

## ***The Founding Fathers Reconsidered***

By R.B. Bernstein

Oxford University Press, New York, NY, 2009.  
256 pages, \$17.95.

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REVIEWED BY HENRY S. COHN

R.B. Bernstein, author of an acclaimed biography of Thomas Jefferson, returns with *The Founding Fathers Reconsidered*. His goal is to reveal the origin of the term “founding fathers,” to test the term’s validity, to formulate a list of founding fathers, and to detail their accomplishments and weaknesses.

The expression “founding fathers” originated at the 1912 Republican convention, in an address by Sen. Warren G. Harding, as he endorsed President Taft for re-election. (The Democratic candidate, Woodrow Wilson, won that election and won again in 1916.) Harding declared that the “founding American fathers” had written “the covenant of a people’s rule into the bond of national life, beyond all erasure or abridgement.” At the 1916 Republican convention, Harding used the term “founding fathers,” dropping the “American.”

Bernstein notes the sloppiness of Harding’s pet phrase. Harding did not name anyone in particular or specify whether he was referring to those who drafted the Declaration of Independence or the Constitution or both. Harding’s unnamed founding fathers are without flaw, and Harding ignored the charges of sexism and racism that had been leveled against some of them, even in his day. And, if he had given it a thought, would Harding have included Aaron Burr, a significant participant in the 1800 presidential crisis and later the murderer of Alexander Hamilton, among the founding fathers? Also, would Harding, an arch-conservative, have been revolted to see Thomas Paine on the list, even though, as a contemporary saying went, “[W]ithout the pen of Paine, the sword of Washington would have been wielded in vain?”

Bernstein takes a more precise view of the founders than did President Harding. He selects seven primary founders, relying on Richard Morris’ book, *Seven Who Shaped Our Destiny*. The seven are Benjamin Franklin, George Washington, John Adams, Thomas Jefferson, John Jay, James Madison, and Alexander Hamilton. Except for Jay, who was the first Chief Justice, they were all among the signers of the Declaration of Independence or the framers of the Constitution (or both). Bernstein also places Burr and Paine in a category of “secondary” fathers and even creates a class of “founding mothers,” including Abigail Adams and Mercy Otis Warren.

Bernstein starts his discussion of the founding fathers with a background of their efforts, and much of this material is an update of Bernstein’s 1987 book, *Are We to Be a Nation?* He describes how, in the late 1700s, participation in government was limited to white male property owners, and he recounts the calling of the First Continental Congress in 1775 and the Constitutional Convention in 1787. But the heart of the book is an analysis of the achievements of Bernstein’s founding fathers. The author would concur with historian Gordon Wood that the Constitution was remarkable for being a distinct document and not merely part of a collection of statutes, as in England. The first three articles of the U.S. Constitution established three branches of government, with checks and balances, as opposed to Great Britain’s parliamentary system. Article III spurred the development of judicial review and also provided for “actual representation” by legislators, rather than “virtual representation,” as in Britain, where districts did not in fact have representatives. Finally, the Constitution was ratified only after its proponents promised that the first Congress would add a Bill of Rights to the document.

Bernstein offers an interesting discussion of what he calls “exploding cigars” in the Constitution—matters that were not fully settled by the document. He gives three examples, the

first being the procedure for electing the President, which the election of 1800 demonstrated to be unworkable and which was changed by the Twelfth Amendment. The second example is the right of the President to remove executive branch officers—an issue that became significant at the time of the impeachment of Andrew Johnson. The third cigar almost exploded when the bribery prosecution of Spiro Agnew was nearly derailed because Agnew argued that he had to be impeached before he could be tried. It is not clear what Agnew’s grounds for this argument could be, but, if he had made it persuasively, then Agnew was prepared to argue that he would have to preside over his own impeachment trial. The reasoning here is that Article I, section 3, of the Constitution provides that the Senate shall have the sole power to try all impeachments and that the Chief Justice shall preside over impeachment trials of the President. This provision seems to imply that the Vice President, as president of the Senate, must preside over impeachment trials of anyone other than the President—in other words, that Agnew would have to preside over his own impeachment trial.

Bernstein also has an excellent chapter on the historical legacy of the founding fathers. Several of them have been held in esteem, only to have their public regard wane. For example, from the 1930s to the 1960s, the reputation of Thomas Jefferson, as the champion of liberty, was in ascent. Since then, his reputation has declined because he owned slaves and had an affair with Sally Hemings. Meanwhile, Alexander Hamilton, whose aristocratic tendencies had lowered his standing during the Depression, has risen in stature lately; today he is pictured as an economic genius.

The epilogue to *The Founding Fathers Reconsidered* provides an important perspective by summarizing the speeches of five famous African-Americans. The first is an address Frederick Douglass gave on July 5, 1852, in which

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he questioned what the American slave would take from Fourth of July celebrations. To Douglass, the answer was fraud and hypocrisy. The second speech was given by Martin Luther King during the march on Washington in 1963. King, according to Bernstein, “urged African Americans to invoke the best aspirations of the founding fathers as authority to confront and overcome the failures of the American experiment.” King also said that America had defaulted on the words of the Declaration of Independence and had given African-Americans a “bad check, a check which has come back marked ‘insufficient funds.’ But we refused to believe that the bank of justice is bankrupt.”

The third speech Bernstein cites is the one given by Rep. Barbara Jordan (D-Texas) during the 1974 impeachment proceedings against President Nixon. The Constitution eloquently commenced, she said, with “We the People.” Yet, she went on to say, her ancestors were not included in “the people” until after the enactment of the Fourteenth Amendment. In 1987, Justice Thurgood Marshall echoed this theme when he stated at a celebration of the bicentennial of the Constitution that, “[w]hen contemporary Americans cite ‘the Constitution,’ they invoke a concept that is vastly different from what the Framers barely began to construct two centuries ago.” According to Justice Marshall, it was not the work of the founding fathers but the process that they set in motion that should be celebrated. Bernstein concludes with Barack Obama’s victory speech on Nov. 4, 2008: “If there is anyone out there who still doubts that America is a place where all things are possible, who still wonders if the dream of our Founders is alive in our time, who still questions the power of our democracy, tonight is your answer.”

Bernstein’s discussion of these five speeches highlights that the founding fathers’ great achievement also reveals enormous gaps between ideals and reality. **TFL**

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*Henry S. Cohn is a judge of the Connecticut Superior Court.*

## ***The Prince of Darkness: 50 Years of Reporting in Washington***

By Robert D. Novak

*Crown Forum, New York, NY, 2007. 672 pages, \$29.95 (cloth), \$18.95 (paper).*

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### REVIEWED BY JOHN C. HOLMES

Robert Novak begins his autobiography with his most notorious journalistic episode: the Valerie Plame affair. Plame was a CIA agent whose husband, Joseph C. Wilson, was sent by the CIA to Niger to investigate allegations that Iraq had agreed to buy uranium in the form of yellowcake from Niger. Wilson concluded that the allegations were highly unlikely. According to Novak, President George W. Bush was unaware of Wilson’s conclusion; in any case, in his 2003 State of the Union address, Bush said, “The British government has learned that Saddam Hussein recently sought significant quantities of uranium from Africa.” In an op-ed piece in the *New York Times*, Wilson asserted that Bush’s claim was untrue, and, in retaliation, the Bush administration leaked his wife’s identity as a CIA operative to the press. Novak published the information and refused to divulge the source for his story, who was later revealed to be Deputy Secretary of State Richard Armitage. Novak claims that the mainstream media unfairly attacked him and that the attacks caused him much anguish.

Novak’s journalistic coup-turned-sour only slightly marred the otherwise distinguished career of perhaps the most prolific and longest-serving member of the media in history. Critics of Novak might contend that the black mark from the Plame affair was well-deserved, because, throughout a career that turned increasingly partisan, Novak himself had given little quarter when pointing out the weaknesses, foibles, and screwups of political figures.

#### **Novak’s Background**

Robert Novak was born in Joliet, Ill., in 1931. His grandfather, a secular Jew

who had emigrated from Russia, was a passionate Democrat, a heavy drinker, and an authoritarian father. One of his sons, the author’s father, Maurice, worked his way through college and was a nominally observant Jew who had his only son, Robert, bar mitzva-hed. Maurice was a Republican and thought that Franklin D. Roosevelt was meddling with the system that had permitted him, the son of poor immigrants, to achieve middle-class respectability as a low-level corporate executive and officer in local civic organizations. Robert Novak attributes his own early political interests and Republican leanings to his father.

Maurice Novak was also a news junkie: he subscribed to several newspapers and magazines and listened avidly to radio news broadcasters such as H.V. Kaltenborn and Gabriel Heatter. This further whetted his son’s appetite for politics and kindled Robert’s interest in journalism.

Although not an athlete, Robert Novak became a sportswriter for his high school newspaper. In his senior year, he became a stringer for the *Joliet Herald-News* and a full-time staffer in subsequent summers. This newspaper became his journalism school, where he “learned the formula for writing obituaries, how to lay out a page and write headlines, how to cover police news without getting sued for libel ... [and how] to bluff when [he] didn’t know much about the subject.”

In 1948, Novak entered the University of Illinois, where he received high grades and reveled in liberal arts studies, particularly of the great English writers. He avidly continued his sports journalism, writing for the school newspaper, the *Daily Illini*, as well as covering sports events for the *Champaign-Urbana Courier*. He was devastated, however, to lose the prestigious honor of being named sports editor for the *Daily Illini* to Morris Beschloss (father of historian Michael Beschloss), who, according to Novak, was less deserving but a better campaigner for the honor. Novak spent his senior year in college working long hours for the *Courier*, skipping many classes, and partying. One professor flunked

him for missing too many classes, and a student-faculty disciplinary committee summoned him to face expulsion from school. Student members voted against him for his arrogance — a quality that would cause him frequent difficulty throughout his career — but a faculty member persuaded the committee to allow Novak to stay because of his exemplary performance during his first three years.

Novak had joined the ROTC at the University of Illinois, and was called into service and sent to Korea after graduation. Fortunately for him, the Korean war had just ended, so he spent the final year of his military commitment reading voraciously and drinking heavily. Just prior to being discharged and with no other likely opportunities, he accepted an offer from the Associated Press bureau in Omaha as a 12-week vacation replacement for another reporter. He parlayed this assignment into an extended stay, which eventually took him to Washington, D.C., at the age of 26, as a reporter for a national newspaper. From there he moved on to a career that would include, among other things, 26 years with Rowland Evans Jr. as co-writer of the “Evans-Novak Political Report,” author of his own columns after Evans retired, co-host of CNN’s “Crossfire,” and panelist on and executive producer of the television show, “Capital Gang.”

The amount of work that Novak took on in writing his columns and preparing for television shows was remarkable. Novak specialized in gathering inside information from government officials, which required him to spend much time flattering and schmoozing with these people, then attempting to verify the information they gave him. The intensity with which he pursued these efforts is evidenced by the fact that he hardly knew his neighbors, although he lived in the same house for more than 30 years.

Novak’s prodigious production is even more amazing when one considers the humongous amount of hard liquor he consumed when he was plumbing his resources and partying. He engaged in noontime political forays greased by three or four glasses of scotch, followed by evenings of party-

ing at the National Press Club, where he would consume still more scotch. Only in his late 40s did he realize that he had a serious drinking problem, and it took contracting and almost dying from spinal meningitis at age 56 to cure him of his taste for scotch. He continued to consume gin and other liquor, but his days of heavy drinking were over.

Novak’s first marriage ended in divorce after little more than a year. He remarried, and dedicates this book to his second wife, Geraldine Williams Novak, “my intrepid and loving partner.” Both Geraldine, who was an Episcopalian, and the author converted to Catholicism and were baptized in 1998; Novak devotes a chapter to why he converted.

### Presidents (and Contenders) He Knew

Novak has met every President since Eisenhower. He reports unabashedly on his meetings with these Presidents and analyzes each of their presidencies—usually critically. Novak’s least favorite of the Presidents he met was Jimmy Carter. Like nearly every other follower of politics at the time, Novak did not take Carter seriously as a candidate for President in the crowded field of Democrats vying to challenge incumbent President Gerald R. Ford. Novak unearthed nine untruths Carter had put forward, such as his claims of friendship with Sens. Henry “Scoop” Jackson and Richard Russell, Carter’s membership in Common Cause, and his hard work on Atlanta’s school busing plan. Carter, Novak concludes, “was a habitual liar who modified the truth to suit his purposes.” But Novak acknowledges Carter’s shrewd political tactics and luck in grasping the 1976 Democratic nomination and electoral victory over Ford, who was burdened by his pardon of Nixon. Novak found Carter an unsuccessful President, not only in failing to recognize the designs of the Soviet Union to acquire world domination, but also in having an unhealthy trust in his own capabilities to reform dictators such as Fidel Castro.

Novak’s two favorite Presidents—as people—were Kennedy and Reagan. He was most fond of Kennedy, but most philosophically attuned to

Reagan. Novak’s modus operandi was to ingratiate himself with potential informers—including political leaders—and, after gaining their confidence, report their disclosures in his own critical manner, often angering them and sometimes permanently losing their allegiance and his access to these individuals. But Kennedy was different. Even when Novak’s columns were harshly critical of Kennedy’s actions, Kennedy would nearly always respond with equanimity, realizing that Novak was a hard-hitting reporter and having confidence in his own capabilities as President. Novak found President Kennedy to be warm, gracious, and trusting, but found his brother Bobby brash and arrogant. Overall, however, Novak considered Kennedy’s a failed presidency in terms of both domestic and foreign policy and expects it to lose its luster as history unfolds. By contrast, Novak believes that Reagan’s stature will continue to grow. Novak’s appreciation of Reagan coincided with his own evolution from a Rockefeller Republican to a hard-core conservative. Although Novak does not give Reagan a pass and criticizes his mistakes, he found little to dispute in Reagan’s policies.

Novak cites President Ford’s appointment of John Paul Stevens, rather than someone more conservative, to the Supreme Court as “a presidential decision that enhanced my view that he [Ford] had no public purpose and that extended his negative impact decades beyond his presidency.” Novak’s blunt criticisms of Ford made a congenial relationship with him difficult, and, although he views Ford as the nicest of the Presidents he has covered, he considers him to have been ill-equipped for the job.

Novak’s wife Geraldine had been a secretary to Vice President Lyndon Johnson, and Johnson insisted on hosting the Novaks’ wedding reception. Novak views this as both a gracious gesture and an attempt to manipulate him to give Johnson good publicity. But Novak’s columns reflected his opinion that Johnson’s presidency was a disaster, and Johnson retaliated by embarrassing Novak publicly and de-

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nying him journalistic access to the White House.

Although Novak had high hopes for a successful Nixon presidency, he disliked the “den of vipers” that surrounded him, especially Bob Halde- man, John Erlichmann, and Chuck Colson. According to Novak, Nixon saw him as a kindred spirit who could be manipulated by selective leaks. Years after he resigned over the Watergate nightmare, Nixon said, “One of the best ways to learn what’s going on in politics is reading Evans and Novak. One of the best things about being retired from politics is not having to return their calls.” Of John Dean, the Nixon White House counsel who testified against Nixon during the Watergate hearings, Novak wrote, “I had disliked him from a distance and liked him even less as I now met him for the first time. He seemed to typify the Nixon ‘Beaver Patrol’—not just short on principles, but smug and arrogant, odd for an informer who had turned against his own president and was on his way to prison.”

Novak saw Clinton as “a man of the Left who disguised himself as a man of the center. His opening agenda was higher taxes, socialized medicine, and homosexual rights. Combining this with his personal misadventures meant the nineties would be a dreadful decade for the Democrats.”

In addition to discussing the Presidents he knew, Novak offers revealing comments on some of the losing contenders for the office. He details the unlikely nomination, in 1964, of Sen. Barry Goldwater over three liberal Republican governors: William Scranton of Pennsylvania, George Romney of Michigan, and Nelson Rockefeller of New York. Of the 1968 Democratic vice-presidential nominee he writes, “[Edmund] Muskie’s appeal was as a cool New Englander, calm when all about him were in tumult. Nothing could have been further from the truth. He was an erratic personality with an uncontrollable temper. ... He also was dull and devoid of ideas.” One Democrat whom Novak feels should have been considered more seriously for the presidency was Sen. Daniel Pat-

rick Moynihan, whom Novak saw as an effective public servant, inspired innovator, and eloquent orator. Despite drinking too much, Moynihan’s problem in being nominated was that his sometimes conservative views and his service in the Nixon administration caused liberal Democrats to block efforts on his behalf.

### Novak’s Journalism

Novak mastered the technique of scooping the rest of the pack in obtaining inside information about political events. Although he praised his long-term partner, Rowland Evans, as a smooth operator with easy access to high-level politicians, and denigrated himself as an offensive individual from a nondescript background, Novak actually obtained the majority of their scoops through his aggressive schmoozing, pursuing his stories fearlessly and relentlessly. Novak rarely published gossip or hatchet jobs; rather, he came up with information on prospective high-level appointments and secret foreign affairs briefings and conducted revealing interviews with domestic and foreign politicians and diplomats. Novak was able to accomplish this because, despite his reputation for being an arrogant and pushy antagonist (hence the “Prince of Darkness” label), he also had an impish “sweet” side that allowed him to charm and, at least temporarily, gain the confidence of his sources. Moreover, Novak maintained the highest journalistic standards in not quoting or revealing his sources—unless they authorized him to do so—and in confirming leaked information with other sources. *Prince of Darkness* sheds a blinding light on the symbiotic relationship between journalists and politicians—the attempts of the former to get information that will make a good story and of the latter to manipulate the facts to make the story favorable.

Novak became instantly attached to his role as a television panelist, and he was most successful at playing the heavy. On “The McLaughlin Group,” for example, he was the conservative doing battle with liberal icon Eleanor Clift, although his prickly personality

also clashed with that of the moderator, the thin-skinned John McLaughlin. An original member of the “Capital Gang” on CNN, Novak found that dealing with other high-powered egocentric personalities could cause problems. One such personality was conservative pundit Mona Charon, who, though intelligent and articulate, often became hostile and personal in her confrontations with liberal panelists such as Al Hunt. Novak suggested to her that she tone down her approach, and she went over his head to complain to CNN management about his treatment of her.

*Prince of Darkness* is chock full of the names of people who fed Novak information in the hope that he would publish a column that would promote their interests. David Stockman, for example, who was the director of the Office of Management and Budget under President Reagan, had biweekly breakfasts with Novak at the relatively private Hay Adams dining room (rather than Paul Young’s restaurant, where politicians and celebrities generally went to see and be seen). Stockman would divulge information on decisions that the Reagan administration was about to make and expected a favorable column in exchange. Stockman would also use the meetings to leak unfavorable information about his rivals in Reagan’s cabinet, such as Secretary of Transportation Drew Lewis. Once, at a Gridiron dinner, Stockman publicly accused Novak of being too harsh on Lewis, and Novak recognized that Stockman was using him just as he was using Stockman.

Novak frequently refers to the income he has earned (equating it to today’s values), apparently not only as a matter of information as well as pride but also as a kind of scorecard reflecting his increasing presence and influence in his chosen field.

Although *Prince of Darkness* is Novak’s personal story, it explains a great deal about the relationship between journalism and politics. The book is well-written and covers an enormous amount of material, frequently quoting Novak’s newspaper columns. The book’s subtitle—*50 Years of Reporting*

in Washington—aptly summarizes its content. **TFL**

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*John C. Holmes served as a U.S. administrative law judge for 30 years, retiring in 2004 as chief administrative law judge at the U.S. Department of the Interior. He currently works part time as an arbitrator and mediator and can be reached at trvlnterry@aol.com.*

#### Endnote

Robert Novak died on Aug. 18, 2009, at age 78, after this book review was written.

### **Meltdown: A Free-Market Look at Why the Stock Market Collapsed, the Economy Tanked, and Government Bailouts Will Make Things Worse**

By Thomas E. Woods Jr.

*Regnery Publishing, Washington, DC, 2009. 194 pages, \$18.45.*

### **Fool's Gold: How the Bold Dream of a Small Tribe at J.P. Morgan Was Corrupted by Wall Street Greed and Unleashed a Catastrophe**

By Gillian Tett

*Simon & Schuster, New York, NY, 2009. 304 pages, \$26.00.*

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#### REVIEWED BY CHRISTOPHER C. FAILLE

Judging just from their titles and subtitles, one would not necessarily expect these books to make a complementary pair. Don't free market advocates (of whom Thomas E. Woods Jr. is one and your reviewer is another) generally believe, with Gordon Gekko, that greed is good? And that Wall Street greed is the best of all? Shouldn't Gillian Tett's view that "Wall Street greed" unleashed the ongoing financial catastrophe put her at odds with Woods?

After we remind ourselves that Gekko was and is a creature of fiction (the movie "Wall Street"), we should answer the question "yes and no." Yes, Tett does seem friendly to a range of regulatory activity to which Woods is hostile. But no, in that the essence of Tett's

analysis does not conflict with Woods'. His analysis can easily accommodate the particular sort of greed she considers so corrupting, and he, in effect, proposes hard-money policies as the key to reining in that dysfunctional greed.

#### The Underlying Dynamic

Woods does a very good job of telling us what has gone wrong with the U.S. economy in recent months and why. Perhaps more important, he tells us why there is nothing new about the underlying dynamic. I was particularly impressed by certain apt quotations he draws from the 1830s newspaper editorials written by William Leggett, an admirer of Andrew Jackson.

In the final years of the Second Bank of the United States, the country experienced a boom. Soon after Jackson destroyed the bank, there was a bust—which the Whigs, of course, blamed on the dissolution of the central bank. But Leggett argued forcefully that the cause of the bust was the boom itself. The bubble burst only because it had been blown—and bursting is what artificially blown bubbles do best. In December 1837 Leggett wrote the following:

Any person who has soberly observed the course of events for the last three years must have foreseen the very state of things that now exists. ... He will see that the banks ... have been striving, with all their might, each emulating the other, to force their issues into circulation, and flood the land with their wretched substitute for money. He will see that they have used every art of cajolery and allurement to entice men to accept their proffered aid; that, in this way, they gradually excited a thirst for speculation, which they sedulously stimulated, until it increased to a delirious fever, and men, in the epidemic frenzy of the hour, wildly rushed upon all sorts of adventures. They dug canals, where no commerce asked for the means of transportation; they opened roads, where no travelers desired to penetrate; and they built cities where there were none to inhabit. ...

The "thirst for speculation" and its "sedulous stimulation" that Woods quotes Leggett as abhorring are identical in kind to the Wall Street greed in Tett's subtitle.

Woods' overriding point is that, over the centuries, governments have been tempted to push interest rates down below the level at which the market would set them. This temptation has given rise in the fullness of time to several developments:

- the prevalence of paper money (the "wretched substitute for money" of Leggett's editorial);
- the delinking of this paper money from precious metals—or indeed from any nonarbitrary source of value;
- the ubiquity of central banks;
- an ideology of home ownership—the view that everyone ought to own a home, however much money they have to borrow to do so;
- an unwillingness on the part of the banks to say "no"; and
- the growth of ever more exotic financial instruments, the ostensible purpose of which is to help lending institutions manage their vulnerability to defaults by borrowers, but the secondary purpose of which is to enable and to hide the extent of that vulnerability.

Woods nails the first five of those points. For the details of the last point, one has to turn to other sources, emphatically including Tett's fine book. Together, the two books show the latest turn of the boom/bust cycle both as an iteration of a very old story (Woods' emphasis) and as a sociologically novel twist to that story (Tett's focus).

Tett's sympathies are very much with the "small tribe" at the center of her narrative—the J.P. Morgan swaps department, a nerdy gang who thought they were doing something both historic and progressive by devising new financial instruments that could help insure Morgan, other banks, and in time nonbank lenders against the risk of default.

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### Learning to Live with Ignorance

Out of this “bold dream” of Tett’s title came the Broad Index Secured Trust Offering (BISTRO). In 1997, tribe member Blythe Masters stated her view of the importance of the department’s work as follows: “Credit derivatives will fundamentally change the way banks price, manage, transact, originate, distribute, and account for risk.” The BISTRO involved packaging together a lot of corporate loans, known as the “underlyings.” Just as it is unlikely that all the ships at sea will sink, it seemed unlikely that borrowers would default on all the underlying loans—one or two might, but, by packaging them together, J.P. Morgan could create a new instrument that was much more secure than its individual parts. Then it could create classes of notes (senior, mezzanine, and junior)—known in financial jargon as “tranches”—and stipulate by contract that the senior notes would be paid first. The issuer would have to offer a higher rate of interest to get the riskier tranches off its books, of course, but that was all done in the name of financial engineering.

It is important to note that, at the time of these early BISTRO offerings, J.P. Morgan had access to extensive data about the commercial loans it was packaging. Furthermore, the bank deliberately listed for investors each of the companies whose loans were included. (In the breakthrough deal there were 307 companies involved.) J.P. Morgan’s own statisticians, as well as investors in its products, could have a great deal of confidence about the likelihood of defaults.

We learn what Tett’s subtitle means by the “corruption” of this dream when her story reaches 1999. In that year, German bank Bayerische Landesbank asked if Morgan could help it use such a structure to remove the risk from the \$14 billion of U.S. mortgage loans on its books. But team members soon became nervous. Data were in very short supply in the mortgage market, because mortgages were generally dumped into pools of debt that were entirely anonymous.

The team’s quants, including notably Terri Duhon and Krishna Varikooty, puzzled over how to model the

risks of defaults on Bayerische Landesbank’s books. They eventually did the deal (and one more similar deal a few months later) but then dropped that line altogether. “We just could not get comfortable” with the application of BISTRO to mortgage loans, Masters said. But other banks had fewer scruples. “In subsequent months, Duhon heard on the grapevine that other banks were starting to do [analogous] deals with mortgage debt, and she wondered how the other banks had coped with the data uncertainties that so worried her and Varikooty. Had they found a better way to track the correlation issue? Did they have more experience with dealing with mortgages? She had no way of finding out.”

Actually, these banks hadn’t found any better way of coping with uncertainty. They had simply decided not to worry about it. It was just as, in the 1830s, an investor in a canal where there is no commerce might have told himself not to worry about the risks—the trade would turn up.

### What Is to Be Done?

Tett is rather vague about prescriptions. She has a Ph.D. in social anthropology from Cambridge University, and she is more interested in “holistic” cultural pronouncements than in a specific legal or regulatory agenda. But she does give the following warning: “Excessively loose monetary policy stoked the credit bubble. So did savings imbalances and poor regulatory structures. Those tangible deficiencies must be addressed.”

When offering solutions, Woods isn’t vague at all. He has a program: Insolvent firms—including banks—must be allowed to go bankrupt. The government should stop exposing itself to the real estate market through the government-sponsored entities designed to see that everyone becomes a home owner. Government spending must be scaled back. And what is most important is that the current system of fiat paper money must come to an end.

### A Word on Short Selling

One oddity in the federal government’s response to the crisis during the

final months of the Bush administration was a temporary prohibition on short selling of the stock of 799 specific firms. Short sellers sell stocks they don’t yet own, with a promise to deliver them to the buyer at a specific time. For example, if shares of XYZ Company are selling on day D for \$100, and Samantha Short believes that XYZ is due for a price drop, she can sell the stock to Lazarus Long for \$100, deliverable on day D+14. She can pocket Long’s \$100, then, if the price drops (to, say, \$80) during the two-week interval before delivery is due, she can buy the stock (thus “covering” her position) and deliver it to him as promised, pocketing the \$20 difference in price.

That’s a vastly oversimplified account of the practice, but it will suffice for now. Short selling is often blamed for the collapse of stock prices because, after all, they benefit from that collapse, and when there is trouble, as “The Dude” says in “The Big Lebowski,” “you look for the person who will who benefit.” In Woods’ view, short selling is unpopular with regulators for another reason: “short sellers often show up the failures of regulators. It is regulators, after all, who are supposed to ferret out fraud, dubious accounting practices, and whatever else might tend to make a firm’s profitability seem greater than it really is.” Regulators are supposed to do that sort of thing guided by the public interest. But they don’t. Short sellers, though, often accomplish precisely those results, guided by the invisible hand.

Cue Mr. Gekko.

At any rate, Woods persuasively explains why short sellers are an important part of the marketplace, and thus why we should all be happy that the temporary ban was allowed to expire unextended. That a ban was declared at all is to him a fine example of the surreal character of economic policy in the final months of 2008, as “government officials ran around like chickens with their heads cut off, utterly in the dark.”

These two books both offer some light to those who are willing to open their eyes. **TFL**

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*Christopher Faille, a member of the Connecticut bar since 1982, writes on a variety of financial issues, and is the co-author, with David O'Connor, of a user-friendly guide to Basic Economic Principles (2000). In his review of Maddoff in the June 2009 issue of The Federal Lawyer, Christopher Faille called Frank DiPascali the "mayor of [Mad-off's] Potemkin village." On Aug. 11, 2009, DiPascali pled guilty to being essentially that.*

## **The Supreme Court and the American Elite, 1789–2008**

By Lucas A. Powe Jr.

Harvard University Press, Cambridge, MA, 2009. 421 pages, \$29.95.

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### REVIEWED BY CHARLES S. DOSKOW

If we judged a book by the words on its dust jacket, we might be inclined to believe that a certain cynicism had motivated this fine volume. The dust jacket quotes Mr. Dooley's, "The Supreme Court follows the election returns." So what else is new? Politicos and lawyers have known this from the beginning of the republic.

But there is nothing cynical about this book. It is a straightforward chronological account of the U.S. Supreme Court from its earliest days through 2008. In highly readable prose that eschews legalisms, *The Supreme Court and the American Elite, 1789–2008*, describes the Court's cases and doctrines in both legal and political terms—always with a view to the electoral climate in which they were handed down.

What is most clear is that the Court is, and always has been, a political institution, both in the effect of electoral politics on it, and in its effect on national politics. The dust jacket goes on to use the words "disturbing" and "troubling" in describing the Court's role in our political system. But the book justifies neither of these adjectives.

The Founders may not have envisioned judicial review in the form into which it has evolved, but Professor Lucas A. Powe Jr. makes it clear that the idea was present at the creation, despite the fact that the record contains precious few references to it. Fortify-

ing this conclusion was the inclusion in Article III of a guaranteed salary as well as life tenure for federal judges during "good Behaviour," although these were not a feature of any of the state constitutions at the time.

*The Supreme Court and the American Elite, 1789–2008*, takes us from era to era, election to election, court decision to court decision, seamlessly weaving together the relevant politics and jurisprudence. The dominant theme of the volume, according to Powe, is that the Court is a "majoritarian institution" in that "it identifies with and serves ruling coalitions."

Presidents have the power to change the composition of the Court only by appointing justices who reflect their views, and opportunities for such appointments are unevenly distributed. Jimmy Carter had no appointments; Richard Nixon was able to change the Court's direction from its Warren era when two vacancies occurred in his administration's early days.

Powe, who also wrote *The Warren Court and American Politics*, speaks his mind without partisanship. He refers to Thurgood Marshall as "the twentieth century's most important lawyer" and to John Roberts at his confirmation hearings as having "absurdly" equated a judge to an umpire. But the author also characterizes Franklin D. Roosevelt's statement, "The only thing we have to fear is fear itself," as "either vacuous or wrong." The book's bibliography calls one work on the early Court "worthless" and finds that all biographies of Felix Frankfurter "suffer from their author's either loving or loathing him."

Although appointments to the Supreme Court are the key to the President's influence on the Court, not all appointments accomplish their intended result. Dwight D. Eisenhower told his attorney general to find a "conservative Catholic Democratic judge." The judge selected was William J. Brennan, who was Catholic and Democratic but turned out to be anything but conservative, and remained the liberal icon on the Court long after Eisenhower had left office. David Souter, of course, is another case in point. Earlier, Harry Truman was upset that two of the justices he had appointed did not support his seizure of the steel mills during the Korean War.

Powe's narrative is made colorful by the occasional intrusion of dissension among the justices on both ideological and personal matters. John Marshall is given due credit for his role in establishing the Court's power of judicial review, but Powe offers little comment on how Marshall was able to rule for three decades with only minimal dissent from his colleagues. Robert Jackson, whom Truman passed over when appointing a chief justice, believed that Franklin Roosevelt had promised to nominate him for the position. Jackson feuded with Justice Black for years and seriously embarrassed the Court with his public complaints.

Powe concludes by commenting on the Court's willingness to take on what it considers tough issues, although not *really* tough ones, such as the financial crisis, health care, taxes, or Iraq. According to Powe, the Court will continue to "harmonize the Constitution with the demands of majoritarian politics." That's pretty good for an institution usually characterized as unelected, and, by the terms of the Constitution, immune from retribution. **TFL**

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## **Life Without Lawyers: Liberating Americans from Too Much Law**

By Philip K. Howard

W.W. Norton & Company, New York, NY, 2009. 221 pages, \$24.95.

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### REVIEWED BY GEORGE W. GOWEN

It's been 14 years since Philip K. Howard evolved from an obscure private practitioner into the best-selling author of *The Death of Common Sense: How Law is Suffocating America* (Random House, 1995). Now comes his *Life Without Lawyers: Liberating Americans from Too Much Law*, which is something akin to "son of *The Death of Common Sense*."

**REVIEWS** continued on page 72

I will admit up front that I found the book's cover disturbing and perhaps misleading. Large, heavy, bold black lettering on a white background blares forth the main title: *Life Without Lawyers*. Inexplicably, a small red balloon floats over the "i" in "Life." This may be marketing directed at the impulse buyer, but it cheapens what is a serious book that deals with life *with* lawyers.

On the back dust cover, the publisher has lined up an impressive—if aging—team of “blurbers”: Bill Bradley, the former basketball star and senator; Newt Gingrich, the former speaker of the House and co-author of the forgotten “Contract with America”; Michael Bloomberg, the current mayor of New York City and a self-made billionaire; and Derek Bok, a lawyer, the former president of Harvard University, and darling of the liberal establishment. Three of the four endorsements speak of “common sense.”

Common sense is ingrained in the American psyche. *Common Sense* was the title of Thomas Paine's 1776 best-seller. Benjamin Franklin's *Poor Richard's Almanack* was a compendium of basic wisdom by that most American founding father. Mark Twain's Tom Sawyer and Huck Finn were simple lads without cultural polish but rich in pragmatism. Will Rogers personified the basic common sense and the “Aw, shucks” truisms of the population at large. More recently, this appeal to common sense echoed in the aphorisms of Ronald Reagan.

So what's happening today? Howard offers examples of why, as the subtitle suggests, Americans should be liberated from too much law:

- A dry cleaner is sued by a customer, who happens to be a judge, for the loss of his pants—sued for \$54 million. Another judge finally throws the case out, and the dry cleaner closes shop and thinks of returning to Korea.
- A teacher puts her hand on the back of a rowdy student to lead him out of the room. The school settles for \$90,000.
- After nearly 200 lawsuits for injuries

on playgrounds, a school district bans running at recess.

- McDonald's pays a hefty price for serving hot coffee to a careless customer.
- A church is held liable for the traffic accident of a volunteer.
- A teacher can't take the class on a nature walk because of a wheelchair-bound student.
- A school board goes through a 27-month legal proceeding to fire a recalcitrant teacher.
- A police officer is reinstated despite being drunk on duty, because alcoholism is a disease.

*Life Without Lawyers* is thoughtful and at times refreshingly original. Who would expect a lawyer to espouse risk over safety? Howard reminds us that 50 years ago, in the name of fitness, a presidential commission had monkey bars installed in playgrounds; most of the monkey bars have been removed because someone might fall. Howard concludes that the child safety movement is not prudence but paranoia and results in dangerous rather than safe conditions. As a result of this fear of danger, children are not physically fit, their social development is arrested, and they lack a sense of self-reliance.

The condition of our public schools is summarized in the chapter “Bureaucracy Can't Teach.” Howard quotes Peter Drucker as saying that American schools are organized on the erroneous assumption “that there is one right way to learn and it is the same way for everyone.” He takes issue with expanded concepts of due process by pointing out that “[d]isciplining a student is not akin to criminal conviction—the principal is sending the student home, not to jail.”

Howard cites the Federal Emergency Management Agency response to the housing needs resulting from Hurricane Katrina to illustrate how bureaucracy is handcuffed by regulations. According to Howard, the government spent more than \$400 million for 19,000 mobile homes and trailers, a majority of which were not used because they did not comply with rules against mobile homes in flood plains. Rather than

waiving the regulations and giving people a place to live, the units were stored in a neighboring state, which then experienced a tornado. The units weren't used there either because that state hadn't been designated as a federal disaster area.

Howard spells out his theme as follows: “We will never fix our schools or make health care affordable, or reenergize democracy, or revive the can-do spirit that made America great, unless American law is rebuilt to protect freedom in our daily choices.”

In a review of this book in its Jan. 5, 2009 issue, *The Economist* asked whether any of this will change under President Barack Obama. It concluded: “At first glance, the odds are poor,” but went on to say that “he no longer needs to outdo the other Democrats in cozying up to the trial bar. And he seems to understand how to weigh the benefits of new rules against their costs.” In addition—unstated in the *The Economist's* review—Obama may possess that commodity so long in short supply: common sense. **TFL**

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