

Originalism, Federalism, and the American Constitutional Enterprise: A Historical Inquiry

By Edward A. Purcell Jr.

Yale University Press, New Haven, CT, 2007.
301 pages, \$45.00.

REVIEWED BY HENRY S. COHN

New York Law School Professor Edward A. Purcell Jr., the author of a prize-winning book on *Erie Railroad Co. v. Tompkins*, now examines the strange entity known as the American federal system. To Purcell, however, the subject of “federalism” includes topics that do not usually fall under its rubric, such as the separation of powers of the federal government and the diversity and uniformity of state law. Purcell is hostile to the current federalism revival, which would limit the power of the federal government, and sees this movement as tied to originalism, which finds meaning for constitutional provisions solely in the statements of those who drafted the document. Originalists, according to Purcell, argue that federalism cannot mean more than what the Founders specifically stated about relations between the nation and the state in 1789.

Purcell sees federalism as “doubly blurred, fractionated, instrumental and contingent.” In other words, the highlight of federalism, from its beginning in 1789, is its uncertainty and elasticity. By “doubly blurred,” he means that federalism is both ambivalent and ambiguous. It is ambivalent because of the overlap in powers between the national government and state governments. As Antonin Scalia wrote when he was a law professor, there is a “duality of meaning in the word ‘federalism.’” Federalism is “a stick that can be used to beat either dog”—that is, one political entity can create a body of law that conflicts with that of the other.

The second characteristic of federalism—its ambiguity—was recognized by Madison and Hamilton, who, along with the other Founders, delib-

erately produced a constitution with, in Purcell’s words, “a certain degree of obscurity”—a constitution that never completely resolves the “uncertain tension” between the state and federal governments. A political scientist whom Purcell quotes concludes that American federalism “is so far out of control that we do not know what to call it.” Purcell cleverly assembles a list of terms used by law professors to capture the nature of federalism in this country. “[T]he ambiguous nature of American federalism inspired a variety of descriptive labels—including ‘coercive,’ ‘competitive,’ ‘co-operative,’ ‘co-optive,’ ‘creative,’ ‘dual,’ ‘false,’ ‘fiscal,’ ‘franchise,’ ‘functional,’ ‘judicial,’ ‘lip-service,’ ‘market-preserving,’ ‘neurotic,’ and ‘permissive,’ as well as colorful metaphors invoking ‘fences’ (picket and bamboo) and ‘cakes’ (layer, marble, birthday, and fruit)—offered to explain its nature.”

Purcell next explains that federalism is “fractionated,” because the national government is separated into three branches, an arrangement that has “generated continuous pressures along ... fault lines.” Federalism is also fractionated by the fact that each of the 50 states has developed its own body of law.

In addition to viewing federalism as doubly blurred and fractionated, Purcell sees it as “instrumental and contingent.” It is instrumental in that it is a “malleable device” used by interested parties to accomplish purposes that have already been set. According to Justice Clarence Thomas, federalism is not bad or good in itself but “is just a construct” to serve certain ends. Federalism is contingent in that the relationship between the state and federal government evolves, as the framers expected it to do. Examples that Purcell discusses include the Constitution’s provisions on the census and on the reapportionment of voting districts every 10 years. The Constitution’s provision on amendments also shows federalism as contingent. The 18th Amendment, for example, allowed for federal enforcement of liquor control and diminished the states’ role. With the repeal of the 18th Amendment and the passage

of the 21st Amendment, the policing of liquor passed back to the states.

Originalism, Federalism, and the American Constitutional Enterprise also discusses the historical development of federalism, including its status before the Civil War as well as after the adoption of the 14th Amendment, and the eventual application of most of the Bill of Rights to the states. Purcell notes the importance of the states’ serving as “laboratories” for new ideas and providing “local and regional flavor” to legislative enactments. He also traces enactments of uniform state laws. On the federal side, he discusses the Constitution’s Supremacy Clause, Justice Marshall’s implementation of judicial review, and the rise of administrative adjudication and its impact on the role of the executive branch. His history of the federal legislative branch shows the Senate becoming more powerful and more divorced from issues facing the states.

On the subject of originalism, Purcell concludes that the originalists, relying exclusively on the drafters’ statements, have joined the federalism revivalists in favoring a rigid division of power between the federal and state governments. This approach forecloses making policy decisions on such topics as federal gun control or state voter identification laws by considering every option and the full record. Purcell argues that federalism does not need a bright line between what is national and what is local. Rather, the discourse about federalism should emphasize practical consequences. This means that consideration must be given not just to the formal structure of the Constitution and the state governments but also to “fair and equitable relations among the society’s groups and interests; and intellectual humility, political tolerance, moral sympathy, and public integrity in the nation’s citizens and officials.” **TFL**

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

The Oregon Project

By Natasha Roit

Tapestry Press, Arlington, TX, 2006. 198 pages, \$14.95.

REVIEWED BY ARTHUR L. RIZER III

The author of *The Oregon Project*, Natasha Roit, is no stranger to the real world of legal soap operas. A talented trial attorney in California, Roit made a name for herself when she unsuccessfully represented the parents of O.J. Simpson's murder victim, Nicole Brown, in a battle for custody of Simpson and Brown's two children. In *The Oregon Project*, Roit uses her lawyering experience to develop a tawdry world involving the Chinese Mafia, corrupt government officials, and various sordid affairs.

The Oregon Project is unusual in that the story has no central protagonist, but Roit fills this void with a bevy of heroes and villains. Moreover, Roit tells a compelling story in fewer than 200 pages, set in an unusually large font and so much white space that it appears as if the publisher had meant to make room for the reader to take notes.

The story involves a heated election battle between an incumbent district attorney, Grant Billinger, and one of his assistants, Mitch Landau. When Mitch stumbles across information that can sink his crooked opponent, a political maneuver by his opponent throws Mitch into a legal battle of his own. At the same time that Mitch is battling Billinger, a devastatingly beautiful and fiercely independent art dealer named Tess Lowe is getting sucked into a real estate scam by a handsome con artist. What at first seems to be a tangent with few connections to the main plot turns into the key that will unlock the Oregon Project's mystery.

The Oregon Project is a fast-paced, breezy legal thriller that keenly knits several interesting characters into a believable setting. Although the book's brevity makes it a fast read, it results in introducing numerous characters who are never really developed and are all but forgotten, save for the final few chapters, when they fly in to save the day. In addition, at times the book has

a rushed feel to it, as if Roit were running into a deadline and felt pressure to end the various story lines and the novel itself. Overall, however, *The Oregon Project* is entertaining and perfect for a plane trip—you will probably finish it before you land. **TFL**

Arthur Rizer is an attorney with the U.S. Department of Justice. The views expressed in this review do not necessarily represent the views of the Department of Justice.

George Kennan: A Study of Character

By John Lukacs

Yale University Press, New Haven, CT, 2007. 207 pages, \$26.00.

REVIEWED BY RICHARD L. SIPPEL

George Frost Kennan (1904–2005), though never a headline-grabber, was an architect of the containment policy that shaped America's and Western Europe's foreign policy during the Cold War. Starting in 1928, his career would include stints as a foreign service officer, diplomat, and foreign policy adviser to government officials and Presidents. Later in life, Kennan was a lecturer, a commentator, and a respected professor of history. He was a proficient and prescient writer of numerous books and articles, an occasional book review, and voluminous letters that described his times; thankfully, the letters were preserved. Politically, he was uncommitted but negative toward populism and positive toward government by elitists.

Historian John Lukacs, the author of this brief but insightful biography of George Kennan, has read most of Kennan's prodigious writings. He shows an appreciation for Kennan's unique understanding of Russia's national character, and, through his portrayal of Kennan, Lukacs shows why political and social history are so crucial to the art of international diplomacy. Lukacs correctly credits this patriotic diplomat and scholar with a containment strategy that successfully neutralized the West's greatest nuclear adversary for more than 40 years.

Kennan was a deep thinker, who

would not be distracted by popular political perceptions, such as the misunderstood and exaggerated view of the Soviet appetite for territory. He never accepted the hyped "red scare" that Sen. Joe McCarthy and his apparatchiks preached; as a result, Kennan found his diplomatic efforts hobbled by McCarthy's vindictiveness. But Kennan was not cashiered as was the distinguished John Patton Davies—a foreign service officer, who had urged American support for Communist forces over Nationalist forces in China in the 1940s—a patriot and friend whom Kennan openly defended.

Kennan wrote on a broad range of subjects; in addition to writing numerous books on diplomacy, he kept a detailed travel diary, wrote his *Memoirs*, and wrote a history of his family's origins, tracing its journey from Scotland to Milwaukee, where Kennan was born. A Presbyterian who expressed "high respect and, in some instances, admiration" for the Catholic church, Kennan, according to Lukacs, later in life "found solace and comfort in the Episcopal Church, descendant of the Church of England," which Kennan once called "a partially rebellious child of the Roman Catholic one." His religion, together with a naturally strong character and a strict upbringing, provided Kennan with an unflinching self-discipline, and Lukacs attributes Kennan's intense focus and direction and his immense capacity for work to this trait.

Kennan's early life was not run-of-the-mill. His father, Kossuth Kennan, who had been named for the Hungarian revolutionary Louis Kossuth, was learned in comparative taxation and went to Europe often, mostly on business. In 1912, when George was eight years old, he accompanied his father to Kassel, Germany, where the boy learned German; he later mastered Russian and French, among other languages. After graduating from Princeton in 1925, Kennan passed the foreign service exam and was accepted to the Foreign Service School. His first posting was in Geneva, followed by service in Hamburg. Under a foreign service program, he studied Russian culture and language at the Uni-

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versity of Berlin. From 1928 to 1931, he served in Berlin, Tallinn (Estonia), and Riga (Latvia). In 1938, just before Germany's invasion of Czechoslovakia, he was assigned to Prague, and, from 1939 to 1941, he served in Berlin, where he was horrified at seeing Germans who were Jewish forced to wear yellow stars ("a fantastically barbaric thing"). During the war, Kennan was put in charge of a group of about 130 Americans who had been living in Germany and were interned in a hotel until their exchange with German counterparts in the United States. After leaving Germany in June 1942, he was sent to London, then to Lisbon. In 1944, he was posted to Moscow—an assignment he had sought and obtained through the efforts of his friend Charles (Chip) Bohlen; both men served in Moscow under Ambassador Averell Harriman.

In Moscow, in 1946, Kennan received a routine telegram from the U.S. Treasury Department, which was searching for an explanation for, in Lukacs' words, "the Soviet government's disinclination to agree to the standard American proposals of adherence to the World Bank and International Monetary Fund." Kennan took the opportunity to provide an in-depth explanation, partly as a way to clarify his own thinking on Russian intentions and strategy. From his sickbed he dictated 8,000 words, and the essay came to be known as the "Long Telegram." He did not expect much from his effort, but when the telegram was received in Washington, it was reproduced, widely circulated, and read by the secretaries of war and the navy, as well as, apparently, by President Truman. Historians have come to regard the Long Telegram, Lukacs writes, "as one of the principal documents and instruments of the change of American policy toward the Soviet Union, indeed, of the beginning of the Cold War, an importance comparable to Winston Churchill's Iron Curtain speech a month later. ..."

Secretary of State George Marshall and his undersecretary, Dean Acheson, were so impressed by the Long Telegram that they brought Kennan back to Washington, D.C., to lead a planning staff in the Department of State. The

first item on the agenda was the Communist insurgency in Greece, which a war-weary Britain was unwilling to fight. Soon afterward, the Truman Doctrine announced an American commitment to support any nation threatened by "armed minorities or by outside pressures." Kennan favored this policy as it applied to Greece, but he feared that such a universal commitment would carry U.S. interests astray. Dean Acheson, who would become secretary of state in 1949, had considerable respect for Kennan, but, Lukacs writes, "by March 1947 he thought it both politic and proper to 'sell' the Truman Doctrine to Congress with a—wholly exaggerated—language in order to frighten its members with the prospect of a Red tide sweeping all over western Europe unless the present administration took a stand."

In 1947, Kennan wrote an article entitled "The Source of Soviet Conduct" (later called the "Containment" article), which was published in *Foreign Affairs* under the pseudonym "X," although Kennan's authorship was revealed almost immediately. "The sum of the 'X' article," Lukacs writes, "was that any further advance of the Soviet Union and communism in the West must be resisted, principally by political means. ... The article's reverberations were astounding and instant; its reputation became enormous and enduring, indeed worldwide, indeed to the present day."

Kennan also made major contributions to formulating the historic and highly successful Marshall Plan; his drafts of the complex undertaking were left largely unchanged. The Marshall Plan emerged as a long-term economic strategy for the recovery of Western Europe after World War II. The strategy stabilized Europe, preventing communism from taking advantage of desperation or chaos, and it salvaged a devastated Germany in time to allow it to become a vital ally against Soviet expansionism. The world was fortunate to have a State Department led by Marshall and Acheson and served by Kennan at that time; the three men advanced allied Western policy interests extremely well at a time when so much was at stake.

Kennan's immersion in Russia's his-

tory and culture allowed him to offer an accurate prediction in the early 1920s: that Soviet Russia would eventually abandon communism but cling to nationalism—and nationalism seems to be Russia's foremost trait in 2008. Trying without much success to communicate this reality to the powers in Washington, Kennan became concerned that an extreme brand of anticommunism was replacing traditional American patriotism. Although never soft on communism, Kennan was not doctrinaire, because he wanted the United States to maintain the flexibility needed to adjust to changing circumstances. For Kennan, communism was always an obvious lie, but anticommunism was a half-truth and therefore more easily sold to an unsuspecting American public and a greater threat to democracy in America than was communism itself.

In 1952, Kennan became American ambassador to Moscow; this was "the peak point of his official career," according to Lukacs. Probably because of his tendencies to be the first to accurately assess a developing situation and to speak with candor, Kennan would never rise to the top of Washington's bureaucracy. At age 94, in an article titled "A Letter on Germany," which was published in the Dec. 3, 1998, issue of *New York Review of Books*, he wrote that, in government service, one is never forgiven "for saying the right thing at the wrong time." "This cruel reality," he added, "was to dog my entire official career." Yet, notwithstanding his propensity for being right too soon, Kennan was constantly sought out by Presidents and statesmen for advice.

George Kennan's career as a diplomat—a career that spanned a period when the world was threatened the most—ended abruptly in 1953, as a result of differences with Secretary of State John Foster Dulles. Starting in 1956, Kennan held a prestigious professorship at Princeton University, leaving once to serve as President Kennedy's ambassador to Yugoslavia. In 2002, at the age of 98, Kennan spoke with a reporter about the prospect of invading Iraq and commented that, "if we went into Iraq, like the president would like us to do, you know where you begin.

You never know where you are going to end.” He viewed President George W. Bush as “profoundly shallow.”

George F. Kennan’s life of public service spanned the 20th century. After writing for the ages, he put down his pen for the last time at the age of 101. **TFL**

Richard L. Sippel is the chief administrative law judge at the Federal Communications Commission. The views expressed in this review are his alone and not the commission’s.

The Terror Presidency: Law and Judgment Inside the Bush Administration

By Jack L. Goldsmith

W.W. Norton & Co., New York, NY, 2007. 256 pages, \$25.95.

REVIEWED BY JOHN C. HOLMES

From October 2003 until his resignation less than a year later, Jack L. Goldsmith served as assistant attorney general in the Office of Legal Counsel at the U.S. Department of Justice. Goldsmith’s duties in this much-sought-after position included advising the President as to what he could legally do or not do. Goldsmith’s predecessors in the job included such conservative icons as Supreme Court Justices William Rehnquist and Antonin Scalia and Solicitor General Theodore Olson. The job took on added significance after Sept. 11, 2001.

In *The Terror Presidency: Law and Judgment Inside the Bush Administration*, Goldsmith expresses sympathy with President Bush’s philosophy that dealing with terrorists requires the exercise of executive powers that go beyond the traditional ones that have been used in times of conventional war. After all, when fighting terrorism, the men and women of our armed services do not face uniformed personnel of an enemy nation, but people who kill civilians purposefully as a weapon to advance their cause. Moreover, whereas soldiers in a conventional war do not usually have access to classified military information, terrorists may have knowledge of future terrorist activities. This fact causes the interrogation of captured terrorists to take on added importance

and has prompted some—both inside and outside the Bush administration—to claim that the Geneva Conventions’ prohibition on torture does not apply to terrorists, who are not, of course, signatories to the agreement.

Goldsmith disagrees with the idea that the “war on terror” is merely a war on a technique and is designed to enable the President to lash out at amorphous threats without defining them and to expand executive power. To the contrary, obtaining reliable information on terrorist plots to do harm within the United States has made it possible to thwart these plots. Goldsmith also defends the need for the indefinite detention of terrorist combatants, although he would prefer a more comprehensive process for identifying the guilty.

Goldsmith contends that there has been an explosion in the use of lawyers to determine the boundaries of permissible actions by federal executive agencies. This development has resulted, for example, in near-continuous crises within the Central Intelligence Agency, as its officials constantly consider advice on what actions are legal and what are not. This consideration may paralyze these officials by causing them to fail to act because of fear of legal retribution, or it may cause them, because of the security needs they perceive, to engage in legally questionable acts without submitting them to a possible legal veto. Goldsmith believes that the Bush administration has made more mistakes because of too much lawyering than it has made because of too little lawyering.

Seeking historical precedents for Bush’s exercise of executive powers, Goldsmith considers Abraham Lincoln’s suspension of habeas corpus and Franklin D. Roosevelt’s order to imprison Americans of Japanese ancestry. Lincoln and Roosevelt, however, were apologetic for their actions—emphasizing that these steps were necessary because of crisis situations—and asked the public for trust and patience. At the time, these two Presidents were condemned for these actions, but eventually they both received the highest marks for the overall handling of the crises they faced. President George W. Bush, by contrast, has been unapologetic for enhancing presidential pre-

rogatives, and he has done so against a background of distrust, particularly with respect to the war in Iraq.

Bush is not the only recent President to have been challenged by Congress or in the courts for allegedly exceeding his constitutional authority in pursuing his foreign policy. Examples of other challenges that Goldsmith cites include the War Powers Act of 1973, by which Congress sought to limit and make more transparent presidential assertions of executive prerogatives; the Iran-Contra hearings during the Reagan administration; and the steel seizure case overturning President Truman’s order to nationalize the steel industry during the Korean War. Goldsmith believes that President George W. Bush has acted on the basis of believable threats to the nation and sees Bush’s low ratings as more a matter of politics than anything else. The jury is still out on Bush’s handling of the war in Iraq and other crises.

Goldsmith names as he provides an intimate picture of administration officials who advise the President on these legal matters. But Goldsmith is less than wholly convincing in explaining his refusals to affirm some legal determinations made by his predecessors that he concluded would extend presidential authority too far. These refusals, Goldsmith states, were the basis for his resignation after less than a year in office.

Goldsmith acknowledges that he wrote *The Terror Presidency* hurriedly and that, as a result, it may contain inaccuracies and its style may be uneven. Nevertheless, on balance, *The Terror Presidency* provides an easily read legal analysis of issues related to fighting terrorism and will prove valuable beyond the Bush administration. **TFL**

John C. Holmes retired as chief administrative law judge at the U.S. Department of the Interior, after having served as an administrative law judge at the U.S. Department of Labor for almost 25 years. He currently works as a mediator and arbitrator and may be reached at TRVLNTERRY@aol.com.

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Asian Godfathers: Money and Power in Hong Kong and South-east Asia

By Joe Studwell

Atlantic Monthly Press, NY, 2007. 328 pages, \$26.00.

Law and Corporate Finance

By Frank Cross and Robert A. Prentice

Edward Elgar, Northampton, MA, 2007. 230 pages, \$115.00.

Playing the REITs Game: Asia's New Real Estate Investment Trusts

By Dominic Whiting

John Wiley & Sons, Hoboken, NJ, 2007. 224 pages, \$24.95.

REVIEWED BY CHRISTOPHER C. FAILLE

The crony capitalists of East Asia are an endlessly fascinating subject for journalists in the United States. There may be any number of reasons why this is so, the simplest of which is just that exoticism gives them an advantage (as copy) over homegrown crony capitalists. This is the same exoticism, after all, that makes *Madama Butterfly*, by some accounts, the most frequently performed opera in the history of that art form.

The conceptual funhouse-mirror quality of such stories is also a factor. The Salim Group, headquartered in Indonesia, was long supported by the Suharto regime. Support from that regime helped the companies in that group secure a virtual monopoly on the importation and distribution of wheat in Indonesia, and that monopoly, in turn, became the basis for a variety of other enterprises until, in time, the Salim Group became a globe-circling conglomerate. Nobody in the United States (or nobody who has been awake over recent decades) will find anything shocking or exotic in that bare-bones account. Still, the particulars are always interesting, tinged with cultures, languages, and time zones far from our own. Moreover, through the distortions

of these particulars, Americans can see and not see our own crony capitalism in the Indonesian looking glass.

The Myth of Confucian Business

There is one widespread way of looking at the similarities and differences. Chinese ethnicity brings with it a Confucian ethos: a dedication to family, hard work, and personal commercial connections. It is this ethos that has spread about the region, sparked growth, and turned various nations into “tigers” of productivity.

Consider the Salim Group again. Its founder was Liem Sioe Liong, also known as Sudono Salim (multiple names are common in a region where languages themselves are commonly intermingled). In the early years of his Indonesian wheat monopoly, Salim brought in an associate from Malaysia, Robert Kuok. The two men became co-investors in wheat and sugar trading and in sugar cultivation for three decades. Stories about their partnership have routinely mentioned the fact that both the Malaysian and the Indonesian half of the partnership originally hailed from China's Fujian Province. Indeed, the families of these two men come from two towns in that province that are only 25 miles apart. The partners' commodities business, then, is the result of not only a social network that goes back to the old country but also the Confucian lenses through which the inhabitants of that network presumably see one another and the world.

So runs the myth. In 1994, *Foreign Affairs* featured an interview of the longtime prime minister of Singapore (then in retirement) Lee Kuan Yew, which has become a classic source for this outlook. Eastern societies are different from Western ones, Lee told his interviewer, because Easterners believe that “the individual exists in the context of the family. He is not pristine and separate. The family is part of the extended family, and then friends and the wider society.”

Three Takes on the Myth

When I write of the “myth” of Confucian business, I don't mean to imply that there is no truth in it. I use the

word in the classical sense: A myth is a story of forgotten or vague origins that helps its believers explain or rationalize their world. Generally, a myth will be an admixture of distant historical fact and subsequent encrustations. The classical Greeks believed in a distant war that their forefathers had fought on the shores of Asia Minor, around the walls of a city named Troy. The Greeks may have had the history more or less right, but they also invented what they needed.

Each of the three books under review sees the myth of Confucian business in a different way. Joe Studwell comes to us as a debunker. There was no Achilles! There may not even have been a Troy! He states his own bias pretty clearly with the word “Godfather” in the title of his book, *Asian Godfathers*. That word has, of course, acquired its connotations from the notorious novel by Mario Puzo and the subsequent motion picture trilogy directed by Francis Ford Coppola. Both Puzo and Coppola were self-consciously romanticizing some ugly realities. Studwell thinks of himself, however, as a debunker; therefore, he uses the term to bring about the contrary effect: to bring realism to a field that is often romanticized.

There are three steps to Studwell's efforts. First, he contends that the class at issue isn't as thoroughly Chinese as it portrays itself to be. Some of the families most prone to cronyism are, of course, Chinese. Others are partially Chinese, in which case “the non-Chinese bloodline is sometimes seen as a source of embarrassment and played down, particularly in a Chinese setting.” Still other families aren't Chinese at all, such as Ananda Krishnan from Malaysia—a Sri Lankan Tamil.

Second, Studwell believes that there is no special amity or philosophic commonality among those who are Chinese. Consider the relationship between Sudono Salim and Robert Kuok yet again. Studwell writes that the two tycoons were “partners in a forced marriage of convenience.” Over time, Kuok became convinced that Salim and the government were cheating him out of his share of the profits, so he sold his stake in the mid-1990s. When the Su-

harto regime came crashing down in 1998, Salim had to ask his old partner and associated interests for a loan. They, in turn, asked him for 70 percent interest for the loan—a rate that doesn't indicate a lot of sentimentality about the old days in Fujian Province.

Third—and this is Studwell's major thesis—is that the “godfather” class throughout the region is a retardant to growth, not an accelerant. The cronies are a big reason that Indonesia, Malaysia, and other countries in Southeast Asia haven't had the success of the Asian nations northeast of them: Japan, South Korea, and Taiwan. These three nations have developed branded businesses that compete globally (which is not to be confused with the outsourcing operations for brands originating in the Western countries), and they've learned the tricky politics of stable multiparty competition (which is not to be confused with the periodic overthrow of autocracies by street fighting).

Studwell's *Asian Godfathers* is a fine book, and, although I don't embrace all its conclusions, I heartily recommend it to anyone who cares about the microeconomics of nations on the western side of the Pacific Rim. Neither of the other two books under review is equal to Studwell's treatise—in readability or in insight—but each has something to add to the discussion that Studwell has opened.

The Issue of Liquidity

The word “liquidity” is used in both law and finance, although there is a shade of difference in what it means in the two contexts. In law, for example, when used to discuss creditor-debtor relations, an asset is thought of as “liquid” to the extent that it can be turned into cash quickly. Real estate is the ultimately “illiquid” asset: it can take months to sell a plot of land. By contrast, corporate bonds, in normal circumstances, are very liquid: one quick call to the broker and the job is done.

In finance, one speaks of markets rather than of underlying assets as liquid. The more liquid a market, the more fungible its units and the larger the volume of transactions routinely handled.

The connection between a market and the underlying assets is that a liquid market is what makes assets liquid.

Because bonds are routinely traded in large volumes, individual bonds are quickly converted into cash. Hence, that phone call to the broker is easy. On the other hand, real estate is illiquid, because every plot of land has a unique location, every building on it may have unique features, and buyers have particular ideas about what they are looking for (not just “some land somewhere!”). Under these conditions, a call to a broker is just the beginning of a lengthy and tiring process.

In the first chapter of *Law and Corporate Finance*, by Frank Cross and Robert A. Prentice, my attention was drawn to this nugget:

The value of stock-market financing was disputed for some time, when East Asian countries' success was fueled by bank lending and cross-ownership arrangements for investment, without much in the way of freely traded national equity markets. Some even suggested that the developed capital markets of countries such as the United States could be counterproductive, by creating demands for short-term performance at the expense of long-run economic success. Time has not been supportive of these theories, though, and empirical research generally bears out the importance of developed and free equity markets, although the incentive for short-term focus by American companies remains a concern.

The people who “suggested” the superiority of private illiquid financing did so in the 1980s and the first half of the 1990s, when the term “the four tigers” (sometimes, confusingly called “the four dragons,” instead) became popular as a way of lumping together South Korea, Taiwan, Hong Kong, and Singapore. This grouping ignores the distinctions between the northern and southern countries in the region that Studwell emphasizes, drawing two tigers from each side of the line dividing the north from the south. Two other southern countries within his purview—Malaysia and Indonesia—were often called “aspiring tigers.”

The ideas discussed above—the

“myth” that Studwell seeks to debunk—incorporates the idea that interpersonal relations are better (more Asian) than the impersonal relations one experiences through a stock exchange. When a company borrows money from a bank, one person speaks directly to another, discussing the terms, filling out the forms, and the like. It doesn't seem too chummy at the time, but it is a marvel of intimacy compared to raising money by selling bonds or stocks in the market at large. The Asian markets sacrifice the liquidity available through the Western exchanges, yet they get various advantages in return.

What do Cross and Prentice mean when they say that time has not supported these theories? They refer chiefly, I think, to the currency and financial crises that swept through the area in 1997 and 1998. When crises hit, they hit hard, perhaps because the traditional handshake-driven ways of doing business were opaque to outsiders, and the shocks made the valuation of the assets of a business a matter of guesswork. Guesstimations deflate quickly! So the Western way turns out to have something to be said for it, after all.

Even so, the issue isn't as cut-and-dried as Cross and Prentice think. They seem to be saying, simply, that illiquidity is bad. But that isn't obvious. After all, panics also occur in Western nations that have liquid and transparent stock and bond markets. One may be under way as I write these words (in late February 2008). Yet whatever happens, I doubt that Cross and Prentice will conclude from the situation that bank lending and Confucius-inspired cross-ownership is the way to go, after all! I suspect that, to a great degree, the authors simply presume their conclusions are valid and invoke only the facts that justify them.

Liquidity: Another Look

This brings us to Dominic Whiting's *Playing the REITs Game: Asia's New Real Estate Investment Trusts*. Whiting is Reuters' Asia property correspondent in Hong Kong. He is a post-Kipling East-meets-West kind of guy—born in Thailand and raised in Great Britain. And his book, which doesn't mention

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Confucius even once, belongs in this review because it raises the issue of whether—even if the myth of Confucian business once had a great deal of validity—the myth is rapidly becoming obsolete.

The Asian entrepreneurs, as Whiting describes them, certainly value liquidity. That, after all, is the whole point of a REIT, a real estate investment trust—that is, an effort to turn land, that ultimate illiquid asset and common family heirloom, into something that can be bought and sold on an exchange. REITs haven't been in Asia long, but they've made a big splash in that brief time. Whiting tells us, for example, that Japan enacted an Investment Trust Law in 2000, after a decade of stagnation and in the wake of the regionwide currency crises described above. "A seemingly endless queue of unprofitable companies needed to deal with massive debts, and selling off property assets seemed a good way to start," writes Whiting. To allow for the prompt sale of such assets, the country's legislators had to create liquid markets.

The first two trusts established under Japan's Investment Trust Law were listed on Sept. 10, 2001. The following day, terrorist attacks in New York City and northern Virginia shocked the world, including its financial quarters, and the two firms behind these Japanese REITs took a beating. Nevertheless, the promoters persisted despite that misfortune of timing. By 2006, a mature REITs market was in place in Japan, expanding outward from Tokyo to the provinces, and investors were becoming quite discriminating when considering one trust or another.

As Whiting was getting his book ready for the presses, he expected a boom in mergers and acquisitions activity among REITs. He quotes Matt Nacard, an Asian REIT analyst at Macquarie Securities: "REITs will look to each other to achieve economies of scale to grow more effectively."

Concluding Thoughts

I believe that such discussions are often rendered otiose by the very use of the term "illiquidity," which suggests

a bad thing. Liquidity is the positive term, illiquidity its negative. Why not speak of liquidity and solidity?

My own view is that liquidity, like all good things, can be overdone. An economy that values liquidity for its own sake will soon become one in which too much money chases too few opportunities for real growth, because, for real growth to take place, somebody somewhere has to keep some assets together in a solid form and put them to productive use. Productivity is activity that occurs on land, in buildings, and among workers who have a long-term sense of teamwork—an illiquid investment in one another's reliability.

I have no great confidence in the philosophical and sociological generalities that are often draped around the discussion of business in East Asia, but I think it likely that historical emphases have been different in different regions of the world. Studwell's *Asian Godfathers* goes too far in debunking this rather commonsensical notion. I also think it likely that a convergence is under way, and that Whiting's *Playing the REITs Game* gives us some hint of that development. **TFL**

Christopher Faille is a financial correspondent for an Internet-based news service and is a member of the Connecticut bar. He maintains a blog, "Pragmatism Refreshed," at cfaille.blogspot.com.

The Nine: Inside the Secret World of the Supreme Court

By Jeffrey Toobin

Doubleday, New York, NY, 2007. 369 pages, \$25.00.

REVIEWED BY ELIZABETH KELLEY

For good reason, Jeffrey Toobin's recent book, *The Nine: Inside the Secret World of the Supreme Court*, was named one of the best books of 2007 by the *New York Times* and was on the bestseller lists for months. I predict that *The Nine* will have the staying power of *The Brethren* by Bob Woodward and

Scott Armstrong, *Gideon's Trumpet* by Anthony Lewis, and *A Civil Action* by Jonathan Harr.

Toobin is a legal analyst for CNN and a staff writer at the *New Yorker*. *The Nine*, which reads like a novel, opens with Chief Justice Rehnquist's casket being carried up the magnificent steps of the Supreme Court Building, as each justice (except Souter, who could not make it to the ceremony) stands on a step. The steps form a powerful image: "The ceremony on the steps represented a transition from an old Court to a new one." The nine justices on the Supreme Court when Rehnquist died—Justices Breyer, Ginsburg, Kennedy, O'Connor, Rehnquist, Scalia, Souter, Stevens, Thomas—served together longer than any other nine in the Court's history had. *The Nine* tells its story chronologically and is organized around the major cases decided by the Rehnquist Court, including *Planned Parenthood of Southeastern Pennsylvania v. Casey*, *Lawrence v. Texas*, and *Bush v. Gore*—all of which Toobin addresses as a neutral reporter. Toobin also describes the confirmations of most of the justices of the Rehnquist Court as well as those of Justices Roberts and Alito and the failed nomination of Harriet Miers. As the narrative unfolds, so too does the character of each of the justices.

Toobin not only analyzes the judicial philosophy of each justice, as well as the impact of their decisions, but also pays attention to the humanity of the justices: their backgrounds, educations, family lives, and delightful eccentricities. Toobin tells us, for example, about the strict discipline under which Justice Thomas was raised by his grandfather, the sexism that Justices O'Connor and Ginsburg surmounted, and the fact that Justice Souter once received a television set as a gift but never plugged it in.

Toobin's description of the fellowship between and among various justices is endearing. Justices O'Connor and Ginsburg were constantly trying to set up Justice Souter on dates. Following deliberations on a case involving interstate shipment of wine, Justice Scalia referred to the justices on one

side of the decision as “the rosy cheek coalition.” Once, when Chief Justice Rehnquist read a draft opinion featuring one of Scalia’s attacks on O’Connor, Rehnquist said, “Nino, you’re pissing off Sandra again. Stop it!”

If *The Nine* has a main character, it is Justice Sandra Day O’Connor. As a state senator from Arizona and an elected judge on that state’s court of appeals, O’Connor was, in one sense, the most political of the nine justices; she was always sensitive to societal attitudes and to the need for bridging divergent viewpoints, most notably on abortion. Although she was a Republican appointed by a Republican president, O’Connor was a moderate and took umbrage at her party’s shift to the far right; she was not impressed with

George W. Bush. For years, she was the crucial swing vote on the Court—the one to whom attorneys targeted their briefs and oral arguments. But her last months on the Court became saddened by conservatives’ demand that justices pass political litmus tests as well as by her husband’s descent into the ravages of Alzheimer’s disease.

As Toobin’s narrative opens on the steps to the Supreme Court Building, it also closes with the steps. Because of renovation plans as well as post-Sept. 11 security concerns, the magnificent front entrance is no longer used. Toobin’s conclusion is clear-eyed and sobering:

Cass Gilbert’s steps represent at some level a magnificent illu-

sion—that the Supreme Court operates at a higher plane than the mortals who toil on the ground. But the Court is a product of a democracy and represents, with sometimes chilling precision, the best and worst of the people. We can expect nothing more, and nothing less, than the Court we deserve. **TFL**

Elizabeth Kelley is a criminal defense attorney in Ohio. She has a special commitment to representing individuals suffering from mental illness and mental retardation. She frequently provides legal commentary for Court TV and can be contacted at ZealousAdvocacy@aol.com.

PREVIEWS *continued from page 63*

The Federal Circuit awarded Clintwood both damages and interest for its 1994 to 1996 payments. The Supreme Court will determine whether Clintwood can file claims for repayment of unconstitutional taxes under the Tucker Act and whether these alternative claims include interest awards. In addition to affecting the outcome of similar pending cases, the Court’s decision is likely to affect all taxpayers by determining the amount of reimbursement for taxes later found to be unconstitutional. Full text is available at www.law.cornell.edu/supct/cert/07-308.html. **TFL**

Prepared by Hana Bae and Courtney Zanicco.

United States v. Ressam (07-455)

Appealed from the U.S. Court of Appeals for the Ninth Circuit (Jan. 16, 2007)

Oral Argument: March 26, 2008

Ahmed Ressam was convicted of numerous crimes connected with his participation in an al Qaeda plot to bomb Los Angeles International Airport. He challenges one of the laws under which he was convicted, 18 U.S.C. § 844(h)(2), which provides for a mandatory minimum 10-year sentence for anyone who “carries an explosive

during the commission of any felony which may be prosecuted in a court of the United States.” Ressam was carrying explosives in his car when he signed a customs declaration with a false name, which is a felonious act. The question in this case is whether the language of the statute requires the defendant merely to be carrying the explosives during the commission of a federal felony or whether the explosives must have some relation to the underlying felony. The Ninth Circuit held that there must be a relation between the felony and the explosives, and it vacated the portion of Ressam’s sentence linked to this issue. The Supreme Court granted certiorari to review that determination. Full text is available at www.law.cornell.edu/supct/cert/07-455.html. **TFL**

Prepared by Deepa Sarkar and Joe Hashmall.

Warner-Lambert Co. v. Kent (06-1498)

Appealed from the U.S. Court of Appeals for the Second Circuit (Oct. 5, 2006)

Oral Argument: Feb. 25, 2008

Under Michigan law, individuals may bring personal injury suits against manufacturers of prescription drugs ap-

proved by the Food and Drug Administration (FDA) only if the plaintiffs can show that FDA approval depended on fraudulent submission or withholding of information. In this case, 27 Michigan residents sued Warner-Lambert Co., claiming personal injury arising from using Rezulin, Warner-Lambert’s FDA-approved drug used for treating diabetes. Warner-Lambert argues that Michigan law is pre-empted by federal law, because permitting state courts to second-guess the FDA’s product approval and fraud detection processes interferes with the agency’s essential functions and promotes regulatory uncertainty. The Michigan plaintiffs respond that federal preemption does not apply to traditional state tort claims. The decision in this case will clarify the scope of FDA autonomy in policing the drug approval process and plaintiffs’ freedom to assert state tort claims in areas regulated by federal entities. Full text is available at www.law.cornell.edu/supct/cert/06-1498.html. **TFL**

Prepared by William Grimsbaw and Stephen Markus.