## *The Body of John Merryman: Abraham Lincoln and the Suspension of Habeas Corpus*

By Brian McGinty

*Harvard University Press, Cambridge, MA, 2011. 253 pages, $29.95*

## *Abraham Lincoln and Treason in the Civil War: The Trials of John Merryman*

By Jonathan W. White

*Louisiana State University Press, Baton Rouge, LA, 2011. 191 pages, $49.95 (cloth), $18.95 (paper)*

---

Reviewed by Henry Cohen

On April 12, 1861, the South fired on Fort Sumter and the Civil War began. On April 15, President Lincoln issued a proclamation calling for 75,000 state militiamen and summoning a special session of Congress for July 4. Two days later, Virginia seceded from the Union, putting Washington, D.C., in danger and making it imperative that Maryland not secede and cause the capital to be surrounded by enemies. Militiamen from Massachusetts and Pennsylvania started to stream into Maryland on their way to Washington. On April 19, they arrived by railroad at Baltimore's President Street Station (today the site of a Civil War museum). There the railroad cars had to be detached and pulled by horses for more than a mile west on Pratt Street to be hooked to a locomotive at the Camden Street Station (still a railroad station) to proceed to Washington.

Although Maryland had not seceded (and did not secede), it was a slave state, and much of its population was sympathetic to the Confederacy. On April 19, an angry mob of some 10,000 men attacked the railroad cars as they carried the troops on Pratt Street. The soldiers got out and started to march. Some of the rioters fired pistols at the soldiers, and the soldiers shot back. Four soldiers and 12 civilians fell dead, and dozens more were wounded.

Three days later, when a group from Baltimore called at the White House to demand that he forbid troops to pass through their state, Lincoln replied:

> I must have troops to defend this Capital. Geographically it lies surrounded by the soil of Maryland; and mathematically the necessity exists that they should come over her territory. Our men are not moles, and can't dig under the earth; they are not birds, and can't fly through the air. There is no way but to march across, and that they must do. But in doing this there is no need of collision. Keep your rowdies in Baltimore, and there will be no bloodshed. Go home and tell your people that if they will not attack us, we will not attack them; but if they do attack us, we will return it, and that severely.

Following the Pratt Street riot, state authorities ordered members of the Baltimore police and Maryland militia to burn railroad bridges north of Baltimore to prevent additional Union troops from passing through the city. On April 23, John Merryman, a wealthy Baltimore County farmer, slaveholder, and first lieutenant in the Baltimore County Horse Guards (which was attached to the Maryland militia), burned at least six bridges. A month later, on May 25, at 2 a.m., a Union military force entered Merryman's home, arrested him, and imprisoned him in Fort McHenry in the Baltimore harbor. Fort McHenry, today an attractive tourist site, was the birthplace, during the War of 1812, of the poem that became "The Star Spangled Banner."

And now to the legal part of our story. Through his lawyers, Merryman petitioned Chief Justice Roger B. Taney, a fellow Marylander and author of the *Dred Scott* decision, for a writ of habeas corpus. Federal law in those days required Supreme Court justices to ride circuit, and historians to this day debate whether Taney's role in the Merryman case was as a circuit judge for the District of Maryland or as a Supreme Court justice in chambers. The difference this makes is uncertain, but both books under review discuss the question. Article III of the Constitution does not give the Supreme Court original jurisdiction to issue writs of habeas corpus, but section 14 of the Judiciary Act of 1789 gave this power to both individual justices and district court judges; therefore, in either event, Taney was acting legally when he ordered General George Cadwalader, the military commander of Fort McHenry, to "have the body of John Merryman" brought to his courtroom.

Cadwalader declined Taney's order, citing President Lincoln's suspension of the writ of habeas corpus as his justification. For, on April 27, Lincoln had written to General Winfield Scott: "If at any point or in the vicinity of the military line" between Philadelphia and Washington, "you find resistance which renders it necessary to suspend the writ of Habeas Corpus for the public safety, you ... are authorized to suspend the writ." In response to Cadwalader's disobedience, Taney issued a writ of attachment, citing Cadwalader for contempt of court. A marshal brought the writ to Fort McHenry, but he was not admitted and Cadwalader would not appear to be served with it. On May 28, the day Taney had specified for return of the writ, the federal courtroom was jammed, as a crowd estimated to be as large as 2,000 formed on the street. Taney read from a written memorandum he had prepared, stating that, under the Constitution, the President had no power to suspend the writ of habeas corpus. He followed up his statement with a written opinion known as *Ex parte Merryman*.

Article I, section 9 of the Constitution provides, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Taney, of course, did not deny that the Civil War constituted a rebellion, but he found that the power to suspend the writ belonged solely to Congress. Article I, he observed, "is devoted to the Legislative Department of the United States, and has not the slightest reference to the Executive Department." But that is not true. Article I, section 9 has several limitations on executive power, including the provision that "No Money shall be drawn

from the Treasury, but in Consequence of Appropriations made by Law." This is only one of a number of legal problems with Taney's opinion that Brian McGinty ably discusses in *The Body of John Merryman*. McGinty does so by examining the writings of such legal scholars of the time as Reverdy Johnson, Joel Parker, and Horace Binney. But whether Taney was right or wrong, Lincoln suspended habeas corpus several times after Taney issued his opinion in *Ex parte Merryman*. McGinty quotes Clinton Rossiter: "The one great precedent is what Lincoln did, not what Taney said."

In his July 4, 1861, written address to Congress, Lincoln defended his suspension of habeas corpus, asking, "are all the laws, *but one*, to go unexecuted, and the government itself go to pieces, lest that one be violated?" Congress had been out of session when Lincoln suspended habeas corpus. Because the power to suspend, Lincoln argued, "was plainly made for a dangerous emergency, it cannot be believed the framers of the instrument intended, that in every case, the danger should run its course, until Congress could be called together; the very assembling of which might be prevented, as was intended in this case, by the rebellion." In any case, even though Lincoln believed that what he had done was constitutional, he left the question of "[w]hether there shall be any legislation upon the subject ... entirely to the better judgment of Congress."

Congress accepted Lincoln's invitation and passed a statute, which Lincoln signed into law on August 6, 1861. It provided that "all the acts, proclamations, and orders of the President of the United States, after the [day Lincoln took office], respecting the army and navy of the United States, and calling out or relating to the militia or volunteers from the States, are hereby approved and in all aspects legalized and made valid. ..." This measure did not mention the suspension of habeas corpus but was broad enough to include it.

A year and a half later, Congress enacted a more specific statute, which Lincoln signed on March 3, 1863. It provided that "during the present rebellion, the President of the United States, whenever, in his judgment, the public safety may require it, is authorized to suspend the privilege of the writ of habeas corpus in any case throughout the United States, or any part thereof." But, if Lincoln already had this power, then this statute actually limited his power, because it provided that the secretary of state and the secretary of war shall give federal judges a list of all prisoners detained without the benefit of habeas corpus, and, "in all cases where a grand jury ... has terminated its session without finding an indictment ... against any such person, it shall be the duty of the judge of said court forthwith to make an order" discharging the prisoner, provided the prisoner takes "an oath of allegiance to the Government of the United States, and to support the Constitution thereof; and that he or she will not hereafter in any way encourage or give aid and comfort to the present rebellion. ..."

As Jonathan White observes in *Abraham Lincoln and Treason in the Civil War*, this provision of the 1863 act made suspension of habeas corpus "practically worthless. It is little wonder, then, that Lincoln disregarded it," as he had disregarded Taney's opinion in *Ex parte Merryman*. According to White, "Lincoln had a war to fight and a nation to save and he would not allow himself or his administration to be hamstrung by another branch's interpretation of the suspension clause"—be it the judicial branch or the legislative branch.

The 1863 act also dealt with the problem of civil suits and criminal prosecutions of federal officials who arrested people and denied them habeas corpus. It allowed defendants to have their cases removed to federal court, and it made "any order of the President, or under his authority, made at any time during the existence of the present rebellion ... a defence in all courts to any action or prosecution, civil or criminal ... for any search, seizure, arrest, or imprisonment, made ... under and by virtue of such order. ..." Some state judges, particularly in Kentucky, which, like Maryland, was a slave state that did not secede, refused to remove these cases to federal court. In response, Congress enacted a statute that President Andrew Johnson signed on May 11, 1866, allowing federal officials and military officers to sue state judges who refused to remove their cases to federal court.

The two books under review cover much of the same ground, but they also contain much that is different. The history that this review has narrated thus far has been drawn from both books, but more heavily from McGinty's, because McGinty is especially cogent on the legal issues on which this review has focused. But White discusses the 1863 act in more depth than does McGinty, and White includes more historical detail than does McGinty. (Not surprisingly, McGinty is a lawyer and White is a historian.) White "remind[s] legal scholars to delve more deeply into unpublished case materials and to rely on more than the published court reports," and, in *Abraham Lincoln and Treason in the Civil War*, he reproduces a previously unpublished letter by John Merryman that he discovered. In the letter, Merryman claimed that his motivation for burning the railroad bridges was to protect the city of Baltimore from harm that would result should Union troops again enter the city and face "opposition." (He did not add "in the form of violent pro-Confederate mobs.") Furthermore, Merryman wrote, if such harm had occurred, "would not the N.C. Railway have been injured, to a greater extent, than by stopping its opperations [sic], for a few weeks?" So, he was doing the railway a favor by burning its bridges.

White notes that it has been estimated that at least 14,000 civilians were arrested by Union military authorities during the Civil War. Lincoln claimed that his concern was "for *prevention*, and not for *punishment*—as injunctions to stay injury, as proceedings to keep the peace. ..." White finds this claim to be, "at best, disingenuous," as many of these civilians were prosecuted by military commissions and sentenced "to hard labor or prison terms fixed for years (and not the duration of the conflict)," and these sentences "were punishments, pure and simple." In addition, some of the activities for which civilians were prosecuted and convicted were far less serious than

**REVIEWS** *continued on page 64*

burning bridges and perhaps should have been deemed protected by the First Amendment.

White discusses in some depth the Baltimore riots, Merryman's life before and after his arrest, Lincoln's pardons of traitors, the politics underlying enactment of the 1863 act, Merryman's financial connection to the railroad whose bridges he had burned ("He may have," White writes, "burned more than just physical bridges in April 1861"), Merryman's convoluted connections to Secretary of War Simon Cameron, and, perhaps most significantly, lawsuits against federal officials who made the arrests that Lincoln and his subordinates had ordered.

White notes that this was "an era before the legal concept of qualified immunity had been developed," and that "hostile judges and juries could make decisions and render verdicts that might alter the trajectory of the war and reconstruction." According to White, "Suspected traitors in the North began filing lawsuits against Union officials very early in the war." Merryman himself sued General Cadwalader for $50,000 in damages for wrongful arrest. "We can now see," White writes, "that the 'civil liberties' problem was only one side of the habeas corpus issue." On the other side, government officials and military officers feared financial ruin and criminal prosecution for the actions that they had taken on behalf of the government.

So, which book should you read? Both, ideally. Both are well written and, excluding their endnotes, bibliographies, and indexes, they total only 317 pages of text (196 in McGinty's book and 121 in White's). Lawyers may prefer McGinty's book, as I did, but this preference does not reflect on the value of White's accomplishment. **TFL**

---

*Henry Cohen is the book review editor of* The Federal Lawyer.

## *Keeping Faith with the Constitution*

By Goodwin Liu, Pamela S. Karlan, and Christopher H. Schroeder.

*Oxford University Press, New York, NY, 2010. 248 pages, $21.95.*

---

Reviewed by Louis Fisher

The intent of this book is implicit in its title: to show how to keep faith with the U.S. Constitution. The purpose of interpreting the Constitution is not to discover the original intent of the framers or to be guided by what some call strict construction. Rather, interpretation "requires adaptation of its text and principles to the conditions and challenges faced by successive generations." For the book's three authors, the term "constitutional fidelity" represents the interpretation of words and principles "in ways that preserve the Constitution's meaning and democratic legitimacy over time." They regard original understanding as an important source of constitutional meaning, "but so too are the other sources that judges, elected officials, and everyday citizens regularly invoke: the text of the Constitution, its purpose and structure, the lessons of precedent and historical experience, the practical consequences of legal rules, and the evolving norms and traditions of our society."

The passage just quoted recognizes that not only judges, but also elected officials and private citizens, participate in interpreting the Constitution, and the authors develop the theme for the next few pages of their introduction. "Throughout our history," they write, "the meaning of the Constitution's text and principles has been the subject of public debate and, at times, intense mobilization among the American people and their representatives." Constitutional interpretation "is not a task for the judiciary alone." Judicial doctrine "often incorporates the evolving understandings of the Constitution forged through social movements, legislation, and historical practice." This public engagement enables the Constitution "to retain its democratic authority through changing times."

The theme identified in the introduction is not carried forward in subsequent chapters, which are devoted primarily to judicial interpretations. As the authors state, "We focus on the role of the Supreme Court in the development of constitutional meaning over across a variety of areas." They do, however, point to court decisions that have undermined individual rights: "The Supreme Court's proslavery decisions purporting to resolve the issue only inflamed it further." The authors also discuss the congressional initiative in 1875 that gave African-Americans equal access to public accommodations, only to have the Court declare the provision unconstitutional in the *Civil Rights Cases*, 109 U.S. 3 (1883). For some reason, the authors claim that "the Constitution in 1789 made clear that the national government is one of enumerated powers." Of course, that is only partially true. As Madison and others argued, government must have access not only to powers expressly stated but also to implied powers that can be reasonably drawn from enumerated powers. All three branches have a number of implied powers. For the judiciary, a major power is that of judicial review, which is not enumerated in the Constitution but is certainly implied.

The authors acknowledge that "nonjudicial actors" have acted on their best understanding in promoting broad constitutional principles but add that "the judiciary has a special role in our system with respect to constitutional interpretation, even though the Constitution does not explicitly provide for judicial review." What makes the role of the judiciary "special"? Why should an implied power exercised by the judiciary have preferred status over interpretations by the elected branches about their enumerated powers? The authors do not argue explicitly in favor of an exclusive role for the courts in constitutional interpretation, but reference to a special role can tilt in that direction. To their credit, the authors do not accept *Marbury v. Madison* as evidence of judicial supremacy. Instead, they regard it as "a claim of interpretative parity." Fair enough.

The "special" role of the judiciary ap-

pears to come from this source: life tenure that gives the courts independence "from the political branches and public passions of the moment." In Federalist No. 78, Alexander Hamilton argued that this independence gives federal judges a "peculiar province" in interpreting the laws. Nothing in the past two centuries provides evidence that federal courts have been a reliable guardian of individual rights and liberties. Only in the last six decades or so have federal courts been deeply involved in matters of individual rights, and the record over that period of time is decidedly mixed. In *Ledbetter v. Goodyear Tire & Rubber Co. Inc.*, 550 U.S. 618 (2007), the Supreme Court struck down a claim of gender discrimination in employment. Congress overturned that ruling when it passed the Lily Ledbetter Fair Pay Act of 2009, which President Obama signed into law. The authors do not refer to this case, which is a good example of constitutional interpretation by all three branches, with the elected branches serving as a better guardian of constitutional rights than the Court.

With regard to gender equality, the authors state: "For more than a generation, the nation has recognized the equal citizenship of men and women as a core constitutional value." The Supreme Court did not strike down discrimination against women until *Reed v. Reed*, issued in 1971! Compare that record to the role of Congress, which in 1879 passed legislation (20 Stat. 292) authorizing women to practice law before the Supreme Court, in the face of the Supreme Court's having denied women that right. It would have been useful for the authors to discuss this example to illustrate how often the elected branches and, by extension, the public are better protectors of individual rights than the courts are. The authors do fault the Supreme Court for failing to recognize "the distinctive institutional capacities for fact-finding, remedial innovation, and policy judgment that Congress brings to the task of enforcing constitutional rights." When the Court insists that legislative enforcement of constitutional rights be guided solely by judicial standards, the Court "effectively treats Congress as if it were a lower federal court instead of a co-equal branch of government with its own democratically legitimate interpretative authority." A fair rebuke!

In the chapter on separation of powers, the authors refer repeatedly to the claim that the President has certain "preclusive" powers in the field of national security. Apparently, this word has the same meaning as "inherent" powers: powers that inhere in the President and for that reason may not be limited by the other branches. The authors approach this issue cautiously, suggesting that the war on terrorism that began after Sept. 11, 2001, may call "for novel responses." They ask whether terrorist threats require a departure from "the long-standing power of Congress to regulate the President's conduct of military campaigns." The authors suggest that it "may be too soon to answer the question definitively," although the claim of unchecked presidential power based on changed conditions "should be viewed with skepticism." The chapter concludes on a firmer note: "fidelity to the Constitution requires that we preserve, not abandon, the core principle of checks and balances by working within our system of divided power to meet new challenges through democratic means."

The authors thoughtfully explore a number of other constitutional issues as well as the art of interpreting the Constitution. They could have developed some of their points in greater detail, and, because they did not, *Keeping Faith with the Constitution* may be viewed as a primer that raises some central questions that invite extended examination. The analytical part of the book consists of only 155 pages, followed by the text of the Constitution, endnotes, and an index. **TFL**

---

*Louis Fisher is scholar in residence at the Constitution Project. From 1970 to 2010, he served at the Library of Congress as a senior specialist in separation of powers with the Congressional Research Service and as a specialist in constitutional law with the Law Library. He is the author of 20 books, including* Defending Congress and the Constitution *(University Press of Kansas, 2011), which was reviewed in the Nov./Dec. 2011 issue of* The Federal Lawyer.

## *The Derivatives Revolution: A Trapped Innovation and a Blueprint for Regulatory Reform*

By Raffaele Scalcione

*Kluwer Law International, New York, NY, 2011. 456 pages, $203.00.*

---

Reviewed by Christopher C. Faille

The premise of this book is that the complex array and widespread use of financial derivatives constitute a radical change introduced in recent years into the financial world, and that this radical change poses a threat to the public welfare. Scalcione's proposed solution is to empower regulators to "tailor derivatives regulation to the profile of each corporation" so that any corporation (really any "entity," as he says elsewhere) that wants to take on derivatives exposure will be required to hold reserve capital, in the manner of banks under the Basel regime, to protect against "downside risks."

It may seem to some readers as if the above paragraph is written in code. Allow me to explain, then, that in financial jargon a "derivative" is an asset that derives its value from another asset, as a stock option derives its value from the price movements of the underlying stock. The "derivatives revolution" about which Scalcione writes was a rush of innovations and extensions of the available derivatives that bankers and hedge fund managers invented or adopted starting in the early 1990s. Scalcione is entirely right that there has been a revolution in this area, though he breaks no new ground in describing it.

He does have some fun in one long footnote in chapter 1 listing innovative sorts of derivatives. Among options, there are "digital options … Exploding Options … barrier options … Asian options … compound options … lookback options," and so forth. Derivatives that are not options now include the blended interest rate swap, the boost structure derivative, differential swaps, digital swaps, dynamite warrants, and others.

**REVIEWS** *continued on page 66*

### Scalcione's Big Idea

I believe, however, that the variety and complexity of all these options and swaps and the like are only symptoms of what ails our economy, and that Scalcione's big idea—reserve requirements applied to all entities—is a lousy one.

Just one more definition then: reserve capital. As Scalcione notes, this is a concept taken from banking. The reserve is in essence the cash that banks keep on hand to pay to depositors who walk in the door and make an appropriate withdrawal demand. Generally, the bank commits itself, or is required by the relevant regulators, to maintain a certain fraction of deposits, called the reserve ratio, in readiness. A nation's banking regulators can often adjust the reserve ratio, both for the purpose of protecting the banking system against the consequences of a "run" of worried depositors and as a mechanism for controlling the supply of money in circulation–either heating up or cooling the economy as desired.

Scalcione doesn't propose specific numbers for the new broader sort of reserve requirements he would like to see. The correct specific number, he tells us, is a "highly technical" question "outside the scope of the present work." But he does think that such requirements should apply, around the globe through international agreements, to "every entity engaging in the trading of derivatives not strictly for hedging purposes." This would be a (vast) extension of the regime of cooperation on banking reform now accomplished, fitfully, through the Basel Committee on Banking Supervision.

In sum, Scalcione sees the failure of unwise derivative plays as a phenomenon analogous to old-fashioned runs on banks by panicked depositors, so he proposes the same solution for the former problem that seems to have rendered the latter problem largely a matter of historic interest.

### Strictly Hedging

But let's go back to the phrase "not strictly for hedging purposes." What does "hedging" mean in this context? It is a broad term, and I'll evade further efforts to arrive at a definition by using an example. Suppose you own or manage a grocery store, and you make a large part of your revenue selling oranges or orange juice. You have just heard that very cold weather is expected in Florida soon, which may kill much of the orange crop and drive up your costs.

How would you hedge against this risk? Perhaps, inspired by "Trading Places," a movie that starred Dan Ackroyd and Eddie Murphy, you could invest in the orange juice futures market yourself, betting on that increase in wholesale prices you had been worried about. With your bet in place, if the price of oranges does increase, even though you will still end up taking a hit on the operational side of your business, namely the actual store, you will be consoled because your losses will be mitigated by the gain you've made on the futures contracts. On the other hand, suppose you're wrong about the weather and orange prices actually drop. This means a loss on the finance side, namely the futures contracts, but (if you've planned well) you more than make up for that by the higher profit margin you're getting on the resale of the cheap oranges you're buying on the operational side.

All this brings us back to Scalcione's proposal. He would probably regard the dealing I've just imagined for your store as "strictly for hedging purpose," and thus as exempt from the new reserve regulations he would establish. But there would need to be careful monitoring in every participating nation to distinguish which trades are "strictly hedging" and which cross the line (however defined) into speculation. This monitoring would, in principle, have to incorporate even your corner grocery store and might well prove quite onerous.

### Lazy Advocate

I disagree strongly with Scalcione's conclusions. I also found this book extremely disappointing. Those two observations are not related. I could—and often do—find much to intrigue and enlighten me in books that fail to persuade me of their conclusions. Not here. A key difficulty is Scalcione's intellectual laziness. A hardworking advocate for a particular conclusion will acknowledge complicating factors and try to show why they don't weaken his or her desired inference. An intellectually lazy advocate will just ignore such factors.

Let's look, for example, at Scalcione's discussion of the "domino effect." He argues that the use of derivatives by any corporation of significant size to speculate or gamble in a way not required by its underlying operations is a risk not just to those immediately affected but to the whole global financial system—it is a "systemic risk." He invokes the metaphor of the "domino effect" in the text, then explains it in a footnote: "The domino effect describes the risk that the failure of an intermediary in the derivatives market causes other intermediaries to fall in a domino-like effect."

This is a wonderful example of the general clumsiness of his prose, an infelicity of style so severe that it alone can make the book difficult to read for long stretches. He defines the "domino effect" by telling us that it alludes to a domino-like effect. I submit that literal dominoes are sufficiently familiar, and their metaphorical invocation here sufficiently intuitive, to make the extra sentence of explanation only a hindrance.

Beyond that, though, there is an obvious objection to the notion that failures among derivatives intermediaries have such cascading consequences. Derivatives contracts net out to zero. For every trader who bet that the price of oranges would rise, another somewhere has bet that the price would fall. Anything won on the long side is lost on the short side, and vice versa. It is as if, in a lineup of dominoes, the fall of one would necessarily cause the next domino in the line to become more firmly cemented into position. That idea rather plays havoc with the metaphor.

This somebody-has-to-win argument is no innovation of mine. It is common in the literature. Scalcione, who tells us on his "About the Author" page that he has been researching derivatives since 1997, is surely familiar with this point. So why didn't he mention it? It just seems lazy. All in all, *The Derivatives Revolution* is a disappointing performance, and I can't

imagine any buyer to whom it would be worth $203. **TFL**

---

*Christopher Faille is the co-author, with David O'Connor, of* Basic Economic Principles *(2000), and the sole author of a just-released book on the financial crisis of 2007-08,* Gambling with Borrowed Chips.

## *Scorpions: The Battles and Triumphs of FDR's Great Supreme Court Justices*

By Noah Feldman

*Twelve, Hachette Book Group, New York, NY, 2010. 513 pages, $30.00 (cloth), $16.99 (paper).*

---

Reviewed by George W. Gowen

What a terrible title for this highly readable book that is so rich in personalities, politics, and law! Although Hugo Black, William O. Douglas, Felix Frankfurter, and Robert Jackson had their differences while serving together on the Supreme Court, theirs is a saga of America. Scorpions indeed! Horatio Alger can take a backseat to these real life successes.

Noah Feldman begins his tale:

> A tiny, ebullient Jew who started as America's leading liberal and ended as its most famous judicial conservative. A Ku Klux Klansman who became an absolutist advocate of free speech and civil rights. A backcountry lawyer who started off trying cases about cows and went on to conduct the most important international trial ever. A self-invented, tall-tale Westerner who narrowly missed the presidency but expanded individual freedom beyond what anyone before had dreamed.
>
> Four more different men could hardly be imagined. Yet they had certain things in common. Each was a self-made man who came from humble beginnings on the edge of poverty. Each had a driving ambition and a will to succeed. Each was, in his own way, a genius.

What all of them also had in common was their boss, President Franklin D. Roosevelt. He was not a boss in the usual sense of the word, but he was very much the commanding figure who recruited their services and, with them, shaped history. Today, it is considered improper for the judiciary to have a close relationship with the White House, but absent that relationship in the 1930s and 1940s, the statutes ameliorating the impact of the Depression, America's entry into World War II, and the expansion of individual rights might not have blossomed. Maybe Roosevelt wasn't the justices' boss, but he was certainly the captain of the team.

Noah Feldman tells us that, prior to being named to the Supreme Court, "Frankfurter drafted New Deal legislation and staffed New Deal agencies. His closest associates enjoyed daily access to the president." As for Robert Jackson, he "would arrive in Washington in 1934 as counsel to the Bureau of Internal Revenue. In the next six years, he would become an intimate of Roosevelt, solicitor general, attorney general, a potential candidate for vice president, and a justice of the Supreme Court of the United States."

Although Hugo Black (his past membership in the Ku Klux Klan was conveniently kept quiet) was not a Roosevelt intimate, he was a senator and, as such, could be easily confirmed by the Senate. Feldman writes, "In choosing Black, Roosevelt was moving a generally reliable vote in the Senate to an equally reliable spot on the Supreme Court." Roosevelt was saying, in effect, that a Supreme Court justice "did not need judicial experience, nor was it a problem if he had not practiced law in more than a decade. What mattered was his political philosophy, demonstrated in this case through aggressive Senate service."

Douglas had a meteoric rise from law student to professor to chairman of the Securities and Exchange Commission (Joseph P. Kennedy helped). On the way up, Douglas garnered a political patron: Roosevelt, who, according to Feldman, "saw in Douglas limitless energy, personal charm, and a capacity for self-mythologizing that was essential in a politician." Douglas was the man who Roosevelt most believed had the talent to succeed him as President. At the age of 40, Douglas was one of the youngest people ever appointed to the Court and (despite impeachment attempts) went on to become, with 36 years and seven months of service, its longest serving member. In addition to his Court duties, he was a prolific author, an internationalist, and an environmentalist long before the word was invented.

Two cases epitomize the Roosevelt Court's reversal of long-standing precedents. In *West Coast Hotel Co. v. Parish*, 300 U.S. 379 (1937), the Court upheld the constitutionality of a minimum wage law of Washington state, finding that, contrary to *Lochner v. New York*, 198 U.S. 45 (1905), the Constitution does not protect freedom of contract from state laws that reasonably regulate certain activities for the public good. In the second case, *Brown v. Board of Education*, 347 U.S. 483 (1954), with Roosevelt dead but his four key appointees still sitting, the Court, with the ringing phrase, "Separate educational facilities are inherently unequal," reversed the "separate but equal" doctrine of *Plessy v. Ferguson*, 163 U.S. 537 (1896). Although *Brown* is neither a masterpiece of judicial writing nor as convincing as it might have been, Chief Justice Earl Warren deserves all the credit for putting together a unanimous decision.

As much as Earl Warren deserves credit for upholding the rights of minorities in *Brown*, his performance as the governor of California in pushing for the internment of Japanese-Americans tarnishes his reputation. Finley Peter Dunne said that "th' supreme coort follows th' iliction returns," and that was clearly the case when the Court yielded to popular sentiment in *Korematsu v. United States*, 323 U.S. 214 (1944). Finding a perceived espionage threat to outweigh individual rights, the Court upheld (by a vote of six to three) the internment of Japanese-Americans by rationalizing that Korematsu was interned not "because of hostility to him or his race," but "because we are at war with the Japanese Empire. ..." Neither the Court nor Roosevelt (who backed

**REVIEWS** *continued on page 68*

the internment) paid much attention when FBI director J. Edgar Hoover advised that there was no evidence for the view that Japanese submarine attacks were facilitated by reports from Japanese spies in America.

*Scorpions* is more than a history of the leading cases decided by the Roosevelt Court. The book delves into the background of the decisions and the foibles of those who wrote the opinions, with a little gossip and sex thrown in. It will refresh the recollections of readers regarding the Sacco and Vanzetti case, the Securities Exchange Act of 1934, Andrew Mellon's tax problems, Roosevelt's attempt to pack the Supreme Court, Richard Whitney and the New York Stock Exchange, the trade to war-torn England of aging destroyers in exchange for the lease from England of naval bases in the Atlantic and the Caribbean, the four German saboteurs who landed on a beach on Long Island, the Nuremberg trials, the constitutional theory of originalism, Truman's seizure of the steel mills, and the right of privacy. These inviting morsels and many more are spread before readers of this tasty and nutritious offering. **TFL**

---

*George W. Gowen is a partner with the New York law firm of Dunnington, Bartholow & Miller LLP. His areas of practice are trust and estates, corporate, and sports law. He was an adjunct professor at the New York University Graduate School of Business and has served on United Nations commissions, as counsel to leading sports organizations, and as chair of environmental and humane organizations.*

## *Clarence Darrow: American Iconoclast*

By Andrew E. Kersten

*Hill and Wang, New York, NY, 2011. 306 pages, $30.00.*

---

Reviewed by John C. Holmes

In this perceptive biography of one of America's most famous lawyers, Andrew E. Kersten quotes Clarence Darrow (1857–1938) from his own excellent autobiography, *The Story of My Life*, written in 1932 when Darrow was in his 70s: "It is obvious that I had nothing to do with getting born. Had I known about life in advance and been given any choice in the matter, I most likely would have declined the adventure." Kersten frequently refers to Darrow's pessimism and fatalism, which stood in stark contrast to Darrow's amazingly robust, action-filled, and highly productive career in labor and criminal law. Kersten also highlights Darrow's political activism and finds Darrow a lifelong contrarian, who drew great pleasure from "flailing against minds that were as sprung and shut as an iron trap. ..."

Born in the small rural town of Farmdale, Ohio, Darrow could trace his origins to early settlers from England. His father was a furniture maker and an undertaker, and his mother managed the household and took care of seven children (excluding one who died in infancy), of whom Clarence was the fourth. Clarence's parents had a passion for reading and a personal library that was exceptional compared with those of their neighbors, who tended to own only a Bible and an almanac. Clarence's parents were also unusual in that they were freethinkers, albeit of the middle-of-the-road sort: they celebrated Christmas, and Clarence's mother never completely broke from the church. Not surprisingly, Kersten writes, Clarence "came to reject the darker sides of small-community life, particularly its tendency to promote intellectually suffocating homogeneity. ..." Perhaps the only thing that he had in common with his schoolmates was a love for baseball.

Darrow attended Allegheny College but, after a year, returned home to Kinsman (a nearby small town, to which the family had moved when Darrow was young), having found Greek and Latin and geometry useless. He went to work for his father, but Clarence hated furniture making and decided that he "was made for better things" than manual labor. He taught in a county school for three winters, during which time he began to read law books. He actively participated in the Saturday night debates in Kinsman, and, with little other purpose than to seek broader horizons than existed in a small town, Darrow decided to become a lawyer.

Darrow spent an unsuccessful academic year at the University of Michigan Law School, then worked for a lawyer's office in Youngstown, Ohio, and, in 1878, was admitted to the Ohio bar. Darrow's legal practice got off to a slow start, but he nevertheless married Jessie Ohl and settled with her in Andover, Ohio, a town of 400 residents that had little need for a new lawyer. Darrow sustained his practice on "a steady diet of relatively minor infractions of the law," and he honed his trial techniques, "master[ing] a keen, calm rhetorical style ... to unhinge his opponent's case." After three years, Darrow moved to Ashtabula, Ohio, a town of 5,000, where, a year later, he ran unopposed for the office of city solicitor, which paid him $75 a month and allowed him to continue to take private cases, although he dropped all interest in insurance, real estate, and collections cases.

Darrow became involved in Ohio politics and "made a name for himself as the unapologetic and ambitious Democrat amid Republicans." In 1885, he ran unsuccessfully for a seat in the state's General Assembly and, in 1886, he ran unsuccessfully for the office of Ashtabula prosecuting attorney. He was unwilling to switch parties, even though doing so might have improved his chances to be elected to higher office. Instead, in 1887, Darrow moved to Chicago, which Kersten says was, without question, "the most important decision in his life. In Chicago, Darrow finally found a public stage to match his ego and ambitions. … To put it simply: no Chicago, no attorney for the damned," as Lincoln Steffens later called Darrow.

Kersten writes that "Chicago was known as the Windy City for its blowhard politicians as well as for the frequency of its winter blizzards." The second largest city in the nation, Chicago was also the nation's most decadent and corrupt city. Disease, prostitution, and political corruption were standard vices in the hardscrabble city, where the stench of stockyards and high unemployment reigned. Rather than be

discouraged by this scenario, Darrow found it a place of legal opportunities where he could become "a central cog in the Chicago political machine."

At the time that he arrived in Chicago, "Darrow had become a great sympathizer of the common man and women, but he was not yet their champion." Rather, he practiced corporate law, which Darrow described as a "bum profession ... utterly devoid of idealism and almost poverty stricken as to any real ideas." However, his law practice allowed him to garner friends among the wealthy industrialists of the city, some of whom were Democrats whom he was able to approach for contributions to political candidates such as John Peter Altgeld, who ran successfully for governor of Illinois as a reformer and became Darrow's lifelong friend. Darrow became even more adept at public speaking and began to address causes that favored the oppressed and disadvantaged, thereby furthering his reputation among the many reformers, socialists, anarchists, and outcasts in Chicago. He was also ushered into the byzantine world of Chicago Democratic politics, where "friends" played dirtier tricks and used harsher language on one another than they used on Republicans.

One of Darrow's early cases was defending Gene Prendergast, a deranged young man who had shot and killed the mayor of Chicago, because Prendergast, who had no legal training, was refused a job as corporation counsel for the city. Prendergast had already been convicted when Darrow entered the case to try to save him from the death penalty on grounds of insanity. Despite Darrow's energetic work, it took the jury only 20 minutes to reaffirm Prendergast's death sentence. It was Darrow's first capital case and the only one of more than 100 in which he failed to save his client's life.

As counsel for the Chicago North Western Railroad, Darrow observed from a neutral standpoint the heated contest between the Pullman Railroad Company and the American Railway Union, which went on strike because of poor pay and harsh employment conditions. Against Governor Altgeld's wishes, President Grover Cleveland sent in troops, and, "under the direction" of his attorney general, according to Kersten, "a team of two U.S. federal judges issued an injunction against ... the strike on the grounds that the union had violated the 1890 Sherman Antitrust Act. ..." Union leaders, including Eugene V. Debs, were arrested for violating the injunction, and Darrow felt compelled to act. At the age of 37, he left his well-paying job "and his life among Chicago's elite and went to defend a lowly man of the working class. ..."

The case against Debs proceeded on two fronts—one for civil contempt and one for criminal conspiracy. The judge sentenced the defendants to six months in prison on the civil contempt charge. In the criminal case, Darrow put the prosecution on the defensive, showing that the railroad executives had cornered the union into calling the strike and the boycott, then using the federal government to crush the strikers. He seemed to have the jury convinced, but a juror became ill and the trial was temporarily and then permanently suspended without a verdict. Darrow took the civil case to the U.S. Supreme Court, which, in *In re Debs*, unanimously denied his petition for a writ of habeas corpus.

During these tumultuous years, the Pullman Railroad Company case was not the only loss for Darrow. With his old friend and mentor, Altgeld, Darrow helped organize the short-lived Populist Party, aiming to enlist workers in particular. Both men felt that President Cleveland, a Democrat whom they had previously worked to elect, had taken too conservative a path. At the 1896 Democratic National Convention in Chicago, William Jennings Bryan, supporting the expansion of the money supply through the minting of silver, famously proclaimed, "You shall not crucify man upon a cross of gold" and won the Democratic nomination for President. Darrow spoke at the convention and, encouraged by Altgeld, who was running for re-election as governor, ran for what Altgeld considered a safe Democratic congressional seat. Surprisingly, both Altgeld and Darrow were defeated, as William McKinley, the Republican who won the presidential election in 1896, carried other Republicans to electoral victory on his coattails.

On top of Darrow's defeats at the polls, his wife, Jessie, feeling lonely in a busy city with little support from her self-centered husband, whom she suspected of infidelity, decided to return to the less conflicting confines of small-town Ohio, taking their son with her. She later married an Ashtabula judge. Darrow seemed to take her departure in stride, never having lived up to his commitments in the marriage. After his divorce, Darrow "desired to establish a bohemian enclave where Darrow would lead a group of culturally modern Americans in explorations of hedonism, radical politics, arts and letters, and of course sexuality, all the while making his living from the law and advancing his left-wing political causes in the courtroom and occasionally at the ballot box too."

In 1902, Darrow and labor leader George Schilling formed an independent party they called the Public Ownership League, and, running on its ticket, Darrow won a seat in the Illinois legislature. He worked to pass the Mueller Act, which authorized cities in Illinois to own and operate public utilities, including street railways. However, Darrow's other efforts, such as abolishing imprisonment for debtors and ending capital punishment, failed. He found his experience in the legislature disheartening and had no desire to run for a second term.

Two of Darrow's most famous cases were the Leopold and Loeb case and the Scopes monkey trial. The first one involved Nathan Leopold and Richard Loeb, who came from among the wealthiest families in Chicago. In June 1924, at the age of 19 and 18, respectively, they planned and carried out what they intended to be the perfect crime: the murder of Loeb's cousin. Although they initially sought ransom from the victim's parents, their main motivation was the thrill of killing. The boys pled guilty, and Darrow was determined to save them from the death penalty. He had opposed the death penalty on principle since the 1880s, not to mention that he needed the money that the boys' parents (unlike Darrow's labor clients) could pay. At a mitigation hearing before a judge and a packed courtroom, Darrow made a

**REVIEWS** *continued on page 70*

closing statement that, according to Kersten, "left everyone in the courtroom in tears." The judge sentenced the defendants to life imprisonment, and, although Darrow's remuneration turned out to be less than he sought, his enhanced celebrity status permitted him to demand lucrative fees for his lectures and writings.

The second case that gained national attention for Darrow was the Scopes monkey trial, which involved a Tennessee law that made it illegal to teach evolution in public schools. In John T. Scopes, the American Civil Liberties Union found a teacher who was willing to disobey the law and face prosecution. At the trial, which was held in the sweltering summer heat in the small town of Dayton, Tenn., Darrow was confronted by his longtime Democratic rival, William Jennings Bryan, who had lost three presidential elections and now sought solace in religion. The trial was memorialized in the movie "Inherit the Wind," starring Spencer Tracy as Darrow. Darrow bested Bryan in legal and philosophical arguments that pitted Darwin's book, *On the Origin of Species*, against a literal reading of the Bible, as advocated by Bryan. Darrow ridiculed Bryan's arguments, but the jury found that Scopes had broken the law, and he was fined $100. Once again Darrow was the defender of unpopular opinions.

According to Kersten, *Clarence Darrow: American Iconoclast*, "is largely about Darrow's political activism, inside and outside court." The book exposes Darrow's many character flaws, contradictions, and human failings, showing how Darrow often infuriated allies and turned them against him. The book includes many photographs of Darrow, none of which show him smiling. All the photographs suggest a rugged and somber person and appear to confirm Kersten's statement that "Darrow was a skeptic and a pessimist," who "adamantly refused to believe in an afterlife" and who "thought that reality was essentially evil and that happiness was just beyond reach." Yet, Kersten adds, Darrow "devoted much of his life in politics and in the courtroom to rectifying the injustices that plagued the typical American." **TFL**

---

*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 a legal and judicial consultant and can be reached at trvlnterry@aol.com.*