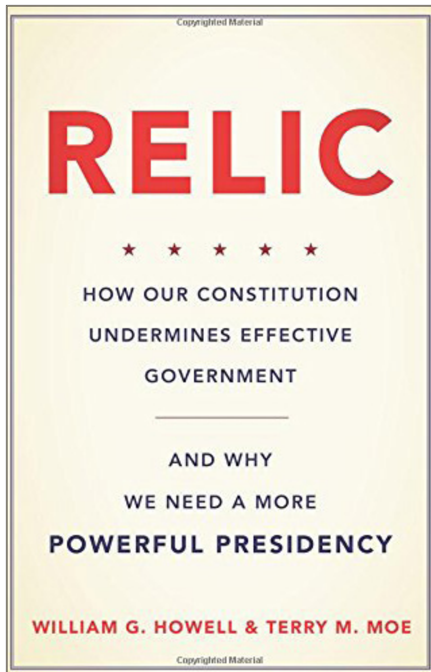

Relic: How Our Constitution Undermines Effective Government, and Why We Need a More Powerful Presidency

By William G. Howell and Terry M. Moe

Basic Books, New York, NY, 2015.

233 pages, $26.99.

Reviewed by Louis Fisher

Relic's subtitle reflects its principal theme: The Constitution is fundamentally defective by placing too much power in Congress and not enough in the President. The book devotes less attention to the judiciary, saying merely that courts "are of no help" in providing solutions to contemporary problems: "With little incentive to create coherent or effective policy, and holding only meager substantive knowledge about the policy measures before them, federal judges cannot be expected to set things right."

William Howell and Terry Moe regard the President as "a very different breed of player." They say that Presidents, unlike members of the other two branches, "are strongly driven to address important national problems by drawing upon the vast informational resources available to them, crafting coherent, effective policy solutions, getting them passed into law, and implementing them." According to their analysis, Presidents "are the champions of effective government—and if this nation is ever to escape its morass of a governance system, the presidency is the way out." It is difficult to square those generalizations with how Presidents conduct themselves in office.

The decision-making capacity of Congress is described as "inexcusably bad. It is immobilized, impotent, and utterly incapable of taking responsible, effective action on behalf of the nation." Having called Congress impotent, the book nevertheless criticizes Congress for blocking and watering down presidential proposals. At times Congress has exercised good judgment in withholding legislative authority from Presidents who wanted to use military force against another country, as it did with respect to Barack Obama and Syria in 2013. *Relic* regards Congress as irresponsible and ineffective "largely because it is *wired* to be that way—and its wiring is due to its constitutional design." The "pathologies" of Congress are "rooted in the Constitution, and it is the Constitution that is the fundamental problem." Beyond the division of Congress into two separate chambers, lawmakers "are wide open to special-interest influence" and "are concerned about their own political welfare." Howell and Moe never fully explore the degree to which the President and executive agencies are also open to special-interest influence. Presidents are also concerned about their own political welfare, or what the authors later refer to as the presidential "legacy."

Howell and Moe conclude that the path to effective government "requires moving Congress from the front seat of legislative policymaking to the back seat." The nation would be "far better off with presidents in the front seat." *Relic* offers several reasons why the "wiring" of Presidents differs fundamentally from that of Congress. Presidents are "truly national leaders with national constituencies who think in national terms about national problems." Compared to Congress, Presidents "are paragons of national leadership," are "strongly motivated by concerns about their legacies," and are positioned to provide "a coherent approach to the whole of government." In contrast, members of Congress are "famously myopic, incremental, and parochial."

With these supposed institutional and political advantages "wired" in the presidential office, Howell and Moe do not explain why so many Presidents fail in office. The blame cannot be placed solely on Congress and the constitutional design. Some Presidents lack judgment, political skills, and competence. Others gain a reputation for lies, deception, and obstruction of justice. Howell and Moe assign much of the fault to the separation of powers. The framers did not trust either Congress or the President, relying instead on checks and balances to preserve individual liberty and free government. Why do the authors want to place greater power and trust in today's President?

In part, Howell and Moe refer to the "built-in pathologies" of Congress without acknowledging presidential pathologies. They insist that Presidents "are cut from a different cloth than legislators." But many Presidents previously served in Congress. How do they change from one mode of clothing to the other? Moreover, it is easy to see profoundly different qualities between one President and the next, such as Abraham Lincoln and Andrew Johnson. Why was one President "wired" so differently from the other? John Burke and Fred Greenstein in *How Presidents Test Reality* compared how Dwight D. Eisenhower and Lyndon B. Johnson decided whether to intervene in Vietnam in 1954 and 1965, respectively. Their analysis of the two decision-making processes decisively favors Eisenhower for his capacity to analyze the relative benefits and risks.

It is a misconception to believe that Presidents possess stable personalities guaranteed to yield constructive and coherent public policies. In *Eyewitness to Power*, David Gergen says of Richard Nixon: "Coexisting with the better angels of his nature were demons from a darker hell." In his memoir, *My Life*, Bill Clinton reflects on the impeachment proceedings and his having testified

falsely about his relationship with Monica Lewinsky. He explains that the controversy "was the latest casualty of my lifelong effort to lead parallel lives," balancing a public effort to address issues of government with "a private one to hold old demons at bay."

Howell and Moe predict that once Presidents gain office they can be expected "to follow through on their campaign promises." That is hardly the case. Compare the difference between what Obama told Charlie Savage in 2007 regarding the President's power over war with Obama's conduct in office. Although the authors praise Presidents for being able to propose and enact coherent programs far better than is Congress, campaign promises, including several that the authors identify, are typically vague: "Change We Can Believe In" (Obama) and "Believe in America" (Romney). The authors say that the President's constituency, while "large in size and national scope," is "filled with so many diverse and competing interests that presidents can rise above the fray and be far less responsive to special interest groups than members of Congress need to be." But those "diverse and competing interests" limit the ability of Presidents to fashion and enact coherent programs.

As Howell and Moe point out, Congress "was the centerpiece of the founders' new government." But the nation "also had a great need for executive leadership—for the energy, dispatch, and capacity for action that the Articles [of Confederation] had failed to provide and that Congress as a collective institution could not provide either." The authors offer insightful analyses of why a number of federal programs—Model Cities, national school lunches, the Merchant Marine Act (Jones Act), farm programs, Aid to Families with Dependent Children, and No Child Left Behind—failed to work properly and needed to be amended. Part of the problem, they say, resulted from the intervention of interest groups, but those groups operate on the executive branch just as they do on Congress. When men and women run for President, they seek to combine the right set of interest groups to reach the White House and then reward those supporters if they are elected.

Relic promotes a number of broad principles, including: "Whereas members of Congress are myopic, preoccupied by the short term, presidents are motivated by their legacies to focus on the long term." Legacy seems to have a nice ring to it, promising positive and constructive results. However, part of Johnson's legacy was to avoid being the first President to lose a war, leading him to escalate the war in Vietnam at great cost to the country and to his record in office. As *Relic* notes, the war "would derail his presidency, along with his plans for seeking a second elected term," adding a "blight" to his many decades as an elected official. Public distrust of the presidency grew during his years in the White House because of repeated lies and deception about military actions in Vietnam.

Consider other costly presidential initiatives after World War II: Harry S. Truman as the first President to take the country to war (against Korea) without first obtaining authority from Congress, as required by the UN Participation Act of 1945; John F. Kennedy's decision to approve the Bay of Pigs; Nixon's Watergate; Ronald Reagan's Iran-Contra; and Obama's removing Moammar Gadhafi without ensuring a stable successor, leaving Libya a broken government that attracted terrorists.

Howell and Moe acknowledge that the policy agendas of Presidents "may be informed by patently partisan considerations" and that "sometimes they make decisions that turn out to be very bad for the country—such as, many would argue, when George W. Bush took the nation to war in Iraq." What legacy did Bush have in mind when he used military force against Iraq on the basis of what proved to be six empty claims that Saddam Hussein possessed weapons of mass destruction? Apparently the legacy was to fight vigorously against terrorism, but the war left Iraq internally weak and a target for intervention by the Islamic State. Howell and Moe claim that the premium placed by Presidents on legacy "makes them champions of the nation's long-term interests in ways that Congress cannot and never will be." It is a stretch to say that Presidents "are the champions of coherence and effectiveness in a fragmented, parochial political world." They can just as easily recommend policies that lack any semblance of coherence and effectiveness.

To illustrate the "myopic pathologies" of Congress, Howell and Moe point to the problem of budget deficits. But here the blame lies heavily on Presidents. When Reagan entered office, the national debt—accumulated from 1789 to 1981—was $1 trillion. With his tax cuts and increases in defense spending, the deficit tripled during Reagan's two terms. George H.W. Bush added another trillion. Clinton's leadership helped reduce budget deficits and even projected surpluses, but George W. Bush early in his first term cut taxes and increased the military budget, moving the country again into deficits. As the authors note, the second Bush "greatly exacerbated the nation's deficit problems." Obama inherited a deep recession and heavy deficits, but during his two terms in office he never submitted a budget that projected a balance or a surplus, even a decade out. He was fully empowered to demonstrate leadership in the national interest but chose not to do so.

To strengthen presidential power, Howell and Moe support fast-track authority used in trade legislation. Under this procedure, Presidents submit a proposal that Congress may not amend and must vote on within a fixed number of days, either to approve or reject. *Relic* claims that "many years of experience show that it works quite well to promote coherent, well-integrated outcomes in that realm precisely because Congress is not allowed to fiddle with the policy's contents." In contrast to fast-track authority that applies solely to foreign trade and lasts a set number of years before expiring, Howell and Moe propose that the Constitution be amended to grant the President "*permanent* fast-track authority over *all* policy matters (including budgets and appointments)."

The authors assume that Presidents have a unique capacity to submit proposals in the national interest that are not compromised by special interests from the private sector. Yet they also warn that Presidents "must be constrained" because, like all political officials, "they cannot always be trusted to do what is right" and "they are bound to make mistakes." Consider the New Deal measures promoted by Franklin D. Roosevelt. As Peter Irons explains in *The New Deal Lawyers*, private interests and trade associations played powerful roles not only in formulating policies within the executive branch but also in carrying them out. Hugh Johnson, administrator of the National Recovery Administration, turned to Donald Richberg to be general counsel. So ingrained was the control of private interests in controlling executive policy that Richberg, as Irons notes, expressed to a group of businessmen his satisfaction that "the administration of the law has been entirely in the hands of industrialists." The drafting of the National Industrial Recovery Act was dominated by industries and trade associations. Executive officials demonstrated little interest or

knowledge about constitutional principles and procedural safeguards.

Howell and Moe understand the problem of private interests gaining control and influence over the executive branch. They point out that when Clinton decided to put his wife, Hillary, in charge of drafting health care legislation and submitting it to Congress, her task force consisted of "some five hundred advisers, experts, and industry representatives." After the proposal was introduced in Congress "it died hard and fast." The bill never even came out of committee. As Howell and Moe remark: "The result was one of the greatest policy fiascos in modern American history."

Another example of failed presidential initiatives is the decision by George W. Bush in his second term to take the lead with Social Security reform. Bush proposed a system of voluntary private investment accounts, to be managed by the federal government. Funds would be invested in private firms. Bush was never able to effectively articulate and defend the purported benefits of his policy. As Howell and Moe point out, the more he talked about Social Security, "the more support for his plan declined." As with Hillary Clinton's health care initiative, the Bush proposal never made it out of committee. The authors suggest that, had Bush been successful in privatizing Social Security, "who knows what further damage the Great Recession would have inflicted on the domestic economy, not to mention the nation's social safety net. It could have been a disaster for seniors."

Notwithstanding this record of presidential errors, Howell and Moe see the need to push Congress "into the back seat, where it belongs." They say that, to gain the support of Congress for fast-track proposals, Presidents "would need to craft and propose policies that could ultimately gain the consent of Congress." In other words, Presidents would have to cater to special interests and the political needs of Congress. Presidents would need "to anticipate what majorities in Congress will actually vote for, of course, and they will not be able to ignore congressional preferences and hope to succeed legislatively." Those strategies undercut the authors' claim that Presidents have a unique capacity to act in the national interest by presenting coherent proposals free of parochial, narrow, and sectarian pressures. *Relic* promotes two inconsistent models: negative-realistic for Congress, positive-idealistic for the President. ⊙

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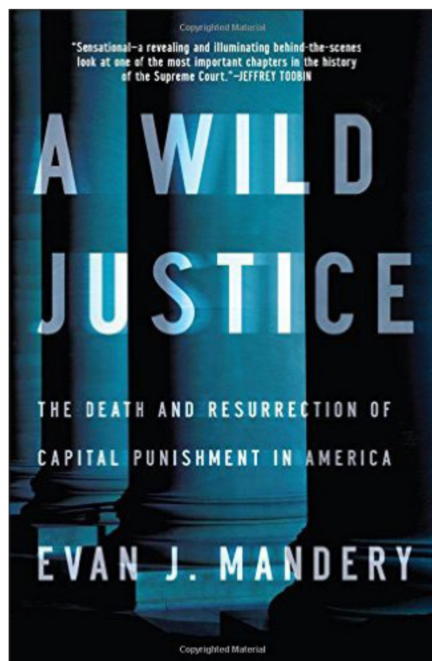

A Wild Justice: The Death and Resurrection of Capital Punishment in America

By Evan J. Mandery

W.W. Norton & Co., New York, NY, 2013.

534 pages, $29.95 (cloth), $17.95 (paper).

Reviewed by Jon M. Sands

In *Glossip v. Gross* (2015), the U.S. Supreme Court, by a 5-to-4 vote, upheld Oklahoma's use of a certain drug combination for the lethal injection of my client. In his majority opinion, Justice Samuel Alito noted that the Court had never disapproved a method of execution, be it hanging, electrocution, gas, or lethal injection. The majority premised its opinion on the constitutionality of the death penalty. Yet, this premise was questioned by Justice Stephen Breyer in his dissent in *Glossip v. Gross*. This may lead the Court again to address the death penalty's constitutionality, which makes it appropriate to review the history of death penalty jurisprudence.

The best book for this purpose is *A Wild Justice*, by Evan J. Mandery, even though it was published two years before *Glossip v. Gross*. Its examination of the key modern cases establishing the current practice is unsurpassed. Mandery details *Furman v. Georgia* (1972) and *Gregg v. Georgia* (1976). In *Furman*, the Court struck down the way that the death penalty was implemented, but not the punishment itself; in *Gregg*, the Court allowed the punishment by affirming narrower procedures that supposedly were more fair.

In explicating these cases, Mandery covers more than the jurisprudence of capital punishment. He does more than just rehash the arguments for and against the death penalty. Mandery sets the litigation in context, pens incisive portraits of the leading advocates, and provides dramatic accounts of the arguments, both those before the Court as well as those among the advocates and even among the justices. Mandery does not waffle. For the advocates, including familiar names such as Anthony Amsterdam and Robert Bork, as well as less familiar ones, he points out the challenges they faced, the risks they ran, and the dangerous stances those on both sides took. As for the justices, he explains how they reached their decisions, including the personal deals and the missed opportunities. Some of his conjectures ring true and others seem questionable, but Mandery does not shy away from making the case for how he thinks the justices made their decisions. Whether you agree with Mandery or not, and are pro-death penalty or not, you will find *A Wild Justice* to be an engaging and unsurpassed account of the cases.

Mandery makes interesting and bold statements. He asserts, for example, that present death penalty jurisprudence had its genesis in a 1963 memorandum drafted by Alan Dershowitz, then a law clerk to Justice Arthur Goldberg, arguing that capital punishment had become unconstitutional under an evolving standard as to what constitutes cruel and unusual punishment. This memorandum brought the issue to the Court's attention, and it has not left since.

Mandery's boldness is also seen in his explication of the unusual history of *Furman*, with justices drafting nine opinions in secret, and a supposed back chamber deal between Justices Potter Stewart and Byron

White. This deal, the boldest of Mandery's assertions, had Stewart and White agreeing to change their positions on constitutionality to one that found the punishment to violate due process. Mandery can point to no written record of this, but only to a meeting one afternoon and a change by Stewart two hours later. This is circumstantial evidence at best, and a thin reed on which to rest such an assertion. Lawyers who were clerks of the justices at the time of *Furman* told Mandery that it was folly to believe that Stewart, or really anyone, could change White's mind once he had made his decision.

Mandery looks for supposed missed opportunities to persuade the Court to declare capital punishment unconstitutional. However, Mandery has to admit that there were never five votes to find the death penalty unconstitutional outright. By the time that Justice Harry Blackmun changed his mind about tinkering with the machinery of death, Justice Stewart was gone. Justice Lewis Powell changed his mind only after he retired. Even Justice John Paul Stevens, who rues his vote to uphold the death penalty, upheld it in *Gregg*.

One valuable aspect of *A Wild Justice* is its incisive portraits of the advocates and the strategies they employed. Mandery is especially good with Anthony Amsterdam, who, at the NAACP Legal Defense Fund, headed the team of brilliant and dedicated counsel who embarked on a decade's long struggle against the death penalty, which continues today. Mandery is equally good with the proponents of capital punishment, such as Bork, who argued to uphold the capital punishment scheme fashioned in *Gregg*. Mandery's account of the arguments of Amsterdam and Bork before the *Gregg* Court is riveting. Amsterdam, taking an abolitionist's position, was asked by Justice Powell during the argument whether the death penalty was appropriate for the commandant of Buchenwald. Amsterdam, who is Jewish, answered "no," and thereupon lost Powell. Perhaps, Mandery asks, a less absolute position would have tempered the result, or at least called into question some of the channeling schemes that have proved quite broad, such as that of Texas, which leads the nation by far in the number of executions.

Mandery tells another interesting story about Powell. When deciding how to vote in *Furman*, Powell told his clerk Larry Hammond that, although he opposed the death penalty, he would vote for it because it is mentioned in the Constitution several times. Powell believed that the arbitrariness in its application resulted from inferior representation, and that better lawyering could fix the problem. He instructed Hammond to do historical research on capital punishment for him. Hammond started out with no view on the death penalty, but the more research he did, the more he believed that it could not be applied rationally. After the justices deliberated, Powell told Hammond, "I have lost the Court," meaning that, contrary to Powell's wishes, the majority of the justices had decided to strike down the statute. Hammond tried to keep a poker face, but he betrayed his sense of relief. Powell said sadly, "You're not with me, are you?" Hammond then tendered his resignation, but Powell rejected it and asked Hammond to stay on for an additional year. Hammond agreed.

Prior to *Furman*, the death penalty was truly random. It was imposed arbitrarily and disproportionately on minorities and the poor. The argument that it is unpredictable and freakish prevailed in *Furman*, which found it to violate due process. With *Gregg*, and despite the efforts to reform the process in *Gregg*, we are arguably at the same arbitrary place. The past is never dead. It's not even past.

Mandery recognizes that death is the ultimate punishment: the state using its legal process to execute a person for murder. However, he does not adhere to the "death is different" mantra, recognizing that the issues that plague the death penalty—racism and shoddy representation—also play out in the criminal justice system in general. Although this is a study of the death penalty, Mandery uses the issues it presents to also discuss broader problems with criminal justice, such as the harsh sentences imposed over the last 40 years.

As for racism, Mandery believes that *McCleskey v. Kemp* (1987) is one of those missed opportunities. It was the last broad challenge to the death penalty on the basis of its racist application. Yet the Court backed away, finding that there must be proof that the defendant had been explicitly affected and not that there is an implicit racism in the system. In addition, the Court noted that, "if we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty." In his dissent, Justice William Brennan observed that that statement "seems to suggest a fear of too much justice."

Given the heated emotions that the death penalty evokes, the intemperate remarks it causes some justices to make, such as accusing counsel for the defendant of engaging in guerilla tactics, the issue will continue to smolder. The call by Breyer to find the death penalty unconstitutional under the Eighth Amendment echoes the memo written more than 50 years ago that started the debate. The arguments remain the same and reverberate across the decades. ⊙

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