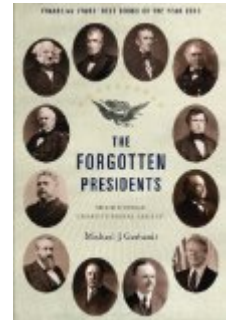




Michael J. Gerhardt. *The Forgotten Presidents: Their Untold Constitutional Legacy.* New York: Oxford University Press, 2013. xxi + 313 pp. \$24.95, paper, ISBN 978-0-19-938998-8.



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The role of presidents, especially the less known and less glorified, in the routine management of American public life may be overestimated. Famously, the social contract providing US sovereignty demands checks and balances among the three branches of government. Members of Congress, judges in all courts, cabinet officeholders, numerous federal workers, and state-level operatives play a considerable role. Similarly, state-level activism may be forgotten, while the president, because of hierarchy and structure, gets the credit—or the blame—for the state of federal affairs.

Michael J. Gerhardt's eclectic book is well worth reading thoroughly to better understand the dynamics of too-often overlooked White House incumbents. That is especially correct for most of the nineteenth century, when Supreme Court chief justices John Marshall and Roger Taney, multiple members of Congress, and numerous governors of individual states were often practically more important than the authority constitutionally vested in executive-branch lead-

ers. For maximum impact, the book is best read chapter by chapter (most are relatively short), president by president (most are indeed largely neglected), as a series of individual microhistories.

Gerhardt is a relativist when it comes to constitutional evolution rather than an absolutist who accentuates comprehensive doctrines. He outwardly prefers microhistory over a grand synthesis. His narrative therefore renders a nuanced jurisprudential context. Above all, Gerhardt offers an affirmation to the conventional image of dull, seemingly mediocre-at-best “also governed” of yester (and perhaps contemporaneous) White House years. Eschewing saccharine nostalgia and traditional obscurity, Gerhardt supplements the conventional focus of studies on outstanding presidents, treating them as an innovative cohort, albeit with uneven degrees of competence, rather than as a self-interested guild. Thus, Gerhardt frequently provides tales of what may be called “seemingly mediocre great men,” rather than building history from “the socioeconomic bottom

up.” This unique focus is similar to general recent academic trends of finding more facts about ordinary people and patterns in less obvious places than in heroic wars and in big crises.

Consequently, Gerhard’s fluid presentation of the trials and tribulations of presidencies underscores something important that is easily overlooked: in a crucial sense, given their aggregated duration as incumbents, the less known and less celebrated officeholders have, arguably, wielded more power and were more important in the essential chronicles of the United States than the stellar, top-rated ones. A reasonable conclusion is that several dwarfs can intermittently combine into a giant. Each chapter has numerous subheadings that accentuate multiple governance philosophies, issues, deliberations, decisions, policies, vetoes, appointments, initiatives, and, not least, cases relevant to American legal history.

Cumulatively, Gerhard paints a vivid tableau, linking federalism and politics to legal developments. US presidents, almost by definition of possessing the bully pulpit, practically by the custom of generations, largely set the political and, even more so, the diplomatic agenda of their nation even in ordinary times. To be sure, any high school student, and surely a scholar, knows about the constitutional legacy of what by the mid-twentieth century would be called “imperial presidents.” Thus, the Civil War constraints Abraham Lincoln endured and created alongside his meaningful deeds, Theodore Roosevelt’s seminal actions on trustbusting and in the Department of Justice, Franklyn Delano Roosevelt’s battles with the Supreme Court to further the pioneering New Deal, the complex role of founding fathers such as George Washington, Thomas Jefferson, John Adams, and James Madison have been widely probed.^[1] Only an elite few know much about most of the others. How about some appreciation for the less extraordinary White House occupants?

Lay readers will benefit from reading this book more than experts. The intended audience is wide, although at times gems are crowded with many more details than the nonspecialist needs. Gerhardt artfully blends erudition and select anecdotes to convey a substantive agenda that could comfort aspiring office-seekers with modest resumes during prolonged eras, where initial challenges seem insurmountable, while ultimate accomplishments are likely to be modest.

This book will not be soon surpassed as the definitive account of constitutional deeds by the second- and third-tier presidents for the interested public. Indeed, most of the thirteen presidents that Gerhardt explores in his chapters were Democrats, beginning with Martin Van Buren (Grover Cleveland is credited twice with distinct chapters, thus duplicating his unique nonconsecutive terms). Others are William Henry Harrison, John Tyler, Zachary Taylor, Millard Fillmore, Franklin Pierce, Chester Arthur, Benjamin (grandson of William Henry) Harrison, William Howard Taft, and Calvin Coolidge. Chronologically, the clear focus is 1837 to 1929, following the founding fathers and lions such as Andrew Jackson, preceding the well-researched modern Herbert Hoover, and beyond. Most presidents whose records were probed were “forgotten” for a reason. For example, they failed to be reelected for a second term, sometimes even to be renominated by their own parties, arguably the most important contemporary test for success.

Jimmy Carter is the exclusive subsequent addition. Was Carter obligatory for a requisite “comprehensive” historical scope? Or does Gerhard fear that Carter, will be “forgotten” in future histories as a mere episode in the Republican era of 1969-93? According to Gerhardt’s painstaking analysis, Carter—who, much to his own chagrin, did not get to appoint any Supreme Court justices—was “incoherent” in his constitutional practices. As I wrote a book arguing that Carter’s foreign policy, too, lacked an actual organizing principle

—human rights did not truly serve in that capacity—I see Gerhardt’s logic on domestic politics as complementary to Carter’s other deeds in striking colors.[2]

To be sure, the contribution of this book is significant and meritorious to a comprehensive and evolving intellectual discourse in US legal history research. It is a wonderful reminder that analyzing the decisions, actions, and consequences of (not-the-remarkable-type), establishment types and top policymakers rather than focusing on grassroots, marginal, victimized, and other vulnerable elements is an essential part of chronicling events, patterns, and changes.

This book is organized into thirteen substantive chapters, complemented by introductory and concluding sections. The subtitle “Constitutional Legacy” is somewhat misleading, as the thematic focus, arguably, is on these presidents’ contribution to public policy, how they spearheaded administrative management, how they approached ethical quandaries, personnel concerns such as Supreme Court nominations, and, perhaps above all, how they handled contemporary political issues in the context in which they operated. Balancing constitutional legacy with the relevant domestic issues in each presidency is a challenge that Gerhardt often meets with scrutiny for presidents’ operations, some more effectively than others. Looking at the contents as a whole gives readers a solid sense that all presidents have been a net “value-add” to American jurisprudence, especially if they were open-minded and appreciated the Constitution’s capacity for organic growth.

Gerhardt begins his journey with Martin Van Buren (1837-41). Gerhardt aptly demonstrates how Van Buren consistently supported state rights, especially with regard to slavery and economic issues. Gerhardt does highlight Van Buren’s contributions concerning cabinet appointments. Van Buren, however, failed to resolve economic issues because of his opposition to an activist government, which was based on a narrow reading

of the federal powers vested by the Constitution. The analysis of the interface of treaties and international law with constitutional issues to explain the implications of the *Amistad* case is lucid. Gerhardt is particularly magisterial with respect to Van Buren’s strengthening of presidential control (almost unilateral power) over usage of military force, and his continuation of Jackson’s Indian removal policy.

Chapter 4 on the Whig Zachary Taylor (1849-50) is superbly instructive. Taylor only served for about fifteen months, but Gerhardt shows that he was a pivotal transitional figure. James Polk’s waging of war against Mexico and his initiative to add Texas as a slave state shaped much of Taylor’s presidency. Taylor, in turn, wanted to admit two free states, California and New Mexico. Taylor was adamant in doing so even in the face of serious challenges. These include congressional adversity, serious threats of Southern secession, and a possible Texan invasion of New Mexico. Taylor, moreover, was a slave-owner himself, and the Whigs had differing views.

According to Gerhardt, Taylor’s paradigm shift in interpreting the Constitution had several components. They included stronger presidential powers, including wielding vetoes, enduring and sustaining censures, and moving away from the decades-old pattern of constitutional compromise that endorsed equality between free and slave states in the admission process to the Union, in favor of popular sovereignty, a move that influenced several of his successors, especially Abraham Lincoln and Jefferson Davis, and subsequently also Ulysses S. Grant.

Just before he became president himself, Lincoln thanked Taylor for the “political education” that he had imparted, especially with respect to the balance between executive and congressional powers and using recess appointments. Davis, the future Confederacy president whom Taylor knew well from army days, and with whom he had a tumultuous relationship, was then Mississippi’s

Democratic senator. He was alarmed by the expansion of presidential powers, the federal regulation of territories, the likely constriction of slavery, and, perhaps above all, the prohibition of secession.

Gerhardt's painstakingly-researched chapter (7) on the Republican Chester Arthur, his quest for integrity in public office, and his selective use of veto with regard to the 1882 Chinese Exclusion Act, presents guidance. Gerhardt highlights Arthur's civil service reform known as the 1883 Pendleton Act. Gerhardt correctly emphasized that Arthur was motivated by the need to address the 1881 assassination of President James Garfield by a disgruntled office-seeker who specifically wanted Arthur to become president. Arthur did not tackle corruption well beforehand: in 1878 he lost a lucrative job due to the corruption in the New York Customs House. Ironically, being a "political hack" who actually sponsored patronage is what facilitated Arthur securing the vice presidential spot. Gerhardt also hails Arthur's independent selections of Supreme Court justices. Gerhardt is more critical of Arthur's approach to discriminatory practices against Chinese immigrants, African Americans, Native Americans, and, to a lesser extent, Mormons. Regrettably, Arthur's advocacy on behalf of racial justice in his early life as a New York lawyer is overlooked.

Of the presidents not included in this study the absence of pre-Civil War James Buchanan; Woodrow Wilson, Warren Harding, Herbert Hoover, and Harry S. Truman—surely not coincidental, as they all stand in the shadow of Franklin Delano Roosevelt; and Richard Nixon and Gerald Ford (arguably the least important president in the twentieth century, for multiple reasons), the forerunners to Carter, is particularly regrettable. Many of these presidents may have wanted to be forgiven more than forgotten.

Harry Truman (1945-53), in particular, could have been a fine addition to this book. He of the Fair Deal, the integration of the army, the Uniform

Code of Military Justice, the National Security Act, McCarthyism, Executive Order 9980 promising equality in employment, and the *forgotten* (and at the time highly unpopular) war in Korea, had his redemption decades later thanks to a splendid biography by David McCullough.[3]

A longer conclusion integrating presidencies and offering more insights would have been useful as an epilogue. Similarly, a stronger appreciation for foreign policy issues affecting each era and their impact would have been helpful. A comprehensive bibliography—complementing the extensive endnotes and a pithy "bibliographic essay" totaling a mere three pages—would have enriched this otherwise impressive monograph.

Notes

[1]. He was both a founding father as well as a reluctant litigant in the seminal case of *Marbury v. Madison* (1803) that Chief Justice John Marshall employed to constrain presidential powers through judicial review.

[2]. Itai Sneh, *The Future Almost Arrived: How Jimmy Carter Failed to Change U.S. Foreign Policy* (New York: Peter Lang, 2008).

[3]. See David McCullough, *Truman* (New York: Simon & Schuster, 1992).

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