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The Decline and Fall of the American Republic

By Bruce Ackerman

Belknap Press of Harvard University Press, Cambridge, MA, 2010. 270 pages, \$25.95.

REVIEWED BY LOUIS FISHER

The Decline and Fall of the American Republic evaluates the health and survival skills of the American republic. For a book with a title that seems on the gloomy side, the introduction begins on a bright note. Acknowledging “defeats along the way,” Bruce Ackerman reviews the last five or six decades and concludes: “there is no mistaking the general arc of ascendancy: America’s victory over the Axis powers and the Communists, its civil rights revolution, and the success of its free market system have propelled the country to the center of the world historical stage—economically, militarily, morally.” This achievement, Ackerman argues, stems from the view of progressives in the early 20th century that the framers had “made a bad mistake in relying on mechanical checks and balances in designing their constitutional machine.” Constitutional progress would come from the “evolutionary struggle of social forces to survive, prosper, and dominate.” With Darwin triumphing over Newton, evolutionary pressures naturally overwhelmed checks and balances.

Ackerman labels as “triumphalism” the New Deal’s ability to adapt classical constitutional forces to support a new activist vision of American government, leading to rulings by the Warren Court and to the civil rights revolution. He says he has been “a triumphalist ever since I’ve been writing about the Constitution.” Rethinking this position, he adds, is “an awkward moment for me.” What he sees in recent decades is not a cause for rejoicing in the American political process. Clear “pathologies” are too dangerous to ignore. Previously, Ackerman looked to the presidency to play a major role in “expressing and consolidating popular demands for fundamental change.”

However, the office he looked upon favorably has become a “principal agent of destruction.” The first part of the book identifies various developments “that have transformed the executive branch into a serious threat to our constitutional tradition.”

As if to anticipate a reader’s question, Ackerman asks “Haven’t we heard all this before?” Arthur Schlesinger, he observes, “sounded the alarm” in 1973 with his book, *The Imperial Presidency*. The Watergate scandal was a major blow to the reputation of the presidency, followed by other “serious outbreaks of illegality”: the Iran-Contra affair and the War on Terror after Sept. 11, 2001. According to Ackerman, “we have managed to recover from them all, to one degree or another.” Nevertheless, three serious outbreaks of presidential illegality, from Nixon to George W. Bush (Bush II), is a remarkable record. What President from Nixon to Bush II conducted himself with a reasonable amount of competence and honesty? Any names come to mind? With a pattern like that, was there any reason to expect Barack Obama to perform well and gain the public trust?

Midway in the introduction, Ackerman seems to fall back on the presidency as the favored instrument for healthy change. “President Obama’s performance in office,” Ackerman writes, “has been anything but imperial.” He attributes the “tough time” experienced by Obama to “congressional obstructionism.” The following generalization is inconsistent with the apparent theme of Ackerman’s book: “At least the president has an incentive to rise above congressional parochialism and speak for the Nation as it confronts the pressing problems of the twenty-first century.” What President from Nixon to Bush II performed in that manner? Although Ackerman began by warning the reader that the executive branch has been transformed into “a serious threat to our constitutional tradition,” he places heavy blame on Congress. “The real dangers come from Capitol Hill: its pandering to special-interest groups, its endless ideological posturing. ...” Surely,

special-interest groups know their way around the executive branch and the White House. There can be little question that Presidents from Nixon to Bush II have made an art form of “endless ideological posturing.”

At this stage of the book, Ackerman seems uncertain about its direction or theme. As to the prospects of the decline and fall of the American republic, “its source is this ‘crisis of governability’—a crisis generated by self-indulgent congressional barons, not presidential demagogues.” Anyone familiar with history from Nixon to Bush II can find plenty of presidential demagogues. What is the point of demonizing Congress, particularly over such abstractions as “special interests”? Are not individuals permitted to organize and press for change?

Toward the end of the introduction, Ackerman recaptures his original theme. Whatever the strengths and weaknesses of Congress, “the presidency represents the graver threat.” Not only was the presidency a dangerous institution at the time of *The Imperial Presidency*, “these threatening trends promise to accelerate over the decades ahead. This is, at any rate, my thesis.” Having earlier derided the mechanical system of checks and balances and championed the evolutionary model of the progressives, Ackerman urges the creation of “new checks and balances responsive to the most likely forms of presidential abuse.” This is an interesting admission, and one for which Ackerman deserves credit because few scholars would be willing to say that what they had believed for most of their professional careers no longer had credibility for them.

Is it possible that the political system can adjust to reduce the pathology of the presidency? Ackerman doubts it. For a number of reasons that he sets forth, he comes to the “darker view,” predicting that presidential abuse will get worse, not better, unless major reforms that Ackerman outlines are instituted.

Ackerman concludes that the presidency is being systematically degraded by seven major factors:

(1) [T]he evolving system of presidential nominations will lead to the election of an increasing number of charismatic outsider types who gain office by mobilizing activist support for extremist programs of the left or the right; (2) all presidents, whether extremist or mainstream, will rely on media consultants to design streams of sound bites aimed at narrowly segmented micro-publics, generating a politics of unreason that will often dominate public debate; (3) they will increasingly govern through their White House staff of superloyalists, issuing executive orders that their staffers will impose on the federal bureaucracy even when they conflict with congressional mandates; (4) they will engage with an increasingly politicized military in ways that may greatly expand their effective power to put their executive orders into force throughout the nation; (5) they will legitimate their unilateral actions through an expansive use of emergency powers; (6) [they will] assert “mandates from the People” to evade or ignore congressional statutes when public opinion polls support decisive action; and (7) they will rely on elite lawyers in the executive branch to write up learned opinions that vindicate the constitutionality of their most blatant power grabs.

The steady growth of presidential power, with its vague (but unfortunately successful) claims of “inherent” executive authority, subject to no legislative and judicial checks, should be of deep concern to all. Ackerman explores these seven factors, searching for more effective checks. But how new are these factors? Presidential candidates have always relied on charismatic skills, often citing their military record or other supposed credentials that may or may not qualify them for the job. They always rely on sound bites, including such familiar chestnuts as “Tippecanoe and Tyler too” and “Yes, we can.” The vast number of White House aides, who do not face

confirmation and are there to honor presidential priorities rather than the law, is a relatively new phenomenon and deserves much greater attention. Military power and assertions of emergency authority are long-standing concerns but quite likely more serious today. Elite lawyers have always served the White House, but never in the numbers that serve there today. One of the factors that Ackerman omits is the willingness of academics—including historians, law professors, and political scientists—to celebrate and idolize the presidency while giving short shrift to checks and balances. Until recently, as Ackerman candidly admits, he was solidly in that camp. The practice of worshiping the presidency has been especially damaging to constitutional government in the years following World War II.

Ackerman covers many interesting areas, predicting that “blogging will degenerate into a postmodern nightmare—with millions spouting off without any concern for the facts.” That is a legitimate concern, but long before blogging public officials and private citizens have been spouting off without any concern for the facts. The list here is too long to enumerate, but we might pick out one: President Lyndon B. Johnson’s claim that there had been a second attack in the Gulf of Tonkin, helping to justify his escalation of the war in Southeast Asia, when we know today (because the National Security Agency finally admitted it in 2005) that the second attack never occurred. Or perhaps a second example: President James Polk’s claiming that “American blood has been shed on American soil,” triggering the Mexican War, when in fact he did not know where the border between Mexico and Texas was. Moreover, it is often the case that a conscientious blogger will catch and publicize false statements promoted by the executive branch.

For remedies, Ackerman has several ideas that have their own limitations. To counter the problems of “a politicized Office of Legal Counsel and a superpoliticized White House Counsel,” Ackerman proposes a new institutional mechanism that he calls the “Supreme Executive Tribunal,” consisting of nine individuals who think of themselves

as judges of the executive branch, “not judges for the sitting President.” Members of this tribunal would serve staggered four-year terms, giving each President the opportunity to nominate three judges during the President’s four years in office. These appointments would have to gain Senate confirmation, putting pressure on the President to select reputable jurists, not political operatives. As Ackerman sees it, this tribunal “will look and act like a court, not like an advocate.” The purpose would be to “put a damper on unilateral assertions of power.” The tribunal would hear from many plaintiffs, including members of Congress.

But why would lawmakers take their disputes to an executive body instead of to their own chambers or to federal courts? For that matter, why would a President create this kind of tribunal? Constitutionally, Ackerman recognizes that the final decision on legality and constitutionality is made by the President, not by the tribunal that would be created. If the tribunal were truly independent and determined to place checks on executive power, the President would have every right to ignore its admittedly advisory opinions. In such cases, the reputation of the tribunal might suffer, and it could appear that the President was rebuffing seasoned legal advice. Both sides could be damaged.

The independence of this tribunal would be difficult to establish. If it were created, the first President would be able to nominate all nine members of the panel. Selections by the next President would provide a somewhat different mix, but the tribunal “will have a powerful institutional incentive to support the tribunal’s previous decisions.” If new arrivals rejected a previous ruling, the tribunal “will soon be rendered a laughingstock.” On the other hand, if new arrivals routinely accepted existing rulings, then the tribunal could seem to be not independent but merely subservient to precedents and executive needs.

Ackerman concludes by expressing his appreciation for 18th-century values: “The Founding legacy remains important,” he writes, particularly “its com-

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mitment to the separation of powers.” He pays tribute to the principles that guided the framers: the Enlightenment tradition, civilian control of the military, the rule of law, and checks and balances. Ackerman no longer looks to the President as a reliable guardian who acts in the national interest. He closes with this question: “[W]ill we take a hard look at emerging realities, and rise to the occasion in a movement for constitutional renewal?” In raising fundamental questions and sounding the alarm, Ackerman can encourage a thoughtful debate on what has gone wrong with our political institutions and what must be done to protect the future of our country. **TFL**

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Zero-Sum Game: The Rise of the World's Largest Derivatives Exchange

By Erika S. Olson

Wiley & Sons, Hoboken, NJ, 2010. 256 pages, \$27.95.

REVIEWED BY CHRISTOPHER C. FAILLE

In 1903, Doubleday published Frank Norris' novel, *The Pit*, a tale of speculation in wheat futures in Chicago, mingled with a romance. Norris' story begins with the main characters enjoying an evening at the opera. The businessmen there, both as they sit in their boxes and as they move to and from the lobby between acts, cannot help talking about a drama that had occurred earlier in the day, which they enigmatically call “the Helmick failure.” The female protagonist, Laura, senses

as her evening unfolds that the real-life intrigue is as exciting as the staged intrigue before her: “[B]etween the chords and bars of a famous opera men talked in excited whispers, and one great leader lay at that very moment, broken and spent, fighting with his last breath for bare existence.”

On the way home, Laura's carriage passes the business district. It is almost 1 a.m., yet people are still in their offices, tidying up the detritus of the Helmick failure. “Through the windows she could get glimpses of clerks and book-keepers in shirt-sleeves bending over desks. Every office was open and every one of them full of a feverish activity. The sidewalks were almost as crowded as though at noontime. Messenger boys ran to and fro, and groups of men stood on the corners in earnest conversation.”

It was the Chicago Board of Trade (CBOT) that so captured Laura's attention in this way. The CBOT, founded in 1848, was already a venerable institution when Norris wrote of it. There was a newer kid in town, though, offering the same sorts of contracts for different commodities: the Chicago Butter and Egg Board, founded in 1898. The Butter and Egg Board would in time change its name to the Chicago Mercantile Exchange (Merc), and the two institutions would develop a cross-town rivalry worthy of the Cubs and the White Sox.

October 2006

When the Merc proposed to buy the CBOT in October 2006, the offer itself produced the kind of feverish activity and earnest conversations that would have fascinated Norris' Laura. The offer was of concern far beyond the confines of the city that the two exchanges shared. Together, the Merc and the CBOT constituted, as the subtitle of Erika Olson's *Zero-Sum Game* says, “the world's largest derivatives exchange” and a formidable force in world markets for agricultural commodities, energy commodities, metals (both precious and industrial), and a wide range of financial instruments.

A derivative is any traded contract that derives its value from the price

moves of an underlying asset in the way that a stock option derives its value from the movements of the stock at issue. The derivatives on agricultural commodities (such as on the price of wheat in a given month or on the price of orange juice concentrate in the Eddie Murphy/Dan Ackroyd movie “Trading Places”) are easy enough to understand. What gets more complicated are the financial derivatives, where the “underlying” can itself be something abstract, such as the movement of an index or an interest rate.

In illustrating financial derivatives, Olson gives the example of the CBOT's binary option on the Target Fed Funds Rate. A trader can buy the right to collect \$1,000 should the Federal Reserve, at a forthcoming meeting, shift its Target Fed Funds Rate up. This is a “binary” option because either the Fed acts in the manner contemplated by the contract or it doesn't; there is no broad spectrum of possible outcomes. If it appears obvious that the Fed will have to shift the rate up—that is, if in previous statements the Fed had given strong hints it was about to do so—then everyone will want this position. On simple supply-and-demand reasoning, you would expect that high demand to drive the price of this option up to nearly \$1,000. There would still be some investors willing to take the other side of that option, though: to put their money on the possibility that the Fed will defy expectations and keep the rate where it is. Why? Because the cost of that position will be low and because the position itself may play a valuable role in hedging a commercial entity's exposure to a spike in the interest rate.

It is easy to dismiss such contracts as “just gambling.” Surely, the thrill of gaming plays a part in the lives of traders in Chicago's pits. What is more, it is very likely that bookies in Las Vegas will happily quote you odds on Target Fed Funds Rate moves. But the binary option is listed on the CBOT because it serves an economic purpose. Suppose you are the chief financial officer of a concern that has lent out a lot of money at a floating rate. Your firm may be counting on an upward move in

the Target Fed Funds Rate, and, if the change defies expectations, that could have very expensive consequences for you. If you take the no-increase side of the binary contract, you'll receive a payoff in the event of that unexpected action that will help cushion the blow. In short, you have hedged against that risk.

The interest of the antitrust watchdogs at the Department of Justice was somewhat piqued then, when, in October 2006, the Merc made its \$8 billion offer for the CBOT. Actually, it wasn't a cash offer. It was a stock swap with a *value* of \$8 billion, but that value would change in the months to come with fluctuations in the price of the Merc's own stock. The number that intrigued the Justice Department wasn't a dollar figure, anyway. It was a percentage. The proposed "CME Group" would control 85 percent of the U.S. exchange-traded derivatives market.

Olson provides a rundown of the reasons why the attorneys for the Merc were (rightly) confident that this transaction would survive antitrust examination. First, on a contract-by-contract basis, there is little or no competition anyway. It is not as if the CBOT and the Merc had offered competing platforms for the trading of, say, binary options on the Target Fed Funds Rate. Only the CBOT offered that particular contract. The CME Group had its own products tied to interest rates, but in general each had a monopoly on most of the *specific* contracts it listed.

The reason for this is a broad consensus that such contracts are what antitrust lawyers and economists call a "natural monopoly." Competition doesn't offer a sufficient justification for the inefficiency that would be involved in splitting up the (not very large) pool of traders who want to buy and sell binary options on the Target Fed Funds Rate.

That argument by itself is not especially persuasive. Competition does take place between similar products, as interested parties decide whether their hedging needs, or speculative fervor, is better served by those offered by one exchange or the other. Why should antitrust authorities not protect this inter-product competition? A sec-

ond and more powerful argument in favor of official acquiescence in such a merger, though, was that the 85 percent figure mattered little, because derivatives exchanges compete with one another in a globalized environment. To speak of the "U.S. market" for the service they provide is, arguably, no less artificial than it would be to speak of the "Chicago market"!

A third argument—and perhaps the best one—is that derivatives exchanges compete not only with each other but also with off-exchange systems for effecting the same transactions, known as over-the-counter (OTC) derivatives markets. OTC trading is attractive in part because the parties involved and their go-betweens can customize their contracts—they are not taking a contract "off the shelf" as offered by one of the listing exchanges. For example, exchange-traded contracts deal in fixed quantities. The CBOT's corn contracts stipulate that a contract represents 5,000 bushels of corn. If two parties find this onerous and want to trade in units of 3,521 bushels, an OTC deal is for them.

The issue of margin is of more public-policy interest than that of quantity. The exchanges have margin requirements: performance bonds that market participants must post, in amounts that vary in a way based on the risk and volatility of the product. In the OTC market there are no rules, and the parties negotiate their own collateral arrangements.

We must now introduce another major participant in the story that Olson tells. In May 2000, Jeff Sprecher, a former power plant developer and investor, created the Intercontinental Exchange (ICE). Despite its name, ICE was not an "exchange" in the full-blooded sense in which the CBOT and the Merc were exchanges. However, ICE was something more than an electronic platform for the negotiation of the OTC derivatives deal. It was, if you will, a hybrid. It did serve as a platform for OTC deals, but it supplemented that with price transparency and risk management tools that made ICE a valuable virtual agora and a formidable foe for the two Chicago institutions and their ilk elsewhere.

March 2007

By March 14, 2007, most of the heavy-hitters in the futures industry were in Boca Raton, Fla., for an industry conference and mandatory rounds of golf. In a bar in the lobby of the host hotel that evening, bigwigs of both CME and CBOT, happy with the progress they had made on the mechanics of the deal, were relaxing energetically. Olson says that Merc chairman Terry Duffy bought rounds of shots, and that the revelers kept at it until 3 a.m. on March 15.

Meanwhile, in Jeff Sprecher's suite at the same hotel, there was intrigue. ICE officials and associates were preparing the necessary documentation for a bid that would turn the Merc's friendly offer into an auction. It is refreshing to see that real-world futures magnates do sometimes burn the midnight oil, just as their fictional counterparts did in the wake of the Helmick scandal. ICE arranged to have bellhops personally deliver these materials the following morning to the hotel rooms of various critical individuals, especially CBOT board members.

As those board members surely knew, it was not open to them at this stage (before any shareholder approval of the deal with the Merc) just to ignore a credible bid. Upon receipt of the offer, even those bleary-eyed and hung over from the shots the night before must have understood that they had a fiduciary obligation to review its terms.

Here I have to interject that Olson commits a stylistic flaw. She writes, speaking of Chris Lown, a banker working in Sprecher's suite that night with the rest of ICE's team, that he was "one of the only people who got a bit of fresh air that night," as he kept shuttling to the neighborhood Kinko's. "One of the only" sounds sloppy. Was he one of the few, or was he *the* only? If Olson isn't confident that he was the only, she could simply say that he "may have been the only." One of the only? Please.

ICE's offer was, like the Merc's, a stock-swap rather than a cash bid. But given the respective value of ICE's stock vis-à-vis the Merc stock in mid-

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March 2007, ICE's offer was worth \$1 billion more than the Merc's.

Perhaps I should skip ahead to the spoilers. In the end, the CBOT's shareholders voted for a somewhat enriched version of the original proposal from the Merc. The Department of Justice announced the close of its antitrust investigation in June 2007. Olson tells us that there were "rumors that the staff overseeing the case did in fact want to block the Chicago union, but had been overruled by their superiors." Other obstacles were overcome, and the parties closed the deal.

2011

If one can forgive an occasional gaffe—such as the author's "one of the only"—Olson tells her story with clarity and economy, avoiding many of the pitfalls of this sort of work. It is a tale of renewed pertinence in 2011, because exchange consolidation is very much in the news again—perhaps a sign of economic recovery.

In February, the London Stock Exchange offered to buy TMX, the owner of the Toronto Stock Exchange. Only days later, the Deutsche Boerse AG entered into an agreement to buy NYSE Euronext, the holding company of both the famed New York Stock Exchange and Euronext, the Amsterdam-based stock and derivatives exchange. Meanwhile, the dominant exchanges in Singapore and Australia are contemplating a merger.

By early March 2011, rumors of still other combinations were rife—including reports that the NASDAQ was planning to buy the Chicago Board Options Exchange, or that the CME Group was looking to buy Brazil's BM&F Bovespa, or that the NASDAQ and the CME Group would team up in order to make their own offer for NYSE Euronext and turn that deal into an auction. By the end of March, the rumors had died down, but NASDAQ was quite openly mulling the prospect of bidding for NYSE Euronext, with or without assistance from ICE.

Before any such combination becomes an established fact, there will surely be obstacles, official inquiries, leaked news reports, twists and turns.

There will be, in short, more material for a book such as this—perhaps even the kind of material that may inspire another novel like Frank Norris' *The Pit*. **TFL**

Christopher Faille, a member of the Connecticut bar since 1982, writes on a variety of financial issues, and is the co-author, with David O'Connor, of a user-friendly guide to Basic Economic Principles (2000).

The Tie Goes to Freedom: Justice Anthony M. Kennedy on Liberty

By Helen J. Knowles

Rowman & Littlefield, Lanham, MD, 2009. 312 pages, \$44.95.

REVIEWED BY JOHN C. HOLMES

Many Supreme Court observers see Justice Anthony Kennedy's role as a swing vote as evidence that he is unprincipled, taking his jurisprudence from *New York Times* editors when he wishes to court liberal critics and from *Wall Street Journal* editors when he wishes to placate conservatives. Helen J. Knowles, an associate professor when she wrote *The Tie Goes to Freedom* and now a professor of politics at Whitman College in Washington state, finds, to the contrary, that Kennedy is a consistent and principled justice. Labeling Kennedy "modestly libertarian," she believes that Kennedy does not have an overarching, easily categorized judicial philosophy. She notes that this often causes Kennedy to agonize over cases, finding truths in the arguments on both sides. By contrast, she quotes Kennedy as having said that "the clear legal philosophy of Scalia and Brennan does seem to yield them an answer a little more quickly."

The title of this book, *The Tie Goes to Freedom*, refers to Knowles' conclusion that, in nearly all close cases, Justice Kennedy chooses the result that furthers freedom. In his decisions, Kennedy quotes not only from the Constitution but from other documents as well, such as the Declaration of Independence and the Federalist

Papers, to support the idea that the framers believed that freedom should be fundamental in our society. Although Kennedy prefers that freedom be advanced through less government interference, he differentiates himself from "pure" libertarians by finding that, on occasion, governing bodies are instrumental in providing freedom. For example, he finds that diversity can be a legitimate governmental goal and that society need not be completely colorblind, as some other justices urge.

Knowles finds Kennedy's most vigorous defense of liberty to be in free speech cases, in which he joins the majority approximately 85 percent of the time. Although not as close to being a free speech "absolutist" as was Hugo Black, Kennedy favors revising strict scrutiny so that very few restrictions on content-based speech are ever upheld, regardless of the offensiveness of the speech in question. In *Texas v. Johnson*, for example, in which the Court found that flag burning was a protected form of expression and struck down a statute that criminalized it, Kennedy wrote a concurring opinion to state that the decision "exact[s] its personal toll," because the Constitution in this case, as in others, sometimes requires the justices to "make decisions we do not like."

Kennedy wrote the opinions in the two leading Supreme Court cases that upheld gay rights—*Romer v. Evans* and *Lawrence v. Texas*—and Knowles praises Kennedy's views on the subject. *Lawrence v. Texas* overturned *Bowers v. Hardwick* by holding that a Texas statute criminalizing sodomy with a person of the same sex violated substantive due process. In a concurring opinion, Justice Sandra Day O'Connor said that she would have struck down the statute because it discriminated against homosexuals but would have upheld *Bowers v. Hardwick*, in which the statute did not so discriminate. Kennedy, however, wrote, "The central holding of *Bowers* has been brought in question by this case, and it should be addressed. Its continuance as precedent demeans the lives of homosexual persons."

Knowles discusses Kennedy's willingness to discuss decisions in public and to refer to foreign law in the Court's decisions. She finds this tendency to arise from a desire to give the Court's decisions more credibility globally and to demonstrate our country's continuing role in the community of nations. She does not see it as in any manner an abdication of our Constitution.

Among other matters that Knowles considers are what she understands to be the elements of libertarian jurisprudence and the degree to which Kennedy adheres to them. She also finds Kennedy to be less restrained by *stare decisis* than are some current and prior justices usually considered to be conservative.

Knowles also emphasizes Kennedy's love of teaching; he has taught for many years at the University of the Pacific's McGeorge School of Law in Sacramento, Calif., as well as in its summer program in Salzburg, Austria. She praises Kennedy for his rapport with students and his belief that judges should be teachers as well as decision-makers.

Knowles acknowledges that she has had only one brief conversation with Kennedy (and found him a "gracious, mild-mannered individual"), but she nevertheless offers many opinions as to his motivations in reaching his decisions. She has obviously scrutinized nearly all of Kennedy's public record—including his speeches and writings, in addition to his decisions—and has even studied the references to Kennedy in the voluminous papers of Justice Blackmun at the Library of Congress. (*The Tie Goes to Freedom* has 78 pages of notes and bibliography.) Knowles rejects labeling the present Court the "Kennedy Court," but, somewhat paradoxically, titles her concluding chapter, "It All Depends on Justice Kennedy."

The Tie Goes to Freedom is a scholarly book and therefore probably of more interest to academicians than to practicing lawyers or the general public; it has little discussion of Kennedy's non-legal life. Although Knowles' introduction and conclusion are clear and succinct, the rest of the book is often heavy going. She writes, for example,

It is a libertarian approach that seeks to minimize the ability of the government to affect the equal status of persons (positively or negatively) by treating them in a particular way because they "belong" to a specific class of individuals. In other words, the belief that Kennedy expressed in *Metro Broadcasting v. FCC* (discussed in chapter 4)—that it is "demeaning" to assume that "certain 'minority views'" are inevitably held by those individuals who happen to possess a certain "minority characteristic"—is just as applicable to cases involving homosexuals or women as it is to racial minorities, with whom that case was concerned.

In a review of *The Tie Goes to Freedom*, entitled "A Faint-Hearted Libertarian at Best: The Sweet Mystery of Justice Anthony Kennedy," published in the Winter 2010 issue of the *Harvard Journal of Law & Public Policy*, Ilya Shapiro, a legal scholar at the Cato Institute, wrote that he found faint evidence of Kennedy's libertarian jurisprudence but much evidence of Kennedy's influence on the Court's results. According to Shapiro, "On abortion, gun rights, capital punishment, campaign finance, affirmative action, detention of enemy combatants, and the host of issues that do not make the front pages but do affect millions of lives and billions of dollars, Justice Kennedy's views become the law of the land." **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 trvInterry@aol.com.

Murder One: A Novel

By Robert Dugoni

Touchstone, New York, NY, 2011. 374 pages, \$24.99.

REVIEWED BY JOANN BACA

Robert Dugoni returns to the city of Seattle and his character, attorney David Sloane, in his legal thriller *Murder One*. Sloane, a widower, is coping with feelings of loss over the murder of his wife, as well as guilt that he couldn't protect her, even though he was at the scene of the crime. Since his wife's death, he has been reclusive and has started to bury himself in work. But a year has passed since the tragedy that scarred his life, and he forces himself to re-enter the social scene, attending a charity benefit at which he is the guest speaker. He tries to sneak out before well-meaning friends can introduce him to eligible women, and literally bumps into an attorney he had come up against in civil litigation some months before. The attorney, Barclay Reid, is the alluring, quietly flirtatious antidote to Sloane's ennui, and, almost without conscious thought, for the first time since his wife's death, Sloane finds himself opening up to the possibilities that life has to offer.

Reid has undergone a tragedy in her own life; her only child died of a drug overdose, and her ex-husband blames her for having been an inattentive mother. Since her daughter's death, inspired by complex emotions, Reid has been looking for opportunities to make the drug dealers, including the reputed local importer, a Russian mobster named Vasiliev, pay for their crimes. When a murder occurs—Vasiliev is found shot to death in his home—the police almost immediately focus on one suspect: Barclay Reid.

Despite the fact that Sloane has never tried a criminal case, Reid has great confidence in his lawyering ability, and, at her urging, he reluctantly agrees to defend her. Will taking on Reid's defense allow Sloane to purge his lingering guilt over his wife's death by protecting his new love from con-

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viction? Having been solely a civil litigator, Sloane's learning curve is steep, but his natural capabilities and the team he has assembled to assist him serve him well. Soon he is making significant inroads in the prosecution's case. But complications abound, and certain secrets frustrate or obstruct Sloane's attempts to provide a rigorous defense.

From the first page of this intriguing novel, Dugoni plunges the reader into an absorbing, intricately woven story that juxtaposes Sloane's personal life with the crime investigation and subsequent trial, which is at the heart of *Murder One*. The reader meets a score of characters, all richly drawn and vividly brought to life. One character has "eyes so blue he finally understood the saying about Irish eyes smiling." Another's "bald head resembled a small watermelon and his ears two lettuce leaves." From Detective "Sparrow" Rowe to Judge Reuben Underwood, from prosecutor Rick Cerrabone to private investigator Charlie Jenkins, from Reid's ex-husband Dr. Felix Oberman to a captivating bartender named Anastasia—all the characters that populate the novel are diverse and fascinating. Well-drawn characters are a necessity in *Murder One*, for, with characters less distinct, it would have been a challenge to the reader to keep their identities straight within the novel's complex plot.

Dugoni peppers his dialogue with sly wit. When Reid hurts her hand and insists there is "no one to blame but myself," Sloan replies, "We are lawyers, after all. I'm sure we could find someone to blame if we put our minds to it." Later, when being interviewed, at one point Reid appears to be on the verge of speaking, but stops, prompting a detective to say, "You looked like you wanted to say something." Reid replies, "I'm a lawyer; I always look like I want to say something." As Dugoni was once a civil litigator, readers with law degrees may be inclined to forgive him for such gentle digs at his former profession.

Dugoni's skill as a teller of engrossing tales gives the reader a seat at the counsel table as Sloane probes for

weaknesses in the prosecution's witness testimonies and seeks to maximize doubt through whatever small cracks in their testimony he can find. The courtroom action feels real and immediate, and readers experience Sloane's frustrations and triumphs as though they were their own. The novel shines outside the courtroom as well: scenes as diverse as a staged car accident, a playful game of pool, and a tracker investigating footprint evidence are well-crafted and flow smoothly. The novel's action shifts seamlessly from scene to scene and moves at a brisk, sometimes breathless, pace.

The novel has some flaws, but they are trifling. A few of the coincidences upon which the plot depends strain belief; a couple of small plot holes niggles at the brain as the reader wonders if they will be addressed (and they are not); and occasionally the plot becomes so convoluted that readers should be forgiven for needing to backtrack to assure themselves of the chain of events. One issue that disturbed this reviewer, but likely would not affect someone who is familiar with Sloane from Dugoni's earlier work, was the manner in which Sloane's back story was disclosed: the information was sparingly provided, making the bits and pieces that were revealed frustratingly confusing; the plot of *Murder One* did not require doling out this information so stingily. Even taken together, however, these small distractions do not detract unduly from the reader's enjoyment.

Murder One is a well-paced, captivating novel, built sturdily of variegated bricks of evidence, insight, and surprise, and is mortared with distinctive characters. Dugoni is as comfortable detailing the minutiae of the police work necessary to bring a murder case to trial as he is in describing a blossoming relationship for a man who is not sure if he is falling in love too quickly. The book's courtroom scenes sparkle, and the plot is juicy and full of intrigue. If you are looking for a good new legal thriller, you would be hard-pressed to find a better one this year. **TFL**

JoAnn Baca is retired from a career

with the Federal Maritime Commission. Her husband, Laurence Baca, is the immediate past president of the Federal Bar Association.

Justice

By Jay Lillie

Ivy House Publishing Group, Raleigh, NC, 2011. 250 pages, \$15.00.

REVIEWED BY JOANN BACA

In his novel, *Justice*, Jay Lillie combines a murder mystery with the behind-the-scenes political intrigue of a Supreme Court nomination process. Lillie shifts the action between Chicago and the corridors of power in Washington, D.C., with visits to New Orleans and New York along the way. Yet these cities, although important to the broader plot, are secondary to the novel. Lillie is more interested in what his characters are doing and thinking than in giving us a sense of place.

A man's body is found in an alley in a rough neighborhood on the south side of Chicago. No identification is found on the body, and the tags have been ripped out of the man's clothing. Police detective Julie Gold assesses the body as it lies on a slab in the medical examiner's lab: "The young man was as handsome as he was dead." This handsome man presents a challenge for Gold, who eventually identifies him as a reporter on the trail of a story that is itself a mystery—even to the reporter's employer. The reporter had been assigned to write a relatively routine article on French influences in New Orleans—an account that clearly would not have involved a visit to Chicago. Who killed him is important, but it is not the only mystery in the novel. The *why* is just as important as the *who*, because the reason the murder was committed might affect decisions at the very highest levels of government. Before the novel ends, even the President of the United States herself has an interest in knowing why that handsome man was in Chicago.

As her investigation proceeds, Gold contacts an old friend of the reporter's,

Kate Stevens, a law clerk for a Supreme Court justice. At first the relationship between the two women is adversarial, but they begin to work together unofficially to discover the secrets for which the handsome man died. Complicating Stevens' life is the sudden illness and subsequent departure from the Court of the justice for whom she has been clerking. The man she plans to marry, Gordon Cox, is a confidant of the President's and is asked to help vet Joan Chatrier, the eventual nominee to fill the vacancy on the Court, leaving Stevens in an uncomfortable situation at the Court. Chatrier is the daughter of an immigrant single mother, Mari Roland, who committed suicide, and Chatrier's success story entailed overcoming all obstacles in her path. But Chatrier has to overcome more obstacles than a Senate confirmation hearing before she can rest easily in a seat on the Supreme Court.

The book's author, Jay Lillie, is a lawyer with experience working with the White House and on Capitol Hill during several administrations. Thus, it is not surprising that the novel's best moments come during Cox's preparation of Chatrier for her nomination hearing and during the hearing itself. Lillie clearly has an insider's knowledge of the grandstanding and gamesmanship of the nominations process for the high court. With precision, if also with cynical glee, he conjures up a believable scenario, mixing senatorial bombast, nominee non-answers, and White House damage control.

Although Lillie relishes writing about political matters with which he is familiar, he does not seem as comfortable with developing the continuity necessary for a clear fictional narrative. The murdered reporter's mother ignites senatorial pressure on Chicago's law enforcement agencies to solve her son's murder, yet by the novel's end, her unceasing efforts to keep the investigation going are marginalized. For another example of a continuity problem, at one point, there is some tension generated over the pills that Chatrier's mother Mari Roland swallowed to commit suicide. Cox tells the President's chief of staff, "The Chicago police have not ruled out that [Chatrier] caused her mother's death

because the sleeping pills were her prescription." Yet this issue is never raised again. There also is some confusion about Stevens' position as a clerk to a Supreme Court justice, with the reader left unsure during much of the novel whether Stevens is still working at the Court or not. Stevens advises Cox midway through the novel that "I was asked to pack up my desk this afternoon." Yet, a few pages later, Cox asks her, "How are you getting on ... at court these days?" Still later, Stevens walks into Cox's office "after cleaning out her desk in chambers," yet many pages after that, Stevens tells Cox, "The word's out on the street ... that I'll be leaving my clerkship."

Lillie's characters sometimes question quite ordinary occurrences, leading the reader to wonder what is so unusual about them that Lillie would fix on them as troubling. For instance, Gold interrogates Chatrier about phone calls from Roland:

"Why did your mother call you at the same time every day?"

"Habit."

"Habit?"

"Yes."

Julia simply could not believe it. She could not get her arms around such behavior.

As a reader with an elderly mother to whom calls are placed at the same time every day, this particular behavior does not seem unusual to me, nor unusual in general. Yet Lillie makes even more of it: "Kate laughed to herself because she'd thought the routine strange. ..."

Another situation that Lillie offers as a potential predicament is frankly unfathomable. When discussing a newly discovered relative of Chatrier's, Stevens asks Cox about the potential impact:

"Wouldn't it have affected Joan's confirmation ... if Joan had a retarded brother?" Kate could imagine how the press would play it.

One cannot imagine any reporter making an issue of such a circumstance, nor of such a fact affecting the Senate's

confirmation of a Supreme Court nominee, yet Lillie places the thought in the mind of someone intelligent enough to have become a law clerk for a Supreme Court justice.

Lillie introduces one puzzling legal matter that is especially germane to the plot but is not fully explained, spawning unanswered questions. Many readers will be familiar with the old joke that being dead is no impediment to voting in Chicago. In *Justice*, being dead in Chicago is no impediment to one of the character's being indicted for murder, facing a potential jury trial, and pleading to lesser charges. One wishes that this startling process had been explained better.

In *Justice*, Lillie has introduced a unique issue about the Supreme Court, but the issue should not be mentioned in a review, because doing so would give away a large portion of the plot, even if Lillie himself discloses the issue in his author's note at the beginning of the book. Readers would be wise to skip the author's note until they have read the novel.

Jay Lillie has crafted a novel that is true to his belief, as stated in his author's notes, that "[t]he United States Constitution is a simple, straightforward document until it needs to be applied to living persons and everyday situations." *Justice* has its strengths—a peek behind the curtain during a judicial nomination process, intelligent characters, a little-discussed fact about Article III of the Constitution—that balance its weaknesses, which include a few baffling plot elements and continuity problems. This is a book for a beach vacation; it does not survive rigorous analysis, but if you don't mind overlooking its weaker elements, it will reward you with a good story. **TFL**

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

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Truth Be Veiled: A Justin Steele Murder Case

By Joel Cohen with Carla T. Main
Coffeetown Press, Seattle, WA, 2010. 242
pages, \$24.95 (cloth), \$16.95 (paper).

REVIEWED BY JOANN BACA

Any book review should answer one basic question: Is this a good book or not? The answer in this case is: It depends. This reviewer is left unsure about the audience to which this novel was intended to appeal. Whether one comes away from the book intrigued or frustrated depends very much upon what one expects from it.

By all appearances, Joel Cohen and Carla Main intended their book, *Truth Be Veiled: A Justin Steele Murder Case*, to be a crime novel. On that level, unfortunately, the book does not succeed. It succeeds, however, as a thinly disguised treatise on the potential dichotomy between legal ethics and morality in the field of criminal defense. Readers who are prepared to delve into the ethical implications of various defense tactics, and who wish to ponder such heady issues as the degree to which truth matters within the context of the criminal justice system, will find much in this novel to satisfy their tastes. For those who expect a typical action-packed who-done-it, however, the disappointment will be keen. In fairness, there is no deception here, because the novel's preface warns that the book is essentially an exploration of the conflicts between truth and legal ethics that a criminal defense attorney faces, and the preface notes that the story is "designed to explore these questions."

We meet the protagonist, Justin Steele, as he is dictating a speech he will deliver when receiving the Clarence Darrow Award in his hometown of Hillsdale (the state is unspecified, allowing the authors to avoid discussing state-specific ethics laws). Steele had been a prosecutor but, for the past two decades, has built a prestigious criminal defense practice. He prefers not to have partners, so his

small office is staffed with a bossy and brassy secretary, Cassandra Higgins, and an earnest and able associate, Marshall Green, a recent law school graduate. The authors make it clear early on that Steele likes to subject his associate to grilling using the Socratic method, which he does many times throughout the novel. He is also the kind of lawyer who likes to name his desk—of all things. It is called "the Behemoth," and Higgins is constantly polishing it—make of that what you will.

The murder case of the subtitle involves George Robbins, a rich, successful, and highly respected member of the community. One day, he came home early to his 15th-floor apartment, just as Adrianna, his wife of 30 years, was tending to a plant on the ledge outside their open bedroom window. Startled by the sound of George's entrance, Adrianna toppled out the window to her death, with George failing to reach her in time. That is George's story. The district attorney, however, believes an eyewitness who lives in a neighboring apartment and claims that the George and Adrianna were arguing and that George, one might say, assisted Adrianna's fall out the window. George knows that his life cannot withstand deep scrutiny and that his secrets may be his undoing. He needs a good lawyer, and Steele is the one George chooses to defend him.

One would expect the plot to progress as in any other legal novel—through accounts of interviews, pre-trial motions, case development, jury selection, the trial, and finally the verdict—and that there would be the requisite number of revelations and plot twists along the way. But one would be wrong. Although such things do happen, nearly all of them happen behind the scenes. And this is the novel's great failing. As well as the book is written and as intriguing as the legal and moral discussions that permeate its pages may be, essentially all the action occurs outside the reader's presence. Thus, the reader gets little novelistic payoff for having read all the legal theory and ethical angst.

Unfortunately, the authors have

ignored the commonly accepted first rule of writing: Show, don't tell. For instance, we hear Steele expound his legal theories, test his young associate via the Socratic method (even the secretary gets into the act at one point, asking Green to explain certain legal precedents that she claims to have learned through osmosis), but we never actually see Steele in the courtroom practicing the art at which we are constantly told he is so good (though the novel includes a brief scene before a mock jury). We hear Steele talk about what occurred during pivotal meetings or in the courtroom, but it's like reading a newspaper account of a trial rather than being present at one. Because of this lack of "you are there" action, the authors fail to nurture the reader's involvement in the story. Rather, the reader is encouraged to marvel at Steele's legal theories, his analytical skills, and his ability to count angels dancing on the heads of pins—all in the abstract.

The novel quickly becomes turgid; only the rare reader will be able to muster enough interest to care much about the alleged crime. The reader is presented with an overflowing creel of red herrings in the Robbins case, most of which seem formulaic at best, and are then dropped without resolution, causing suspicion that the case itself is of limited interest even to the authors. The authors rush the reader from discussion to discussion about aspects of legal strategy or the way legal ethics play into tactics while only meagerly doling out narrative. We eat lunch with the characters as they discuss various ethical considerations, we watch them draw charts evaluating potential lines of defense, and we ride in the car as they chat on the phone (hands-free, naturally) about how to proceed. But, when big moments finally arise, the narrative picks up only after the fact. The reader is left with a disjointed and frustrating peek at what is going on with the case. Revelation and resolution come very late in the novel and seem tacked on, almost as afterthoughts.

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Stephen L. Rossetti Jr.
Stephen E. Roth
Tracy C. Rotharmel
Peter M. Routhier
Daniel J. Rudary
Micah Runnels
Stephen C. Ryland
Lindsey E. Sacher
Robert W. Savoie
Ellie T. Schilling
Thomas S. Schneidau
Mark F. Schuber
Kathryn Ridgeway Shelton
Michael Sices
Christopher J. Sleeper

Andrew Joseph Sloniewsky
Jessica L. Smith
Hon. Rodney Smith
Allison L. Snell
Megan E. Snider
Irma Solares
Danielle A. Soldani-Ryland
Cheryl D. Soto
Caroline A. Spangler
Megan J. Spencer
Scott L. Sternberg
John F. Stewart
Stuart Strauss
Donald W. Strickland
Cory T. Stuart

Cecilia M. Suau-Badia
Lindsey E. Surratt
Ben Suter
Heath Price Tarbert
Roger Lee Taylor
Dayna R. Terrell
James E. Thompson
Michael J. Thompson
Tara Touloumis
Amanda Renee Tyma McNeil
Richard L. Vail
Angel G. Varnado
Louis J. Vazquez
Travis Edward Venable
Brett S. Venn

Paul J. Verlander
Robert B. Vincent
Michelle Visiedo
Margot L. Want
James R. Washington
Matthew Robert Wasik
Christopher J. Weema
Derek G. Weisbender
Adam H. Welle
Michelle M. West
Trayne Saxton Wheeler
Daniel L. White
Victoria P. White
Karen K. Whitfield
Jatavian L. Williams

Laura M. Williams
David Anthony Wilson
David C. Winters
Marc Wolf
Mark D. Wolfe
Philip M. Wood
Donald A. Workman
Todd E. Zenger
Minyi Zhn

REVIEWS *continued from page 64*

When writing a review, the reviewer does not want to give away too much of the plot for fear of diminishing the potential reader's enjoyment. It says a lot about this novel that I feel that I could relate nearly the entire plot without giving away anything of importance, because the plot seems incidental to the novel.

On the other hand, if the reader is a lawyer with an interest in legal ethics and morality in the area of criminal defense, or the reader is not a lawyer but is seeking to understand what makes defense lawyers tick, then he or she will be well rewarded by this novel. The stage is set early on, when Steele is participating on a panel of a bar association program entitled "What If I Don't Believe My Client?" When the district attorney on the panel asks if a defense attorney has no moral obligations, Steele replies, "[T]here is a difference between morality as it's expressed, say, in religion or philosophy, and ethics, which provides rules of behavior for a profession. ... [E]thics rules will be driven by concerns that are not, strictly speaking, a moral concern. ..."

Steele adds that "a trial is a search for the truth, but as a criminal defense lawyer, I'm not part of the search posse." As proof, he indicates that it is legally ethical for a defense attorney "to make honest witnesses look like liars."

The authors clearly are enthusiastic about criminal defense work, and the novel shines when it abandons the pretense of narrative to dig deeply into aspects of legal ethics and tactics. To someone not previously privy to a defense attorney's deepest ruminations, these descriptions are appalling and fascinating in equal measure. At one point, for example, Steele and Green develop an alternative theory of what happened to Adrianna—a theory nicknamed the SODDI (Some Other Dude Did It) defense. Green muses about one of the pitfalls of using a SODDI defense: "A lawyer can't conduct a defense that he knows ... would serve merely to harass or maliciously injure another. ... *But the case law says as long as the intent to be malicious or injure another person is not the ONLY purpose, then it's okay.*"

The authors clearly know their way within—and around—the legal matters

that are the meat of this novel. Joel Cohen is a former prosecutor, who currently practices criminal defense law, and he is also a teacher, author, and lecturer on legal ethics; Carla Main is a legal journalist. When it comes to delivering thoughtful and insightful analysis about the dilemmas faced by criminal defense lawyers as they balance the truth with their ethical responsibilities—and develop a robust defense for their clients at the same time—the reader is in good hands. The authors state in the preface that the reader should consider this question: "Why ... does the truth seem to become a moving target in a criminal case—and is this gamesmanship, or part of adroit legal representation?" For all its deficiencies as a fictional tale, *Truth Be Veiled* provides much food for thought when contemplating those questions. **TFL**

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