

Defending Congress and the Constitution

By Louis Fisher

University Press of Kansas, Lawrence, KS, 2011. 358 pages, \$24.95.

REVIEWED BY DONALD A. RITCHIE

A career in service to Congress has convinced Louis Fisher that the Constitution prescribes more the sharing of powers than the separation of powers among the three branches of the federal government. Fisher wants Congress to exert its equality and cease deferring to the President and the courts in making constitutional judgments. He also wants the public to appreciate the role of the legislative branch in protecting individual rights and liberties. “Without a strong Congress,” he writes, “we cannot speak of a democracy.”

Defending Congress and the Constitution is drawn from Fisher’s four decades of service with the Congressional Research Service (CRS) and the Law Library of the Library of Congress. During those years, he advised senators and representatives, testified at hearings, wrote committee reports and CRS studies, and chafed over Congress’ acquiescence to encroachments by the other branches. He grew skeptical of the claims made for judicial review and contemptuous of the theory of the “unitary executive” and other presidential aggrandizements.

Fisher pulls no punches, minces no words, and spares no criticism of the courts and the presidency. His disdain for presidential overreach is nonpartisan. He accuses Harry Truman and Bill Clinton of waging unconstitutional wars in Korea and Kosovo, and Ronald Reagan and George W. Bush of manipulating the budget process. He is similarly critical of Congress for not defending its constitutional prerogatives. Quoting Senator J. W. Fulbright’s discovery of the merits of checks and balances, three years after his deferral to President Lyndon Johnson on

the Gulf of Tonkin Resolution, Fisher asks: “How many decades does it take a lawmaker to learn that?”

Taking a broad view of constitutional powers, Fisher disagrees with those who insist that the federal government should be limited to the powers enumerated in the Constitution. He points out that James Madison, while a member of the First Congress, argued against a motion to give the states all powers except those “expressly delegated” to the national government. Madison reasoned that “there must necessarily be admitted powers by implication, unless the Constitution descended to recount every minutiae.” Fisher similarly dissents from the U.S. Supreme Court’s dictum in *United States v. Lopez* (1995) that the Constitution created “a federal government of enumerated powers,” pointing out that judicial review of legislation is itself an implied rather than an enumerated power. Members of Congress too often punt constitutional issues to the courts by including in bills language calling for expedited review. He distinguishes judicial review from the Supremacy Clause, which was designed to give the federal judiciary supremacy over state courts, but not over co-equal branches of the federal government. The elected branches, he insists, as representatives of the people, should have an equal say in determining what the Constitution means.

Turning to the source of judicial review, *Marbury v. Madison* (1803), Fisher argues that Chief Justice John Marshall should have recused himself, because he had been the secretary of state who failed to deliver *Marbury*’s commission and therefore had a conflict of interest. Fisher contends that the decision should also have stopped at the point where the justices decided that they had no jurisdiction in the case. Instead, Marshall went on to lecture Jefferson and Madison on their duties and manufactured an argument in order to declare portions of the law unconstitutional. Fisher calls the Supreme Court’s claim of being the ultimate interpreter of the Constitution

“self-serving” and judges *Marbury* to have been a political decision aimed at avoiding judicial humiliation, adding that the case marked the only time that the Marshall Court declared an act of Congress unconstitutional.

Defending Congress and the Constitution describes how a mix of judicial and nonjudicial forces by all three branches have shaped the Constitution. Although not denying the Court’s right and duty to interpret the Constitution, Fisher does not accept it as the final and exclusive interpreter. He writes: “When the Court claims it has the final word on the meaning of the Constitution, it is pretending it has the authority to decide what is orthodox.” Of the argument that only the courts can protect minorities from majorities, he documents how Congress, voting by majorities, has often protected the interests of minorities, and how the courts have at times failed to uphold minority rights, endorsing both racial segregation in the 1890s and the Japanese-American internments during World War II. When the Supreme Court upheld a state decision to withhold unemployment benefits from an American Indian who had taken peyote during a religious ritual, Congress tried to counteract the Court’s decision by passing the Religious Freedom Restoration Act. The Court responded that, once it announced a constitutional result, its word could not be questioned or modified by the other branches. “No branch of government has that authority or competence,” Fisher avows.

Defending Congress and the Constitution renders similar judgments on the Presidents who have tried to hold the Congress at arm’s length. Fisher regards many of the arguments for enhanced executive authority as indefensible and cites the attempt by President George W. Bush to exert executive privilege to prevent Condoleezza Rice from testifying publicly before the 9/11 Commission. At that time, a reporter called Fisher

REVIEWS *continued on page 66*

to discuss the constitutional implications, and Fisher predicted that the administration would have to reverse itself, which it did—an action he calls “exercising better judgment.”

The executive branch is centralized and hierarchical, whereas Congress is decentralized and collegial in nature, ensuring that lawmakers will approach issues in varied ways and from varied perspectives. American history is filled with controversies and clashes between the branches, but Fisher believes that a spirit of accommodation and compromise prevailed until the Nixon administration forced Congress and the courts to curb presidential abuses. Fisher is particularly critical of those who have misused American history in their exaggerated claims for the powers of the presidency. John Yoo stands at the top of his list of malefactors, but that list also includes former Speaker Tip O’Neill, who asserted that he supported President Reagan on foreign policy because “He was our president. We owed him that.” No, says Fisher, lawmakers owe the President their independent and informed judgments as well as their warnings. A vigorous use of the checks-and-balances system keeps the nation secure. “Unless lawmakers exercise their independent judgment, they cannot protect their institution or their constituents, nor can they honor their constitutional oath of office.”

Fisher’s having lived with these issues for so long has made his book somewhat autobiographical (although it is not structured that way). A large share of the footnotes cite his own articles and books. Those publications often led to or grew out of his assignments with Congress. When he joined the CRS staff in 1970, Fisher worked with senior staff on Capitol Hill who were staunch defenders of Congress, which led him to appreciate its role in the federal system. The Appropriations Committees soon “adopted” him, and in 1972 he began writing articles on spending discretion and congressional control of the budget. In 1975, he published a book called *Presidential Spending Power*.

However, he admits that some of the reforms he supported did not achieve their desired results. Confronting the Nixon administration’s attempts to impound appropriated funds, Congress enacted the Congressional Budget and Impoundment Control Act of 1974. Instead of strengthening Congress’ power of the purse, the act wound up empowering the Reagan administration to gain control of the budget in 1981 and since then has created a less effective budget process than had previously existed.

During the 1970s, Fisher watched as Congress’ use of the legislative veto proliferated. When the Supreme Court considered the constitutionality of the legislative veto, Fisher published an op-ed column warning that striking it down would not end the process but would make it more convoluted, because Congress would remain “knee deep in administrative decisions.” Indeed, after the Court struck down the one-house veto, in *INS v. Chadha* (1983), Congress began doing the same thing by joint resolution. Under that procedure, the President submits a reorganization plan to Congress that must gain approval of both houses within a fixed period of time. If one house does not approve the plan, it becomes essentially a one-house veto. Perhaps a thousand such legislative vetoes have been signed into law since *Chadha*, despite many presidential complaints in the signing statements.

As a senior analyst for CRS, Fisher provided help to members of both parties in both houses of Congress without necessarily endorsing their positions. In one instance, when cost-cutting in the House of Representatives reduced committee staffs by a third, the House Government Reform and Oversight Committee turned to Fisher to write the committee report on the line-item veto, despite his opposition to the proposal. Although he wrote both the House and Senate reports for the bill, he testified against it. Congress went ahead and passed the line-item veto, which President Clinton wielded and the Supreme Court struck down. Later, Fisher’s testimony against

a proposed constitutional amendment to permit line-item vetoes helped convince members of Congress not to report it out of the committee.

Eventually, Fisher’s article on the “institutional failures” that led the United States into war in Iraq, published in the *Political Science Quarterly*, led to his departure from CRS. The article drew favorable attention from the journalist David Broder, who devoted a column to it. This triggered a rebuke from CRS management, which accused Fisher of having violated the service’s “neutrality.” Having spent years taking strong positions in his professional writings, Fisher responded that he reached his positions on the basis of “nonpartisan, objective professional analysis”—emphasizing “objective” over “neutral.” A host of scholars came to his defense, but the deteriorating climate within CRS caused Fisher to transfer to the Library of Congress’ Law Library, where he continued to express his opinions without censorship until his retirement in 2010.

The political scientist Edward Corwin famously described the Constitution’s separation of powers as an “invitation to struggle.” Louis Fisher threw himself into the fray, and this book covers many of the struggles over constitutional powers and prerogatives. Closely reasoned and passionately argued, *Defending Congress and the Constitution* belongs on the shelves of every member of Congress. Fittingly, the book is dedicated to the late Sen. Robert C. Byrd, the veteran defender of Congress and the Constitution, who would surely have added an “amen” to Fisher’s conclusions. **TFL**

Donald A. Ritchie is the historian of the Senate and the author of The U.S. Congress: A Very Short Introduction (Oxford University Press, 2010).

Stay of Execution: Saving the Death Penalty From Itself

By Charles Lane

Hoover Institution and Rowman & Littlefield Publishers, Inc., Lanham, MD, 2010. 164 pages, \$19.95.

REVIEWED BY JON M. SANDS

On Sept. 7, 2011, the audience roared its approval at the Republican presidential debate when Texas Governor Rick Perry stated his unequivocal approval of the death penalty and his pride in executing so many people. Two weeks later, on September 21, protestors chanted their opposition to capital punishment as Georgia put to death Troy Davis, who may well have been innocent of the murder of the off-duty police officer for which Davis had been convicted. These two responses starkly exemplify the differing attitudes toward the ultimate punishment.

The United States is the only Western democracy that practices capital punishment, the U.S. Supreme Court has repeatedly upheld it as constitutional, and a majority of Americans support it. And yet, in recent years, the number of death sentences and executions has dwindled amid a growing uneasiness and ambivalence among the population and the courts. Some states have recently renounced the death penalty, and the Supreme Court has held it unavailable for juveniles and the mentally disabled, while continuing to refine the procedures that govern a defendant's eligibility for capital punishment, the circumstances under which a jury may return a verdict of death and a court may impose a death sentence, and the appellate and post-conviction process of affirming and carrying out the sentence. It is enough to cause a Texas prison official, with a tone of resignation, to predict the practical disappearance of the death penalty: "The death penalty's probably got ten to twenty years left in it," he said. "It's never going to go away, but it'll probably stop being used."

As the subtitle of *Stay of Execution* proclaims, Charles Lane, an editorial writer for the *Washington Post*,

wants to save the death penalty from itself. He believes that there are crimes for which the death penalty should be imposed and attributes its decline not to loss of support but to the decrease in crimes in general—specifically, murders. He believes that the death penalty is appropriate for "the worst of the worst," and that its present overuse, even with the declining numbers, threatens its viability as the ultimate punishment. Lane wants to reform the death penalty, in the best think tank policy style (in this case, the Hoover Institution) in order to preserve it.

"Plainly," Lane admits, "the system is not perfect." But Lane finds it far better than it was, and less racially biased and procedurally flawed than in the past. What was intolerable about capital punishment has been made tolerable. Death penalty opponents would certainly take issue with this conclusion, and, although they would agree that the practice now is far better than the one that existed prior to the *Furman* and *Gregg* decisions of the 1970s, there are still too many instances of racially tainted convictions, too many questions of effective assistance of counsel, and too many procedural flaws to say that the system is just. To Lane, though, today's jurisprudence and system are less flawed and less biased than opponents want to admit, and the system works most of the time. "Lingering problems related to race and innocence show that the U.S. death penalty is fallible, but they do not support the notion that it is 'broken beyond repair.' Rather, the issues appear more contained than the critics suggest, and could probably be further mitigated without abolishing capital punishment. Indeed, to the extent that the death penalty foes focus on race and innocence, they neglect American capital punishment's truly intractable flaws." These flaws, to Lane, involve far too indiscriminate use and far too disparate use of the death penalty.

Lane spends the bulk of his book dissecting the case against the case for the death penalty and the case against the case against the death penalty. He seeks an evenhandedness, which at times reminds one of the "balanced"

approach in journalism: on one hand and then on the other hand, even when the hands are not equal. Lane does so, probably, because of the heat the topic generates. Lane recognizes the passions that capital punishment evokes. "People not only disagree about the death penalty, they disagree passionately." He tries to bring some dispassion to the discourse, with charts galore, statistical analyses, and surveys of the literature. His dispassionate approach has him seeing virtue in both sides, and calling for a recognition that the system can be made fairer and that it has its place. His call for death penalty bipartisanship has the same chance for success as calls for political bipartisanship do today.

Lane makes sensible suggestions that would make the application of the death penalty a bit more fair. To Lane, the federal legislation authorizing the death penalty for scores upon scores of offenses overreaches. He believes that the federal death penalty should be pared back to only those offenses that result in death through terrorism or that involve national security. The death penalty for him should be primarily a state function, and, turning to the states, he advocates that the death decision be taken out of the local prosecutor's hands and given to a single state commission that would oversee and approve the prosecution of death penalty crimes. In this way, Lane seeks to take the local political calculations out of the equation and to have a broader proportionality comparison by an expert panel. He uses as his model the approval system instituted by the U.S. Department of Justice. Lane would eliminate the death penalty for felony murder; this reform not only would limit use of the penalty but also would help to combat vestiges of racism, because felony murder prosecutions, according to his analysis, disproportionately target minorities. "Reconfiguring the death penalty as a special penalty for special crimes would restore a certain moral clarity to capital punishment." These are strong points and they make sense. They should be done. They won't be.

REVIEWS *continued on page 68*

Although Lane makes these good suggestions, he fails to fully acknowledge the very passions he earlier stressed. Prosecutions have a political component, and prosecutors can be political. The death penalty has been, is, and will be politics writ large; even habeas corpus becomes political, as in the Antiterrorism and Effective Death Penalty Act. Lane's suggestions to distance the decision-making in these cases and to compare and contrast the use of the death penalty smacks of policy wonkishness that ignores reality. Moreover, the steps that Lane suggests would involve a multitude of legislative actions and a willingness that is simply out of the realm of what is possible today. Even if we grant that Lane intends this essay as a blueprint for the future, the magnitude of the reforms that he finds necessary to salvage the death penalty leads one to recognize how wrong the penalty is at present.

Having a statewide board or commission to decide death penalty prosecutions comes with its own problems. Lane appears unaware of the criticisms that the Department of Justice process has engendered, ranging from high-handedness from Washington, D.C., to dismissal of local prosecutors' advice, to the delays and costs that such reviews entail. Another factor in capital prosecutions involves who will provide the funding. One can't ignore the role of money. Most tellingly, a commission by its nature tends to be political. It may strive to be independent, but who appoints the commissioners and who removes them? Is the commission going to be filled with cronies of an unscrupulous governor, who may be running for re-election? The debacle of the interference of Texas Governor Perry with the post-execution investigation of Cameron Todd Willingham, who was almost certainly innocent, is proof of that.

Even identifying "the worst of the worst" is not easy. One can select terrorists such as Timothy McVeigh, or truly heinous and horrific crimes, but even multiple slayings may have extenuating circumstances. Some serial killers get life imprisonment for dis-

closing where the bodies are buried; others are executed. Applying abstract definitions such as "heinous, cruel, and depraved" has led to disparate results and much litigation.

Lane does not address the most pressing issue for the death penalty today: the funding needed for effective defense counsel. What has been shown, again and again, is that money matters. Having experienced counsel who have sufficient time and enough funding for investigators and experts makes the difference. That is the challenge. Who is to appoint defense counsel? Who is to pay them? Who is to judge their effectiveness? Writing on a more elevated policy plane, Lane does not fully consider the defense function. Nor does Lane fully consider how expensive the death penalty is. It would aid his argument, given these economically strapped times, to note that life imprisonment costs less than the death penalty.

"Americans demand a lot from the death penalty. They want it to strike those who most deserve it, but only those who most deserve it. They want execution to follow swiftly after sentencing, but they also want defendants to get due process, as the Constitution guarantees. To be sure, not all Americans want these often competing outcomes in equal measure." Lane tries to take the measure of the death penalty. He recognizes the competing interests and the clashing arguments. He recognizes arguments on both sides and seeks a policy solution. He also sidesteps the moral and religious stances as well as the red meat political use of the issue.

Lane wrote this book in an ivory tower. Yet he recognizes that, to succeed, his approach must find an audience among the people and the legislators and, recognizing that the Supreme Court will not strike down the death penalty in the foreseeable future, he challenges them to take the necessary steps to make the system better. Recently—and somewhat surprisingly—a few states have taken steps toward abolishing capital punishment. This may not be what Lane wants for capital punishment, but it

may be the approach that is the fairest and clearest. Lane ends the book with this observation: "The question posed by the death penalty's decline is not only what the right number of executions is: more, fewer, the same amount, or none. It is whether a democratic political system like that of the United States can make such decisions in a way that both serves legitimate goals of public policy and commands the respect of fair-minded people at home and abroad." The reaction of the crowd at the Republican debate on Sept. 7 provides one answer to that question. **TFL**

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

The Future of History

By John A. Lukacs

Yale University Press, New Haven, CT, 2011.
192 pages, \$26.00.

REVIEWED BY JEFFREY G. BUCHELLA

Noted historian John Lukacs' 35th book, *The Future of History*, addresses his lifelong preoccupation with one fundamental theme: what is the nature of history? This question has no simple answer, and Lukacs begins his exploration by telling us what history is *not*. History is not a social science, governed by ironclad rules and measurable results. The belief that history is a social science is, for Lukacs, peculiarly "American and illusory." History, rather, is an art, or, more precisely, a form of literature. It does not apply formulas, as does mathematics, or depict events, as do photographs, but attempts to describe—hence the central importance to history of language, of words, and of perceptions. In the 18th century, Voltaire said that history is the form of literature that has the most readers everywhere, but, in the 19th century, first in Germany and then in other Western nations, scholars began to treat history as something to which scientific principles could be applied to yield "truth." Lukacs gen-

eralizes that, during the 18th century, history was regarded as a form of literature; during the 19th century, history was regarded as a science; and, during the 20th century, history was regarded as a social science.

Lukacs believes that the 18th century had it right. In pursuing his thesis, he devotes an entire chapter—the most important one in the book—to “History and the Novel,” in which he summarizes his theme by quoting 19th-century British historian Thomas Macaulay: “History begins in novel and ends in essay.” A historian begins his task by relating a story, perhaps a highly complex one, complete with richly drawn characters, carefully rendered settings, and a suspenseful plot, and containing the essentials of all classical drama: triumph, defeat, tragedy, even comedy. Having presented a narrative, the historian then proceeds to the heart of the matter: the essay—an attempt to find within the story its meaning or meanings.

If history is literature, then the novel may serve not only as a template but also as a source for writing history. Lukacs illustrates this by sketching scenes from his decades-long interaction with George F. Kennan, the late diplomat and public intellectual, who, as a scholar at the Institute for Advanced Study in Princeton, N.J., beginning in the 1950s, wrote sweeping diplomatic histories of the Russian Revolution and pre-revolutionary European affairs. Lukacs notes that, in Kennan’s book about the Franco-Russian alliance of 1894, Kennan relied on literature in describing “the chief of the French Army Staff, General de Boisdeffre, better than Boisdeffre’s portrait limned by no lesser novelist than Marcel Proust in *Jean Santeuil*. The latter was not at all a book about the Franco-Russian alliance: but Kennan read it.”

For historians, knowledge of literature is a great asset in the writing of history, but Lukacs means to emphasize that history itself is literature. Works of history are attempts to construct well-crafted narratives that are not intended to be fictions, but, like the best novels, aim to be accounts that are true to life. Like all great literature, history strives to tell

what has transpired in the course of human events in a way that imparts the greatest possible sense of reality and thereby conveys insight and understanding that will touch the reader and shed light on fundamental truths. This is why history, like literature, contains elements of fable, parable, and legend. Moreover, not only is history a form of literature, but the novel is also conceptually much like historical writing. In fact, the novel *is* historical in nature, perhaps because, as the Hungarian Catholic poet, János Pilinszky, wrote, “The novel is the only real genre ... the subject of which is time.”

Novelists labor to render the worlds they create in such a way as to make their readers feel present—make them feel that they are eyewitnesses to the unfurling of events. Therefore, a novelist’s descriptions of characters may reveal prototypical representatives of their classes and times. Fictional works may thereby represent tendencies in a culture or period, as with Evelyn Waugh’s *Put Out More Flags*, which Lukacs views as a strikingly incisive portrait of English society during the early years of World War II. At this juncture, Lukacs draws an important distinction between novels that are *imbued with historical consciousness* from those that merely set out to describe historical events. Lukacs finds the former novels often superior. Thus, he writes, Flaubert’s portrait of 1848 in *Sentimental Education* is a historically more complex and meaningful portrait than is Tolstoy’s account of Napoleon’s invasion of Russia in 1812 in *War and Peace*. This is because “Flaubert described how people thought and felt at that time; his novel abounds with descriptions of changing sensitivities, of mutations of opinions and transformations of attitudes. In spite (or, perhaps, because) of Tolstoy’s decision for writing a ‘scientific’ history, *War and Peace* reflects a kind of ideological, rather than historical, thinking.” Novels such as Flaubert’s *Sentimental Education* do not simply provide a newsreel-like account of history but, as Guy de Maupassant wrote, “compel us to reflect, and to understand the darker and deeper meaning of events.”

Thus, historical writing is more than a chronicle of events or even a description of them. It may, and often does, shape events. As the Indian scholar and writer, Nirad C. Chaudhuri, wrote in 1951, E.M. Forster’s novel, *A Passage to India*, “has possibly been an even greater influence in British imperial politics than in English literature. ... The novel helped the growth of that mood which enabled the British people to leave India with an almost Pilate-like gesture of washing their hands of a disagreeable affair.”

Key to understanding Lukacs’ notion of history as literature is an appreciation for history’s subjective, elusive nature, which is a theme that Lukacs has explored continually in the course of nearly 50 years of writings. George Kennan wrote the following to Lukacs in 1984: “My own efforts to write diplomatic history taught me that there is no such thing as an objective historical reality ... there is only the view taken of it by the individual historian. ... This is why I view every work of narrative history as a work of the creative imagination, like the novel, but serving a somewhat different purpose and responsive to different, more confining rules.”

As Lukacs would have it, our attempts to understand the past will always be subject to an inevitable “mental intrusion into the structure of events. ... What people—whether individual persons or masses of people—think is the fundamental essence of what happens in this world, the material products and institutions of it being the consequences, indeed the superstructures” of our perceptions and thoughts. People *choose* their ideas, and “[w]hat marks the movement in the histories of societies and peoples is ... the accumulation of opinions.”

History is necessarily revisionist, because the historian is always in search of “truth,” which really means eliminating untruths and can never be perfectly discovered. Much revisionism followed World War I and was intended to correct the inaccurate condemnation of Germany as having been primarily responsible for the war. But, because historical writing—

REVIEWS *continued on page 70*

like all literature—may influence the future, revisionism, even when it approaches truth, may have unintended and undesirable consequences. For example, “American revisionist historians of the 1920s ... went on attacking American ‘interventionism’” during the 1930s and then during and well after World War II, thereby encouraging isolationism long after it was useful in our foreign affairs.

History can still helpfully and simply—albeit imperfectly—be described as it was in the 1694 edition of the *Dictionary of the French Academy* as “the narration of actions and matters worth remembering,” but the key, writes Lukacs, is what, and why, and how, and when people think and believe.

In *The Future of History*, Lukacs argues that history is, in essence, a history of ideas and beliefs. Ideas and beliefs have a transforming power, as is evidenced by the influence that popular feeling about other peoples had in determining the behavior of various nations during World War II. Lukacs writes, for example, that “[i]n 1940 the main sentiment binding together supporters of Marshal Petain in France was not Fascism and not Germanophilia but Anglophobia.” Lukacs quotes Proust in 1915: “The life of nations merely repeats, on a larger scale, the lives of their component cells, and he who is incapable of understanding the mystery, the reactions, the laws that determine the movements of the individual, can never hope to say anything worth listening to about the struggles of nations.”

In *The Future of History*, the concepts of history as literature and history as a subjective account give way to an implicit treatment of history as philosophy. Lukacs’ meditation on this unspoken theme leads to an inquiry that at times turns almost mystical: “The future of history lies there. The knower and the known are not identical: but they are inseparable. ... We did not create the universe; but we invented it, and keep inventing it, time after time.”

For Lukacs, history must be understood at a level that transcends mere

facts. Insight derives from nonrational sources, such as intuition, feeling, memory, and perhaps even a kind of sixth sense. If, for Lukacs, history is literature (and, I think, also philosophy) and is a creation as much of our minds as of external phenomena, then it may have other analogs besides literature. Lukacs intuitively knows what the Dutch historian Johan Huizinga meant when he wrote:

There is in our historical consciousness an element of great importance that is best defined by the term historical sensation. One might also call it historical contact. ... This contact with the past, a contact which it is impossible to determine or analyze completely ... is one of the many ways given to man to reach beyond himself, to experience truth. ... If it takes on a form at all this remains composite and vague: an *Abnung* [sense] of streets, houses, as sounds and colours or people moving or being moved. ... The historical sensation is not the sensation of living the past again but of understanding the world as one does when listening to music.

More concretely, at least a part of this book is devoted to Lukacs’ examination of more prosaic, though interesting, issues, including the current state of the history profession and the publishing world, how in the modern democratic era the writing of history has shifted in focus from a world in which individuals made decisions to one in which bureaucracies do, and how the evident increasing interest in history by Americans today may reflect, in part, a skepticism and “disillusionment, with the American ideal of Progress.” Luckas shares Alexis de Tocqueville’s concern that a “habit of inattention” is “the greatest defect of democratic character.” It is to this collective attention deficit disorder that Lukacs partially attributes the decreasing influence of books and of the printed word itself, as reading declines, as do opportunities to pub-

lish, and as we undergo a shift from a verbal to a pictorial era—changes that Lukacs, perhaps hyperbolically, insists are moving us “toward a new kind of barbarism.”

At bottom, however, as we enter what he calls a new historical era, leaving behind the last 500-year period, Lukacs’ latest book attempts to answer the question implicit in its title with yet another question, which is more mysterious and basic: What is history? **TFL**

Jeffrey G. Buchella is a lawyer who resides in Tucson, Ariz. He is licensed to practice before the U.S. Supreme Court, the Ninth Circuit Court of Appeals, the U.S. District Court for the District of Arizona, and the Arizona Supreme Court.

Lawtalk: The Unknown Stories Behind Familiar Legal Expressions

By James E. Clapp, Elizabeth G. Thornburg, Marc Galanter, and Fred R. Shapiro

Yale University Press, New Haven, CT, 2011.
338 pages, \$45.00.

REVIEWED BY JOANN BACA

Are you the kind of person who enjoys leafing through a dictionary? Do you appreciate new-word-a-day calendars? Does your interest in all things “law” extend to one-upping your friends with little-known lore? If so—and perhaps even if not—*Lawtalk: The Unknown Stories Behind Familiar Legal Expressions* will provide hours of entertainment, enlightenment, and cocktail party conversation.

As the book’s four authors note, “lawtalk” (law-related words and phrases) “pervades our everyday speech”—not just lawyers’ speech—yet we often have “little awareness of its origins or its actual legal significance.” *Lawtalk* provides not only the etymology and historical context but also the cultural significance of a variety of terms with which we are all familiar, yet

may know less about than we think. Indeed, one of the revelations in the book is how often conventional wisdom with respect to the origins of legal phrases constitutes myth.

Both expected and unexpected terminology fills the book. One would not be surprised that this compendium of words and expressions includes “blackmail,” and “posse,” and “the whole truth,” but terms such as “CSI effect,” or “the law is an ass,” or “lawyers, guns, and money” might be unforeseen. Covered in *Lawtalk* are phrases old and new, ranging from terms used since antiquity, such as “eye for an eye” (first appearing not in the Bible, as many believe, but in the Code of Hammurabi, dating from the 18th century B.C.E.), to such latecomers to the lexicon as “abuse excuse” and “blue wall of silence,” which trace back only to the last quarter of the 20th century.

This book is not a slapdash work cobbled together to make a quick buck; *Lawtalk* is serious scholarship. Yet it is written to appeal not only to lawyers but also to anyone who enjoys learning about English expressions and their origins. The authors and researchers have made extensive use of electronic databases and both legal and nonlegal original source material—everything from a California voters’ handbook to a letter written by Thomas Jefferson, to the *New York Times*, and to the U.S. Constitution, with stops at numerous novels, English and U.S. court cases, and even a book of sayings published in 1689. The layout of the book, however, caters to varying readers. Those interested in precise information about the source material used for this work will find extensive endnotes. For those content to read brief references to, and the results of, the research, the material provided within the entries will suffice. The casual reader is thus spared informational overload, but the book’s scholarly underpinnings are preserved.

Although one might suspect that a book so segmented would be choppy or superficial, or that the entries might vary in quality as a result of the book’s multiple authors, such concerns are unfounded. The information is pre-

sented in a flowing style that is at once intellectually fulfilling and easy to read. Many entries are punctuated with jokes that effortlessly illustrate points made in the discussions. Each entry is identified by the initials of the main contributor, although all entries are the product of the combined effort of the four authors. Hence, although Clapp’s and Thornburg’s initials are seen most often at the end of entries, the voice and tone of the book are uniform.

A review of this length cannot provide enough examples to give a full sense of the variety and depth of the entries. The entry on “aid and abet (and the like)” offers a fascinating series of possible explanations of how redundant word pairings may have begun. (Hint: It was not solely to include both English and French synonyms in order to prevent misunderstandings after William the Conqueror brought French to the court of England. Nor was it because at one time law clerks were paid by the line.) After considering and discarding many possibilities, the authors settle on a surprisingly uncomplicated answer: “The fundamental legal rationale for redundancy ... is simply this: it is better to be safe than sorry.”

In another entry, the authors make a good case for their premise that “[c]orpus delicti wins the prize for the legal term that is at once most misunderstood by nonlawyers and most misspelled by lawyers.” Did you know that the term “green card” was not used to describe a Permanent Resident Card “until just before the card stopped being green,” yet use of the term persists to this day? Were you aware that the phrase “make a federal case out of it” entered the lexicon as a punch line used by vaudeville comedians? These intriguing snippets are just the tiniest bites of the large, juicy apple (and, in case you were wondering, the “one-bite rule” is dissected in the book as well).

Although useful as a reference book for those who wish to use terms properly and understand their significance, the book goes beyond the expected, offering readers an enjoyable balance of pertinent and impertinent discourse on its subjects. The

book offers much hard information (dates and quotations) and social and political history, but the information is leavened with wry wit and a snappy style of writing that keeps one turning pages both to discover more and to smile more. Humor lightens the discourse, including the following joke recorded in 1892:

In a case of an assault by a husband on his wife, the injured woman was reluctant to prosecute and give her evidence.

“I’ll lave [sic] him to God, me lord,” she cried.

“Oh, dear, no,” said the judge; “it’s far too serious a matter for that.”

Occasionally the authors veer from their stated mission of providing the story behind the expression by launching into a gratuitous articulation of opinion that does not enlighten but merely exposes their political bias. Case in point: After an informative exegesis of the term “affirmative action,” the contributors end by reflecting upon some “who argue paternalistically that affirmative action undermines the self-esteem of those who benefit from it.” The authors opine that “[s]upporters of affirmative action are still waiting for those intellectuals to produce a single white male doctor or ... construction worker racked by doubt about his self-worth because he got his start at a time when the system affirmatively favored white males over everyone else.” The book might be more digestible to a wider spectrum of readers if such editorializing had been excised.

However, despite such occasional indulgences, most of the book offers valuable and objective analysis. You will learn quite a bit, and you will unlearn a few things as well. Do you want to know why it is inappropriate to address the attorney general as “General”? You’ll find the answer in *Lawtalk*. **TFL**

JoAnn Baca is retired from a career with the Federal Maritime Commission. Her husband, Lawrence Baca, is a past president of the Federal Bar Association.

William Paterson Defends New Jersey Plan. William Paterson (1745–1806) presented a plan of government to the Convention that came to be called the “New Jersey Plan.” Paterson wanted to retain a unicameral (one-house) legislature with equal votes of states and have the national legislature elect the executive. The national Congress held most of its sessions there from 1775 to 1800. Within its walls the Declaration of Independence was adopted, and the Constitution of the United States was debated, drafted, and signed. This print depicts the back of the building, with citizens and Native Americans walking on the lawn. Enlarge. A deep dive into Article I of the US Constitution, which describes the roles and powers of Congress. In this video, Kim discusses Article I with scholars Heather Gerken and Ilya Somin. To read more, visit the National Constitution Center's Interactive Constitution. On this site, leading scholars interact and explore the Constitution and its history. For each provision of the Constitution, experts from different political perspectives coauthor interpretive explanations when they agree and write separately when their opinions diverge. The Congress may determine the Time of choosing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States. No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States. Start by marking “Defending Congress and the Constitution” as Want to Read: Want to Read saving; Want to Read. The examples tend to show Congress as the historically more effective branch when it comes to defending and defining the basic liberties promised by the Constitution. "Settling something [by SC decision] is successful only when the outcome receives public understanding and support." A classic example Dred Scott: President James Buchanan, speaking at his inaugural, opined that "a particular issue is before the SC, where it will be speedily and finally decided." A Constitutional Convention was called in the summer of 1787 to change the Articles of Confederation. During this time, many compromises were formed to appease regional factions. The Great Compromise brought together the New Jersey Plan and the Virginia Plan to create the Constitution’s legislative system. The Three-Fifths Compromise appeased Southern representatives by allowing them to count slaves for representation and taxation purposes. The Federalists wanted a strong government and strong executive branch, while the anti-Federalists wanted a weaker central government.