Isaiah Bowman, who later assisted Woodrow Wilson at the 1919 Paris Peace Conference in drawing the borders of the new European states. Bowman was later also a president of Johns Hopkins University.

In 1878, Gilman founded the Johns Hopkins University Press, the first academic publisher in the United States. One of its earliest publications was a map entitled "Baltimore and Its Neighborhood: An Excursion Map." It was a consolidation of earlier maps relying on Coast Survey data as well as geological explorations, and it was carefully calibrated to the square inch. It was hailed by *Science* magazine on Dec. 5, 1884, as providing the "best existing information relating to the vicinity of Baltimore." *Mapping the Nation* concludes that 20th- and 21st-century map-makers successfully built on Gilman's "endorsement of mapping as a way to rationalize society and knowledge itself." The Internet, in fact, as an organizer of information, might be viewed as a 21st-century extension of the 19th-century mapping projects that Schulten discusses.

Schulten's website, mappingthenation.com, contains additional materials, including the maps mentioned in this review, which it portrays in color, whereas the book shows them in black and white. ⊙

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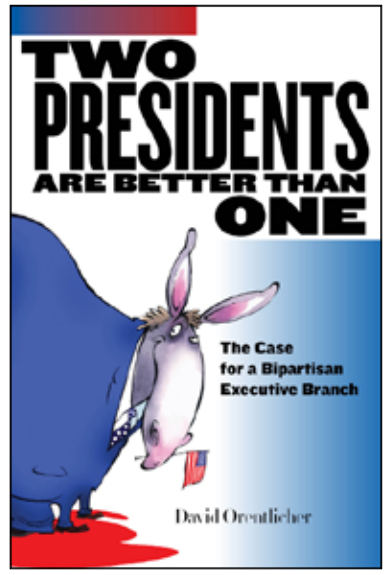
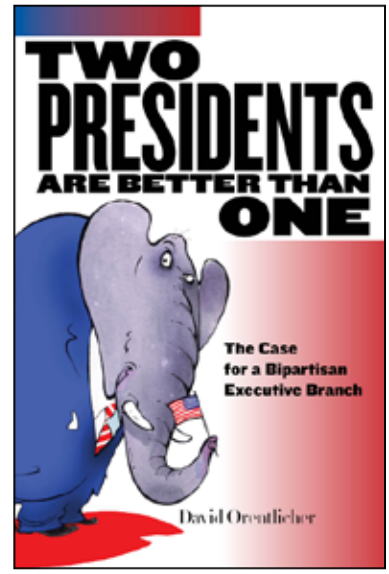
TWO PRESIDENTS ARE BETTER THAN ONE: THE CASE FOR A BIPARTISAN EXECUTIVE BRANCH

BY DAVID ORENTLICHER

New York University Press, New York, NY, 2013. 292 pages, $29.95.





Reviewed by Louis Fisher

A proposal to have two Presidents instead of one may seem implausible on its face, but David Orentlicher's book is a serious effort to analyze the political dysfunction of the national government and recommend possible reforms to deal with partisan polarization. *Two Presidents Are Better Than One* is well written, carefully researched, and thoughtfully argued. Orentlicher teaches at the Indiana University School of Law and served in the Indiana House of Representatives for six years.

The first sentence of his preface strikes a theme that many if not most readers will find highly appealing: "This book is about the very high price the United States pays for its one-person presidency." One of the odd features of the American presidency is the inflated and unrealistic hopes of scholars and the general public that someone will enter the White House and deal effectively with national problems. What we regularly find, instead, is a woeful succession of Presidents who either gravely abuse executive power or are singularly inept in knowing what to do with it. Orentlicher correctly notes: "Much of the enthusiasm for a single president may reflect a tendency for the public to develop exaggerated expectations as to what its leaders can accomplish. For many people, there seems to be an important psychological drive for an all-powerful savior who can solve serious problems and deliver individuals from their travails."

The skills needed to win a presidential election are evidently not the skills needed to govern effectively. Thomas Cronin, who has been studying the presidency since the early 1970s, offered an interesting observation in his book *On the Presidency* (2009). In studying the record of 15 Presidents from 1920 to 2009, he concluded: "Maybe about three were successful" (Franklin D. Roosevelt, Dwight D. Eisenhower, Ronald Reagan). "At least half a dozen failed in one way or another. Nixon was ingloriously forced from the office. Bill Clinton was impeached. The American voters vetoed four others when they sought reelection (Hoover, Ford, Carter, and Bush I). Two others (Truman and LBJ) wisely stepped aside rather than almost surely face voter rebuke in 1952 and 1968." Given that pattern, why should we expect the victor of a presidential contest to succeed in office?

Orentlicher explains the process for electing two Presidents. Presidential candidates would be nominated by their respective parties through the existing system of primaries, caucuses, and national conventions. Each presidential candidate would run with a vice-presidential candidate, resulting in two vice presidents as well. "Voters would cast a single ballot, and the top two vote getters would be elected to the presidency. Ordinarily, the top two would come from the Democratic and Republican Parties, but there may be occasions in which a third-party or independent candidate would run second."

A fundamental issue for Orentlicher is the cause of presidential ineptitude. His explanation: "When the framers of the Constitution decided to divide the legislative power between a House and Senate and rest an undivided executive power in a single president, they paved the way for the development of the 'imperial presidency.'" By this analysis, the problem is with the constitutional framework. However, the imperial presidency is a recent development. Harry Truman was the first President to take the country to war (against North Korea) without first obtaining either a declaration or authorization of war from Congress. As Orentlicher acknowledges: "To be sure, it took some 150 years from the adoption of the Constitution to the development of the imperial presidency." That would date the imperial presidency to about 1939, or President Franklin D. Roosevelt and the eve of World War II.

Therefore, the problem we have faced for the past six to seven decades is not structural or rooted in the constitutional distribution of power. Something else is at work. An alternative explanation: Presidents chronically exercise poor judgment in attempting to use the political power available to them. As one example, President Barack Obama on his second day in office signed an executive order to close Guantánamo within one year. What was he thinking? That putting his signature on a document would resolve that problem? Did he not realize that he needed first to reach out to lawmakers to determine how they would react? Were there no adults in the administration willing to warn him of the political downsides? Democrats and Republicans quickly passed legislation to block closure of the detention facility, handing Obama an early and embarrassing defeat. He should have spoken publicly to persuade Congress and the public that his policy was appropriate and constructive. Moreover, he needed to find a facility in the United States to house the detainees. By taking none of those steps, he instantly offered himself as an amateur who lacked a basic understanding of the American political system.

Similarly, Obama needed to fix his eyes steadfastly on the economy to deal with unemployment and the housing crisis. He did not do that, deciding to focus his atten-

tion on health care, global warming, and other issues. The continued weak recovery has led to prolonged joblessness and inadequate revenue to help control unprecedented budget deficits. These failings did not come from the constitutional structure. They came from Obama's political choices. As Orentlicher notes: "It is quite plausible to think that in Barack Obama's rush to pass as much legislation as he could in his first two years, he made policy choices that reflected unwise priorities. Arguably, he spent too much time on such issues as health care and the environment and not enough time promoting economic recovery."

Orentlicher argues that a two-person presidency "would restore the balance of power between the executive and legislative branches." He states that "plural executives are much more the norm in western Europe and other parts of the world." He means this in the sense that "a collegial or collective executive cabinet is one of the hallmarks of parliamentary systems." The prime minister "may have a preeminent position, but decision making is, to a high degree, a joint endeavor of the cabinet ministers." Major policy decisions by the executive branch in parliamentary systems "are taken up for a vote by the full cabinet."

But that is not the impression we have of power placed in the hands of Margaret Thatcher and Tony Blair in England or in François Mitterrand and Nicolas Sarkozy in France. Orentlicher himself remarks that the president of France "enjoys more power than is typical for a parliamentary president, especially with regard to foreign policy." He adds that, in a parliamentary system, "the executive branch governs as an arm of the legislative branch." In fact, the parliamentary model reinforces executive power over the legislative branch. Legislative bodies in countries with parliamentary systems are markedly weaker than Congress. As Orentlicher concedes: "To be sure, countries with parliamentary systems may have a dominant prime minister." Quite so.

In the United States, we have chosen to move toward joint decision-making in some areas. In the 1936 *Curtiss-Wright* case, Justice Sutherland incorrectly said that treaty negotiation was reserved solely to the President ("he alone negotiates"), the Senate "cannot intrude," and "Congress itself is powerless to invade it." A complete misconception. Presidents often invite members of the Senate and the House to participate in the negotiation process to build political support for a treaty. Woodrow Wilson's stubbornness in refusing to do so doomed the Versailles Treaty. The contemporary "fast-track" process for trade agreements puts members of the House and Senate in key positions for negotiation.

A two-President model would present new complications. Decisions left to the President today (the power to veto, to nominate, etc.) would be shared by two Presidents. Orentlicher would have them "enjoy joint and equal authority." If a bill passed Congress, each would have to sign it before it became law. They would have to agree on a signing statement. Because both Presidents would have to sign a bill, either President acting alone could veto a bill. The two Presidents would have to agree on executive orders, choices of department heads, pardons, and other actions. Orentlicher concludes that these joint decisions would produce more moderate policies and yield benefits. He believes that nominations for federal judges would more likely attract support from both parties and speed confirmation.

Even apart from the fact that they would be from different parties, the two Presidents would not always be in lockstep. Orentlicher says that in all likelihood they "would choose to assume primary responsibility for different areas of authority. For example, one might oversee health care policy, while the other might direct energy policy. One might supervise relations with European countries, while the other might manage relations with Asian countries." The risk: one President could be largely ignorant of what the other is doing. More worrisome: "a second president would double the number of issues that can receive close attention from the top." More presidential activity? Why do we need that? Orentlicher is convinced that a two-President system would so lower the risk of abuse and incompetence that it would be better to repeal the 22nd Amendment and allow Presidents to serve more than two terms. But the political and constitutional dangers are significant. Orentlicher admits he has "sketched a balance increasingly skewed in favor of the executive branch." That is a curious prospect, because much of the book warns about the current imbalance that favors the President over Congress.

He explains: "we do not have to choose between good decision making and expeditious decision making. A 535-person Congress may move slowly, but small groups do not." Precisely. President Obama moved promptly when he ordered U.S. forces to be involved in Libya without ever seeking congressional authority. Orentlicher expressly states that Obama violated the War Powers Resolution with his military intervention in Libya. Quick action does not mean constitutional, legal, or constructive action. Orentlicher adds: "policy making in the executive branch generally does not benefit from the ability of a single president to act decisively and with dispatch, but it does suffer from the absence of a deliberative process among multiple decision makers." He hopes a two-person presidency would increase the amount of deliberation.

As another example of presidential power being expanded not because of constitutional structure alone, Orentlicher discusses the role of the judiciary in facilitating "the development of the imperial presidency." During the Vietnam War, the Supreme Court regularly declined to hear challenges to the constitutionality of the war. On other occasions, courts have "affirmed presidential assertions of extraconstitutional authority," as in *Curtiss-Wright*. The problem here is not with the Constitution and its allocation of political power but with judicial rulings that typically tilt in favor of broad definitions of presidential power over foreign affairs and national security. Why would a two-President system alleviate that problem? As Orentlicher explains, the Supreme Court "has failed to block egregious presidential action that exceeds the power of the national government, as when it upheld the internment of Americans of Japanese descent during World War II."

Orentlicher asks about Abraham Lincoln and the ending of slavery: "Are there some times when only a single, decisive leader will suffice?" Here Orentlicher overstates Lincoln's contribution. He did not end slavery by himself. Congress acted first by passing two Confiscation Acts to establish national policy that would seize property (including slaves) in Southern states that had taken up arms against the Union. Congress prohibited military and naval officers from returning fugitive slaves to their masters. It abolished slavery in the District of Columbia. Lincoln issued the Emancipation Proclamation after these legislative initiatives.

Orentlicher concludes: "With multiple

decision-makers, the quality of decision making would improve. Two heads are better than one." The framers rejected a proposal to have three Presidents (one for the South, one for the middle states, and one for the North) because accountability was a key constitutional principle. They recalled the problems of the multi-person executive boards that functioned during the Continental Congress. They wanted to fix responsibility, and for that reason they chose to have a single President. In 1789, when creating the departments of State, War, and Treasury, members of Congress opted for single executives to run the agencies.

Orentlicher has written a thoughtful, stimulating book. He says that even if his two-party, two-person presidency is not adopted, he will have served an important purpose by highlighting the dysfunction in Washington, D.C. and encouraging reformers "to design alternative remedies for the imperial presidency and partisan conflict. Until we have an adequate understanding of the causes of our problems, we cannot identify effective remedies for the problems." ⊙

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 at the Congressional Research Service and as a specialist in constitutional law at the Law Library. He is the author of 20 books, including On the Supreme Court: Without Illusion and Idolatry *(Paradigm Publishers, 2013).*

THOSE ANGRY DAYS: ROOSEVELT, LINDBERGH, AND AMERICA'S FIGHT OVER WORLD WAR II, 1939-1941

BY LYNNE OLSON

Random House, New York, NY, 2013. 548 pages, $30.00.

Reviewed by David Heymsfeld

Unlike any other war that the United States fought in the 20th and 21st centuries, World War II was strongly supported by the American public while it was being fought, and its popularity has continued to this day. This was the "Good War," which saved democracy in the United States and Western Europe. The public never seems to tire of books and movies about the heroic sacrifices of the "Greatest Generation," the inspirational political leadership of Franklin Roosevelt and Winston Churchill, the military leadership of Generals Marshall and Eisenhower, and the evil embodied in the Nazi genocides.

The glow of approval today is so strong that it is hard to believe that, on the eve of America's entry into the war, with Hitler's conquests extending from the English Channel to the outskirts of Moscow, Americans were bitterly divided over whether we should enter the war against Germany. In fact, in the days following Pearl Harbor, although there was universal approval for going to war against Japan, it was not certain that Congress would declare war against Germany. Hitler took care of that problem by declaring war on us first.

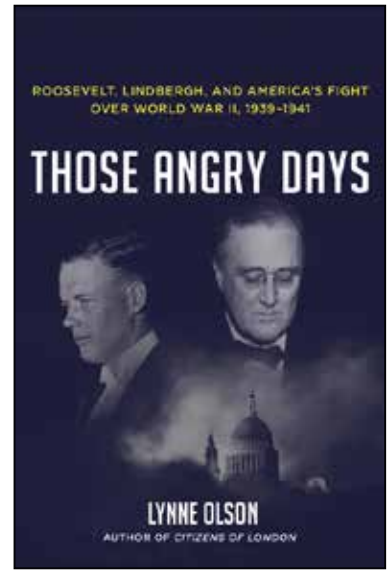
In *Those Angry Days: Roosevelt, Lindbergh, and America's Fight Over World War II*, Lynne Olson compellingly recreates the two-year run up to America's entry into the war, which began in 1939 with Germany's attack on Poland. In addition to offering new perspectives on important historical issues, Olson's book is a great success on a literary level, with clear explanations of complex events, vivid portraits of a large cast of characters, and interesting and telling anecdotes and quotations.

Before Pearl Harbor there was a strong isolationist movement, with its greatest strength in the Midwest, supporting the neutrality of the United States. Isolationists opposed even private sales of armaments to Great Britain. They maintained that events in Europe posed little threat to the United States, which they believed was protected from Europe by the Atlantic Ocean. Isolationists thought that America's entry into World War I in support of the British and French had been a mistake, and that we had been tricked into this mistake by British propaganda and manipulation by arms merchants and bankers who stood to profit from a war. This sentiment was widely shared. In the late 1930s, 70 percent of Americans agreed that our entry into World War I had been a mistake. Some isolationists were motivated by anti-British feeling or by the belief that the main supporters of intervention were Jewish groups, who were understandably concerned about the fate of Jews in a Nazi-controlled Europe.

The isolationists were by no means a fringe group. Even when their positions were not supported by a majority of the public, they had the support of powerful senators who could block congressional action. The strong isolationist bloc in the Senate was led by William Borah (R-Idaho), Burton Wheeler (D-Mont.), Hiram Johnson (R-Calif.), and Gerald Nye (R-N.D.). Many isolationist senators were progressive Republicans who generally supported the New Deal.

Outside of the Congress, anti-interventionists covered a broad range, including Robert McCormick, publisher of the *Chicago Tribune*, as well as many people who would play prominent roles in postwar America, including Sargent Shriver, future Supreme Court Justice Potter Stewart, future Yale President Kingman Brewster, and Gerald Ford.

Support for aid to Britain and France, and ultimately for intervention, was centered in but not limited to what later became known as the Eastern Establishment. Notable supporters who were prodding FDR toward intervention included William Allen White, publisher of the *Emporia Kansas Gazette*, Henry Luce, publisher of *Time* and *Life*, Ogden Reid, publisher of the *New York Herald Tribune*, and Joseph Alsop, a leading *Tribune* columnist. The Roosevelt administration's secretary of the Interior, Harold Ickes, served as the attack dog, saying things that FDR generally believed but couldn't say. At various times Ickes referred to the isolationist's leading spokesman, Charles Lindbergh, as the "No. 1 Nazi fellow traveler," as "the first American to raise aloft the standard of pro-Nazism," and as one of "the quislings who, in pre-



tended patriotism, would cravenly spike our guns and ground our planes in order that Hitlerism might more easily overcome us."

Also highly influential was William Stephenson, head of British Intelligence in America, who, with the tacit consent of the Roosevelt administration, ran an office that planted propaganda, spied on isolationist groups, and dug up political dirt on isolationists. The British ambassador, Lord Lothian, literally worked himself to death, traveling throughout the U.S. to gain support.

An underrated hero of the interventionists was the 1940 Republican presidential candidate Wendell Willkie. He refused pressures from the strong isolationist bloc in his party to oppose steps already taken to end neutrality, and he generally refused to attack FDR's intervention measures during and after the election.

During the two-year run up to the war, battles on a series of issues resulted in increased American support for Britain and France. When World War II began in 1939 with Germany's invasion of Poland, the United States operated under neutrality laws prohibiting any sale of military goods to a belligerent country. The retreat from strict neutrality began with legislation allowing sales for cash with the purchasing country transporting the goods ("cash and carry"). Later measures included the trading of 50 U.S. destroyers to Britain for military bases; "Lend-Lease," which allowed aid without immediate payment; and the U.S. Navy protecting convoys sending aid to Britain. In August 1940, Congress authorized the first military conscription in peacetime, drafting a million men into the U.S. Army. In September 1941, FDR authorized an undeclared naval war against German submarines in the Atlantic ("shoot on sight").

Histories written since World War II generally portray FDR as a strong leader who took bold steps to lead the country down the road to intervention. Olson presents a much less heroic picture of him. She concludes that, in contrast to his consistent efforts to educate the country on the need for government intervention on economic issues, FDR made only sporadic and inconsistent efforts to educate the public on the need to support and ultimately join forces with Britain and France to stop Hitler. For example, FDR made some strong speeches in support of aid to Britain in 1940, but then undercut his efforts with his famous 1940 campaign statement: "I have said this before but I shall say it again and again and again—your boys are not going to be sent into any foreign wars."

Regarding legislation and administrative actions, Olson portrays FDR as moving in fits and starts, winning battles but then retreating into passivity, unnecessarily delaying further measures. To cite just one of many examples, FDR made a strong speech dramatically proclaiming that the United States must serve as the "arsenal of democracy." This led to congressional approval for Lend-Lease aid to Britain. But then FDR failed to follow up with measures that would force American industry to abandon civilian production and in favor of needed military equipment. In Olson's judgment, FDR also waited much longer than necessary to have our Navy protect merchant ships transporting goods.

In defense of FDR, this was a period in which he was weak politically. After his landslide reelection in 1936, he had lost considerable popular support because of his unsuccessful effort to pack the Supreme Court. His efforts to purge conservative Democrats in the 1938 primary elections also failed. In the 1938 midterm elections, Republicans gained many seats. To add to his problems, in 1938 the economy plunged into a new recession.

In the 1939–1941 period, although public opinion frequently favored moves towards intervention, Congress was considerably less enthusiastic. A few months before Pearl Harbor, when 80 percent of the American public believed we would eventually have to intervene, Congress barely agreed to extend the draft. Failure to do so would have led to a 70-percent reduction in our army of 1.4 million. The House agreed to the extension by one vote, and only a quick gavel by Speaker Sam Rayburn stopped one member from switching his vote to "no."

In Olson's recounting of the period, Charles Lindbergh plays a much less prominent role than the book's title suggests. He was primarily a spokesman for the isolationists rather than a strategic leader. A highly admired American hero for his aviation achievements, he was thought to be the only American who could command national attention to the same extent as FDR. Tellingly, when Lindbergh was deciding whether to become a spokesman for the isolationists, FDR's administration tried to deflect him by offering him a new cabinet-level position as Air Corps secretary. Lindbergh declined.

Lindbergh's value as a spokesman was undermined and eventually destroyed by his apparent anti-Semitism and support for Nazi Germany. Lindbergh left himself open to attack as a Nazi sympathizer when, in 1938, on a tour of Germany, he accepted an award from Hermann Goering of the Service Cross of the German Eagle. Lindbergh stubbornly refused to return the medal in spite of increasing public demands that he do so. He claimed that it would needlessly insult the German government to return the medal. At the same time, he apparently had no problem with resigning his commission in the U.S. Army in protest over interventionist policies. This inconsistency was widely noted.

Lindbergh's anti-Semitic statements were roundly criticized. The final straw was his 1941 speech in which he labeled Jews as separate from America. In referring to the Jews and the British, Lindbergh claimed that leaders of "both races ... for reasons ... which are not American, wish to involve us in the war. We cannot blame them for looking out for what they believe to be their own interests, but we must also look out for ours. We cannot allow the natural passions and prejudices of other peoples to lead our country to destruction."

Lindbergh's wife and others warned him that treating Jews as a race separate from America would destroy him, but, as he had been on many occasions, Lindbergh was too tone-deaf and arrogant to listen.

Olson concludes *Those Angry Days* with a chapter entitled "Aftermath," describing the amazing effect of Pearl Harbor in resolving, for all time, disagreement over intervention. Olson's book is an important recounting of a bitter national battle, which has been largely forgotten. The American public's eventual strong support for World War II should not cause us to overlook the initial disagreement over whether to intervene. ⊙

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SAVING JUSTICE: WATERGATE, THE SATURDAY NIGHT MASSACRE, AND OTHER ADVENTURES OF A SOLICITOR GENERAL

BY ROBERT H. BORK

Encounter Books, New York, NY, 2013. 136 pages, $23.99.

Reviewed by Louis Fisher

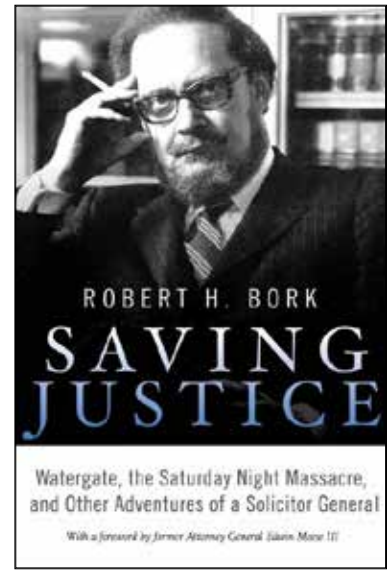
Robert Bork passed away on Dec. 19, 2012. Before his death, he completed a manuscript that describes his extraordinary experience in entering the Nixon administration as solicitor general in June 1973. Within a short period he was thrust into the role of firing Watergate Special Prosecutor Archibald Cox and serving as acting attorney general after the resignations of Attorney General Elliot Richardson and Deputy Attorney General William Ruckelshaus. For those who have been around Bork in his private moments, the book demonstrates his capacity for gentle humor and intellectual insights. Unfortunately for Bork, those qualities were not much on display during his hearings to be associate justice. Fifty-eight senators voted against his confirmation.

Within weeks of his arrival in Washington, D.C., Bork had to deal with Nixon's request that he resign as solicitor general and serve as his chief defense counsel in a possible impeachment trial (a request he declined), respond to Justice William O. Douglas' order that Nixon stop his bombing in Cambodia, file briefs for the prosecution of Vice President Spiro T. Agnew for taking bribes as governor of Maryland, discharge Cox as special prosecutor, and ensure the continued Watergate investigation until a replacement could be found for Cox. Bork notes: "Thankfully, I was spared from dealing with the Yom Kippur War in the Middle East, which occupied others in the administration at the time."

Appointees are expected to hit the ground running when they join an administration. It is difficult to overstate the demands Bork faced. The growth of the administrative state "plunges the solicitor general into all kinds of cases in which he has no real expertise or interest." One of the cases he argued concerned the seabed between the Atlantic coast and the drop-off of the continental shelf, a subject with which Bork acknowledged he "was not intimately familiar." The workload of the solicitor general's office was heavy. During 1973, it made about 2,000 decisions concerning whether the federal government should appeal a case. The office filed pleadings or briefs in about 1,700 cases in 1973. Six weeks into the job, Bork told a group of antitrust lawyers they were under a misapprehension that he wore a beard. "I am not wearing a beard," he told them. "There just hasn't been time to shave, and this is a six-week stubble." When Bork first met Nixon, he understood that he was "notorious for his dislike of Ivy League professors," which would include Bork from Yale Law School. Bork identified another defect: "I was wearing a beard, and a reddish one at that. [Nixon] almost visibly recoiled at being confronted with this apparition resembling an anti-war protester."

Early in the book, Bork states, "I did not find Richard M. Nixon to be the ogre or the threat to our constitutional order painted by his liberal enemies." But did Bork agree with Nixon's conservative friends? How dangerous can presidential power get, and how much can constitutional liberties be imperiled by a President who decided to obstruct an investigation into the Watergate break-in? Many Republicans were willing to defend Nixon until the release of the Watergate tapes, which revealed unmistakable evidence of a cover-up. At a Mar. 22, 1973, meeting in the White House, Nixon said: "And, uh, for that reason, I am perfectly willing to—I don't give a shit what happens. I want you to stonewall it, let them plead the Fifth Amendment, cover-up or anything else, if it'll save it—save the plan." Other tapes demonstrated that Nixon had agreed that the CIA should put a halt to the FBI investigation, which had become too thorough for Nixon's safety. What was it about Nixon's criminal conduct that did Bork not understand? With the release of the tapes, Nixon recognized that a House vote of impeachment "is, as a practical matter, virtually a foregone conclusion." He announced his resignation on August 8, 1974, effective the next day.

Although Bork often expresses support for other officials in the Nixon administration, he presented conflicting judgments about White House Counsel John Dean. When Bork was being considered for several positions in the Justice Department, Dean asked him "with a confidential chuckle, whether I had any skeletons in my closet. I said no, little knowing that if I had need of a skeleton I could borrow one from Dean's closet, which was overflowing with them." In *Saving Justice*, Bork writes that Dean "had been involved" in the Watergate scheme and was properly described by the FBI as "master manipulator of the Watergate cover-up. Several pages later, however, he says that in the Watergate scandal Dean "had no real involvement."



In the choice of Watergate prosecutor, Bork states that the selection of Archibald Cox "was particularly unfortunate." Although "a man of integrity, ... he was the protégé of Senator Edward Kennedy—Nixon's bitterest enemy." Although Bork did not consider Nixon a threat to the "constitutional order," he recognized his "strong paranoia." But Bork admits that he believed, "long after it was reasonable to do so, that Nixon could not have been so careless as to have gotten caught up in what events later showed he had been."

White House Chief of Staff Alexander Haig spoke with Bork about being Nixon's chief defense counsel. A presidential aide, Alexander Butterfield, had already informed the Senate Select Committee to Investigate Campaign Practices that Nixon had installed a secret taping system in the White House. By that time, Bork learned that Agnew had accepted bribes in exchange for construction contracts granted while he was governor of Maryland and that the bribes continued while he was vice president. Bork asked Haig how he would be paid if he defended Nixon. Haig responded: "Well, you'll be on the government payroll." Bork explained that it raised a problem. As a government attorney, if he came across damaging infor-

mation he would be required to turn it over to the U.S. attorney's office. Bork added that he would have to hear the tapes. Haig said Bork could not do that because if Nixon were forced to turn over the tapes "he will burn them first, and then resign." Bork then thought "the best sentence I never spoke": "If that's true, why doesn't he burn them now?" But he held his tongue, imagining "a White House aide burning the tapes in the Rose Garden, and saying he was doing this on the advice of the solicitor general."

A chapter on Spiro Agnew provides details on the steps taken to get him to resign. Under investigation for actions that could have led to 40 felony counts, Agnew hoped to remain in the administration a few more months "to ensure his pension would vest." The question arose whether a vice president was covered by immunity from prosecution while he remained in office. Agnew wrote to the House Judiciary Committee, urging it to investigate his actions to see if they merited impeachment, advising the committee that the Justice Department was trying to usurp the function of the House. Bork read a draft memo prepared by the Office of Legal Counsel, finding it "diffuse and confused." The memo suggested that the President could, in theory, run the executive branch from his jail cell, but perhaps such an arrangement "might be beneath the dignity of the office." Agnew eventually chose a plea bargain and resigned.

Nixon put pressure on Attorney General Richardson to fire Special Prosecutor Cox. To Bork, Nixon "had a clear legal authority to fire Cox and a good reason to do so," but Bork provides no legal or political analysis for those statements. If Nixon possessed that authority, why not fire Cox directly instead of asking someone else to do it? Richardson, refusing to fire Cox, resigned. Deputy Attorney General Ruckelshaus offered his resignation too, but Nixon refused to take it, preferring to fire him. It was now up to Bork, who reasoned: "Had I refused to fire Cox, it was extremely unlikely that any other political appointee would have been willing to take a temporary appointment as attorney general." That judgment is undercut by what Bork says next: "A White House figure—perhaps Fred Buzhardt—would have been appointed as acting attorney general." So Bork could have resigned and let Buzhardt fire Cox. Bork was concerned that, if that had happened, there "would have been mass resignations at the upper levels of the Department of Justice." Asked by Richardson if he could fire Cox, Bork answered he could "but then I will resign." Richardson asked why he would resign. Bork replied: "I don't want to appear to be an apparatchik." If Bork believed that Nixon had every right to fire Cox, then why would Bork be an apparatchik? In any event, Bork fired Cox but did not resign. Bork's letter to Cox has the quality of an apparatchik: "I am, as instructed by the President, discharging you."

Bork states that colleagues understood that, if he resigned, the Justice Department "would have been left leaderless and probably unable to find an acting attorney general within its ranks." When Richardson and Ruckelshaus resigned, they knew that others were qualified to serve as acting attorney general. Bork could have reached the same conclusion, but he did not. No one in any government agency is indispensable. One lawyer told Bork that he should have refused to fire Cox, "as it would have brought Nixon down sooner." Bork replied that "driving a president from office was not in my job description. If a constitutionally inferior officer of the executive branch could topple the president of the United States, then the country would begin to resemble a banana republic." To Bork, the constitutionally prescribed method for removing an unwanted president is impeachment in the House and conviction in the Senate. Anything else "is civil disobedience, which, when the media is unanimous in attacking the president, resembles nothing so much as mob rule."

Toward the end of the book, Bork says his decision to fire Cox "was a duty to justice—to keeping the government running—that convinced me to follow the president's order." That explanation is not consistent with his earlier account, which said that Nixon had every right to fire Cox and that Richardson and Ruckelshaus availed themselves of another option: resignation, which Bork said he would do but did not. Government officials are not required to carry out orders they regard as ill-advised. They can leave public service. Furthermore, Bork knew how to say "no" to a President's request, as he did when he declined to serve as Nixon's defense counsel.

Senator Ted Kennedy's close relationship to Cox concerned Bork, who said that Kennedy's "reckless disregard for truth" was his "key to power." Using that criterion, did Nixon and Agnew have a similar reckless disregard for truth? Bork does not say. As for the War Powers Resolution, which became law over Nixon's veto, Bork would have suggested that instead of vetoing the resolution "and thus giving it the dignity of a statute," Nixon should have returned the bill to Congress "with a note saying he thanked them for their essay on his constitutional powers and, when he found time in his busy schedule, he would send them an essay of his own on his understanding of his constitutional powers." Although with this comment Bork apparently meant to display his sense of humor as well as to articulate constitutional principles, he must have known what Article I, Section 7, provides. Any bill not returned by the President within 10 days, Sundays excepted, becomes law.

For all its flaws, *Saving Justice* provides an interesting and often insightful account of the Office of the Solicitor General during perhaps its most difficult days. ⊙

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