THE OATH: THE OBAMA WHITE HOUSE AND THE SUPREME COURT
BY JEFFREY TOOBIN
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THE ROBERTS COURT: THE STRUGGLE FOR THE CONSTITUTION
BY MARCIA COYLE

Reviewed by Elizabeth Kelley

What accident in the publishing world allowed two significant books on the present-day Supreme Court to be published within months of each other? In September 2012, Jeffrey Toobin, a staff writer at The New Yorker and the critically acclaimed author of The Nine: Inside the Secret World of the Supreme Court, published The Oath: The Obama White House and the Supreme Court. Then, in May 2013, Marcia Coyle, chief Washington correspondent for The National Law Journal, published The Roberts Court: The Struggle for the Constitution. If you had to pick one of the two, which should you choose? My answer is both.

Although overlap is inevitable when dealing with a substantially similar period in time, the two books are different in tone and thematic organization. Indeed, it’s like e-mail notifications you receive from Amazon.com: If you enjoyed such-and-such, then you’ll like this one as well.

Both Toobin and Coyle are legal journalists whose coverage of the Supreme Court has become familiar to television audiences. Toobin is a legal analyst for CNN, who comments on everything from Casey Anthony to George Zimmerman. Coyle is a regular on PBS NewsHour, parsing Supreme Court decisions. When they speak on TV, their eyes dance. I imagine that both would tell you that they have the best jobs in the world. But the similarities end there. Toobin is at times respectfully irreverent and the master of the sound bite. Coyle borders on wonkish and takes her role as a journalist very seriously. Their books reflect these differences.

The title of Toobin’s The Oath refers to the bungled oath that Chief Justice Roberts administered to Barack Obama in 2009 on the steps of the Capitol, which he followed with a private oath hastily scheduled for later that evening. Toobin uses that incident to contrast the backgrounds, careers, and ideologies of Roberts and Obama. He takes us behind the scenes to the incidents that led to the Court’s historic decision to uphold the President’s health care plan—a 5-to-4 opinion made possible by the Roberts’ surprise vote.

Some reviewers have criticized The Oath for its use of others’ reporting. But Toobin conducted dozens of his own interviews, and his stature as a legal journalist gave him the access to do so. Furthermore, wherever he acquired it, Toobin distills his information into a readable, penetrating narrative, which is richly footnoted. Toobin’s telling of the story of the first and second oaths, for example, is a masterpiece of both suspense and analysis.

What makes The Oath such a (dare I say?) fun read are the details that humanize the justices. For example:

The last day of a term always arrived laden with drama. Almost invariably, it was when the Court’s most important and controversial decisions of the year were announced or when the justices revealed their plans to retire. As a rule, it was also a time when the justices were both tired and sick of one another. Everyone needed a haircut and a vacation.

We learn that, as a member of the cafeteria committee—an assignment given to the most junior justice—Justice Elena Kagan created a seismic change by ordering a frozen yogurt machine. And we learn that Justice Antonin Scalia, who can reduce the most seasoned litigators to jello, wept when Chief Justice Roberts announced in court the death of Martin Ginsburg, Justice Ginsburg’s husband.

Whereas The Oath focuses on just one Supreme Court case—National Federation of Independent Business v. Sebelius, upholding the individual mandate in the Patient Protection and Affordable Care Act, known as Obamacare—Marcia Coyle’s The Roberts Court focuses not only on Sebelius, but on three other cases: Parents Involved in Community Schools v. Seattle School District No. 1, the Seattle-Louisville public school integration decision; District of Columbia v. Heller, the Second Amendment case; and Citizens United v. Federal Election Commission, the campaign-finance case. And, although Toobin concentrates on the justices as well as the politics of the Obama White House,
Coye examines the players behind the four cases she discusses: the litigants and their lawyers.

The subjects of Coye’s four cases—health care, race, guns, and money—are volatile and divisive, but The Roberts Court reminds us that flesh and blood human beings brought these issues to the Court. For example, Coye goes into great detail about the motives behind the parents in Seattle and Louisville who brought lawsuits against their school districts. They were simply parents who wanted the best education for their children; racial politics was the last thing on their minds. Similarly, Coye brings us close to the lawyers behind the gun litigation. The story is a simple one: two lawyers having a cocktail one night in Washington, D.C., talking about their favorite issue, gun ownership, and brainstorming about the perfect plaintiffs to challenge the District’s gun ban and, ultimately, to get the Supreme Court to rule that the Second Amendment protects an individual’s right to possess a firearm.

We learn about the odysseys of these cases through the lower courts, the litigation strategies behind them, and how the Supreme Court arrived at its decisions. We learn much about how the Court really works—how it decides which cases to hear, whether oral arguments make a difference, and what the justices think about it. We even learn a bit about the professional relationships between the justices:

Another justice asked, “Who on the Court is the sort of person who is going to carry a grudge? Nino Scalia isn’t going to carry a grudge. Clarence Thomas is going to pat you on the back and give you a hearty laugh all the time. That’s a big part of it.” In general, one justice explained, “There’s a lot of mutual esteem and mutual affection. There have been times on the Court when that hasn’t been true, but I don’t find it surprising that it is true now when I think about it. We have to live with each other for a long time. It’s a lot more enjoyable if you like the people you work with, and this is a likable set of people.”

In The Roberts Court, Marcia Coye notes, “The late Justice Harry Blackmun, after being interviewed on C-SPAN many years ago, told me that he did not think the Supreme Court should be a great mystery to the American people.” Although Coye as well as Toobin have indeed made the Court less mysterious, it is its very air of mystery that makes the Court and its nine justices topics of which we never tire. Elizabeth Kelley is a criminal defense lawyer based in Spokane, Wash. She has a special commitment to representing individuals with mental illness and developmental or intellectual disabilities who are accused of crimes. She has served two terms on the board of the National Association of Criminal Defense Lawyers, has served as the chair of the Mental Health and Corrections Committees, and is currently the chair of the Membership Committee. She hosts two radio shows, “Celebrity Court” and “Celebrity Court: Author Chats.” She can be contacted at zealousadvocacy@aol.com.

BY MARIANNE WESSON

Reviewed by Michael Ariens

The “whodunit” lives in law professor Marianne Wesson’s A Death at Crooked Creek. Her book tells the story of one of the most intriguing mysteries in American legal history: who was shot and killed at Crooked Creek, Kan., on a late winter’s day in 1879? For evidence teachers (among whom Wesson is one), and possibly even law students slogging their way through hearsay and its exceptions, Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285 (1892), is a classic 19th-century mystery story. The case, in which the Supreme Court adopted an exception to hearsay for statements of present intention (now found in Federal Rule of Evidence 803(3)), raises the question: Was the deceased John W. Hillmon, who had recently taken out the extraordinary sum of $25,000 in life insurance, or was it Frederick Adolph Walters, an itinerant who had left Iowa a year earlier, and who had wandered about much of the middle of the United States, including Kansas, during that time? Wesson, who first became intrigued by the mystery when taking an evidence course, became obsessed (in a good way, it appears) with solving this enduring mystery, and to my mind, does so. As should always be the case when reviewing a whodunit, I shall not spill her solution. Instead, I will offer some background of the case, and describe Wesson’s interesting and provocative approach to writing about Hillmon.

In March 1879, a man was shot and killed when a bullet discharged from a Sharps rifle in Barbour (now Barber) County, Kan., in the frontier southwestern part of the state. John Brown (apparently no relation to the abolitionist) admitted that he was holding the rifle when it accidentally discharged and a bullet struck John Hillmon in the face, killing him instantly. Hillmon had recently taken out three life insurance policies totaling $25,000, payable to his new bride, Sallie Hillmon, including one policy he had bought just two weeks before his death. The insurance companies refused to pay on the ground of fraud. Given the circumstances of the case, including Hillmon’s relative impecuniosity, the high amount of the insurance, the manner of death, the interest of Sallie’s cousin and Hillmon’s sometime employer, Levi Baldwin, in both the litigation and the insurance proceeds, and the modest inquest in Barbour County—as well as several notorious instances of life insurance fraud that had come to light at about this time—the insurance companies refused to pay Sallie Hillmon. The insurance compa-
nies sought to obtain a release from Sallie Hillmon (they did, but the courts found it unenforceable for a lack of consideration), and eventually agents for the companies began to search for a substitute victim. In early 1880, they learned of a missing person from Iowa named Frederick Adolph Walters. More intriguingly, they learned of the existence of a letter written by Walters to his fiancée in Iowa, Alvina Kasten, in which Walters stated that he was headed to "a part of the Country that I never expect-ed to see when I left home as I am going with a man by the name of Hillmon." This letter was dated March 1, 1879, and was the last letter that Walters ever sent. In the view of the insurance companies, the date of the letter, its contents, and disappearance of Walters were strong circumstantial evidence that the body found in Crooked Creek was Walters'. Even more damning, though still circumstantial evidence, was that Walters spelled Hillmon's name correctly in his letter to Alvina.

Sallie Hillmon sued the insurance companies in federal court, commencing a Dickensian lawsuit spanning nearly a quarter-century, including six (!) trials and two trips to the Supreme Court of the United States. After the third trial and the first verdict (for Sallie Hillmon), the Supreme Court reversed and remanded the case for a new trial. The Court held that the trial court had erred in refusing to admit the March 1, 1879, letter from Walters to his fiancée. It held that the letter, though hearsay, was admissible as a statement of present intention. After three more trials, the last again resulting in a verdict for Hillmon, the Supreme Court again heard and reversed the verdict in 1903. But there was no seventh trial: the last remaining insurance company settled with Hillmon, possibly with each side paying its own costs.

In addition to teaching at the University of Colorado School of Law, Wesson is the author of three mystery novels. (I have read one, which I enjoyed.) Possibly for that reason, Wesson is interested in writing something other than a legal history of this extraordinary case, or a legal history of the development of hearsay and its exceptions in the 19th century, or even a legal history of late 19th-century law and lawyering on or near the Kansas frontier. Instead, Wesson is interested in a character study, in the people, particularly Sallie Hillmon, who plodded their way through trial after trial, as well as in the story of whose body it was. Wesson thus creates something of a triptych in A Death at Crooked Creek. One thread of her story is a recounting of the six trials and two decisions of the Supreme Court. Interestingly, Wesson spends much more time on the trials than on either decision of the Supreme Court, a choice made more difficult by the absence of a transcript in any of the trials (although local papers covered them extensively). A second thread of her story concerns her efforts to exhume the body buried in Lawrence to attempt to determine whether John Hillmon or Walters lies there. Her third thread, generated by her interest in the participants, provides fictional conversations among the real-life actors in this long-running saga. In these conversations, Wesson uses the present tense.

In general, the approach works. Wesson interweaves these three stories throughout each chapter. It is not until the final chapter that she tells the reader whodunit. Her big "reveal" is done cleverly and with brio. And Wesson does not break the rules of the whodunit. She introduces no new characters at the end, and she faithfully provides the reader all the information those investigating the mystery possessed, so the reader can make up his or her own mind.

At the sixth and final trial, Sallie Hillmon's lawyers (who had a significant financial interest in the case) called a witness, Arthur Simmons, who testified that he employed Walters in April and May 1879, which was after the defense had said he'd been killed (that is, after March 17, 1879). This was the first time Simmons testified, and it was the first time anyone had testified to having seen Walters after the middle of March. Wesson also notes that some persons testified to having seen Hillmon after March 1879, usually in New Mexico or farther west, though their testimony was quite suspect. What the reader knows is that, other than Simmons' testimony, we have little or no evidence of either Hillmon or Walters' sur-facing after 1879. The one who did not die simply disappeared.

Though the one who disappeared may have died without ever having contacted family or friends, it seems fair to speculate that others may have assisted in his disappearance. This allows one to consider the possibility of a conspiracy by Sallie, John Brown, and her cousin Levi Baldwin, if Hillmon disappeared, or one by agents for the insurance companies if Walters disappeared. Wesson first chooses to believe that a conspiracy took place. She then creates a fictional dialogue regarding that possible conspiracy. This is the least successful aspect of A Death at Crooked Creek.

Wesson writes well and the stories, despite the numbing nature of trial after trial, move quickly along. A Death at Crooked Creek is a productive mélange of fact and fiction, of then and now, of mystery and science, and an enjoyable meditation on law and persons.

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BLACK SHEEP
BY ROBERT COVELLI
Luna Court Press, Santa Fe, NM, 2013. 356 pages, $18.50.

Reviewed by Christopher Faille

Robert Covelli's new novel takes a look at organized crime, politics, and the decay of old-line industry in the United States. These aren't unusual themes for contemporary fiction, but Black Sheep's setting is somewhat off the beaten literary path. Our story unfolds in Buffalo, N.Y., in the mid-1990s.
Covelli moves backward and forward in time from there—back to the 1960s and the boyhood of his central character, Tasio Pecoranera, and forward to 2010, when Tasio is recollecting the excitement of the Clinton years in his city while he reacts to a federal investigation into his own role in those excitements.

Covelli is considerate as an author, for example making it clear to us up front (literally up front, even before we get to the acknowledgments page) that the proper pronunciation of his protagonist’s surname is “peh ko rah NAY rah.”

Tasio Pecoranera’s paternal uncle, Carlo, was the boss of the reigning crime family in Buffalo back in the 1960s. Tasio’s father, Carlo’s brother Danielo, wanted out of the family business and pursued an academic life—also adopting a radical political stance. But Danielo, the tolerated black sheep of his family, a man known more-or-less fondly on the streets of Buffalo as il Professore, didn’t get very far away from it after all and, when we first learn of him in this book, his life has left an ambivalent legacy for his son.

Steven Malvoglio

At some point between the 1960s and the 1990s—I don’t believe it is ever made very clear just when—Carlo was pressed into a semi-dignified retirement by Steven Malvoglio. Malvoglio presides over the Mob now, in a 1990s “now,” with the assistance of his accountant, Paolo Orlando.

At a meeting with Tasio, Malvoglio mentions that he has made a cassette of love songs for his own enjoyment, a tape that includes “Someone to Watch Over Me” and “Non ti scordar di me.” The stock figure of the sentimental mob boss gets a new twist: this sentimental mob boss actually does his own mixing.

But this twist in the characterization of Malvoglio is more than a play on that cliché. Malvoglio represents something old that has come under siege, and his absorption in the music that is coming through his earphones is a good synecdoche of reality avoidance.

The names I have used in the course of this review already may have served as something of a warning. The “mob” in question here is a specifically Italian-American phenomenon. The names might have come out of an episode of The Sopranos. If you are among those who believes the whole premise is stereotypical, bigoted, or nonsensical, then this book may not be for you.

Let us say it, should it be felt necessary: Italian-American gangsters obviously never represented the whole truth about Italian-Americans, nor the whole truth about organized crime. Nonetheless, that intersection was for a long time very important in several metropolitan areas in the United States, and it would be folly to deny that fact, or to deny novelists their license to make dramatic use of it.

Another fact of recent history: the salad days of the “mafia” are over—have been over for decades. Relatedly, what gets the plot underway in this novel is the rise of an aggressive new crew, a criminal gang not beholden to Malvoglio, though perhaps willing to ally itself with Carlo and the disaffected old-timers around him at Malvoglio’s expense.

For what it’s worth, the name “Malvoglio” may be an allusion to Dante’s Inferno. The eighth circle of hell, where the fraudulent are punished, is subdivided into smaller circles—because fraud has many forms—and these separate caverns are known as the “evil pits” or “malebolge.” The final two-thirds of this besieged boss’ name, “voglio,” not only sounds like “bolge,” it translates, “I want.” So Malvoglio is someone who has placed himself quite voluntarily—who has wanted—a position in the eighth circle of hell.

Andrew Ross

Some of the most enjoyable and sharply drawn characters in this novel seem to inhabit very different worlds from those of the Malvoglios and Orlandos: higher circles of hell, at the least. One of these is worth some discussion even in a brief review: Andrew Ross.

Here is how Ross is first described to us: “Andrew was one of Tasio’s best friends from college. He was slim with shaggy brown hair and a long nose, rich and very liberal. He wore glasses that couldn’t hide his optimism.” Ross is also described as “A sweet guy, he came from money. He wasn’t spoiled so much as acculturated in pedigree. Tasio understood.”

I love that writing. Covelli’s authorial sensibility crosses the mean streets to arrive in a well-stocked library. Andrew wore glasses “that couldn’t hide his optimism”? That pulls you up short. “Why would one expect glasses to hide optimism?” But it makes you think about both visage and attitude, and it’s a conjunction you’ll carry with you. There’s also that lovely phrase, “acculturated in pedigree.” Ross stands for a type of public figure in U.S. politics, someone who may think himself a “man of the people” and be perfectly well-intentioned but who can’t help giving off an air of condescension in the process. Ross needs to have friends with very different sorts of pedigree who will understand.

I’ll offer just one more quote from this eminently quotable book. In one passage, Tasio is alone with a long-time friend and potential love interest, Marianina Vitiello. She warns him to disassociate himself from Ross. The Powers That Be in the city, she says, “don’t want him.” She also says that Andrew will “play both sides.”

A Puzzle

“She was in pain, but when she met his eyes, calm and clear, Marianina was lying, and she knew that Tasio knew she was lying. About something. Then she closed, like an oyster, because the phone rang.”

I applaud that “About something.” I won’t try to explain the two “sides” Marianina has in mind here, although the context makes that fairly clear. The puzzle is whether she is lying about Ross’ willingness to play both sides, or about the fact that “they” don’t want him anyway. Or both points.

I’ll say nothing more, except that I heartily recommend this book. For lawyers in the trenches of criminal prosecution or defense, especially in contexts where the crime is, as the safe term goes, “organized,” Black Sheep will prove both diverting and provoking.

Christopher Faille graduated from Western New England College School of Law in 1982 and became a member of the Connecticut bar soon thereafter. He is at work on a book that will make the quants of Wall Street intelligible to sociologists.

THE CIVIL WAR IN 50 OBJECTS

BY HAROLD HOLZER


Reviewed by Henry S. Cohn

Hardol Holzer, the author and editor of numerous books on Abraham Lincoln, now presents a different twist on the Civil War narrative. He proposes in The Civil War
Holzer discusses the objects in the book chronologically. He starts with "Slack Shackles Intended for a Child" dating from 1860 and a copy of the 13th Amendment, as passed by the House on Jan. 31, 1865, and sent to the states to be ratified. (The Senate had passed it the previous April.) Some of the 50 objects reveal the cultural interests of the Union and the Confederacy during the war. One is a ticket to the April 1864 New York Metropolitan Fair, which was an effort to raise money for wartime relief. Its major feature was a painting of Washington crossing the Delaware that dominated an art gallery that Holzer describes as "cavernous." Another object is a photograph album that leads Holzer to describe American's new interest in "cartes de visite"—small photographic prints the size of, and named for, visiting cards—that people collected. From the South is The First Dixie Reader, from 1864, which, as Holzer writes, "follows a familiar track of early childhood education in the mid-nineteenth century: repetition followed by more repetition."

Several objects involve Abraham Lincoln's personal life. A cast of Lincoln's right hand done in 1860 by Leonard Wells Volk inspired the sculptor Augustus Saint-Gaudens in 1886 in creating a statue that now stands in Lincoln Park in Chicago. Framed leaves from Lincoln's bier give Holzer the opportunity to describe Lincoln's funeral procession in New York City. Clara Harris, who was in Lincoln's box at Ford's Theatre, writes to Mary Lincoln describing her recollections of the terrible event. This leads Holzer to a discussion of a carriage ride that the Lincolns took on the afternoon before they set out for the theater, where their conversation was happy as they looked ahead to a future without war.

One object is a piece of War Department stationery on which Lincoln, during the first week of October 1864, had scrawled a list of the states he expected to win in the upcoming presidential election, together with the electoral vote count of each. The total had Lincoln defeating Democrat George McClellan by only three electoral votes. But Lincoln won the contest overwhelmingly; Sherman's occupation of Atlanta on September 2 had made a Union victory appear inevitable and had given voters more confidence in Lincoln's abilities.

Another object is Francis Bicknell Carpenter's 1865 painting of Lincoln's family in 1861 standing and seated around a White House dining room table. In actuality, the Lincolns never appeared together as depicted; the painting was a fiction. Carpenter also painted from imagination a scene of Lincoln announcing the preliminary Emancipation Proclamation to his cabinet. Carpenter lived at the White House for six months making studies for his portraits. His work was well received by the public and was praised by Mary Lincoln. But he had difficulties with the Lincoln family when he published a book after Lincoln's death entitled The Inner Life of Abraham Lincoln.

Of course, there are numerous items relating to the war itself. One is a bright red Zouave uniform, derived from the Berber tribe of Algeria's Jurjura Mountains, of the type worn by soldiers in one Union division, who were known as "Zouaves." The youngest volunteers in both the Union and Confederate armies carried snare drums; such a drum is one of the objects. Holzer explains that, contrary to legend, the drummer boys were not always on the front lines, but spent most of the time at the rear, tending to the wounded and running errands. A painting from 1891 shows several of the boys playing cards, away from a battlefield.

Among the other objects are broadsides calling for enlistment, including one from Frederick Douglass entitled "Men of Color, to Arms!" which leads Holzer to a discussion of Lincoln's decision to allow freed slaves and other black men to enlist in the Union army. Another object is a footwear of a military surveyor, containing both personal effects such as a shaving kit as well as his measuring instruments. Still another is a cylindrical object called a draft wheel, used to select men for conscription into the Union army. The names of men eligible for the draft were written on slips of paper and dropped into a hole on the side of the wheel. The hole was covered, the wheel was turned, and an official pulled out names of the men to be drafted. The draft wheel leads Holzer to a discussion of the New York draft riots of July 13 through July 16, 1863—one of the worst urban riots in U.S. history.

Also on display is General Grant's letter offering liberal terms of surrender presented to Lee at Appomattox and saved by Ely Parker, a member of Grant's staff. There is also a striking portrait of Grant. We tend to forget today (probably because of his failed presidency) that Grant was as popular after the Civil War as Washington was after the Revolutionary War.

The cruelty of war is reflected in two objects from Union prisoner of war camps: sketches from the camp at Point Lookout in Maryland, and a prison newspaper written by hand at the camp at Fort Delaware. The brutal injuries of war, and the continual amputations that resulted, are reflected in an 1865 letter from a soldier describing his ability to write with a prosthetic arm.

Many of the objects relate to slavery—both its existence and its destruction by the war. These objects include the heartbreaking shackles intended to secure a slave child, a romanticized painting of "Negro Life at the South," an official copy of the Emancipation Proclamation, a drawing of Union troops freeing slaves at Jefferson Davis' plantation, and a vile cartoon mocking Lincoln's efforts to end slavery entitled "The Miscegenation Ball." Two objects illustrate John Brown's raid. One is a pike to be given out at Brown's envisioned slave revolt at Harpers Ferry. Brown had 950 made at a factory in Collinsville, Connecticut, and each is numbered. The New-York Historical Society holds number 101. The other John Brown item is a painting based on a legend that, as Brown was led to the gallows, he reached out and touched an African-American baby, whose mother had brought her to watch Brown's hanging.
The final object is an official copy of the 13th Amendment passed by the House on Jan. 31, 1865. The document bears Lincoln’s signature, which he added the next day, even though a proposed amendment to the Constitution does not require the signature of the President. Holzer speculates that Lincoln signed the document in keeping with his belief that the 13th Amendment “winds the whole thing up.” The battle to end slavery was over.

Holzer expertly examined the collection of the New-York Historical Society, starting with a long list of objects and then selecting the most germane. The choice of some objects, such as the copy of the Emancipation Proclamation, is not surprising, but Holzer also sought out the unusual in making the Civil War come to life.

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AMERICAN FOUNDING SON: JOHN BINGHAM AND THE INVENTION OF THE FOURTEENTH AMENDMENT
BY GERARD N. MAGLIOCCA

Reviewed by Burrus M. Carnahan

In writing American Founding Son, Gerard Magliocca had two goals. The first was to redress the neglect by historians and biographers of John Armor Bingham (1815-1900), a “fascinating man who is largely unknown despite his immense contributions to law and justice.” A second goal was to “create a handy reference work about the Fourteenth Amendment,” based in part on Bingham’s understanding of it. Magliocca is quite successful in attaining his first goal, somewhat less so as to the second.

Magliocca argues that Bingham, while a member of Congress in 1866, drafted “the most important sentence in the Constitution”: the second sentence of the Fourteenth Amendment, prohibiting the states from depriving “any person of life, liberty, or property, without due process of law,” or denying any person “the equal protection of the laws.” The original intent of the framers in drafting the 1787 Constitution has been hotly debated, as has the significance of that intent for contemporary constitutional interpretation. Although the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments is often referred to as a second founding of the American republic, Magliocca notes that there has been little discussion of the original intent of the drafters of those amendments. He hopes to partially fill that gap through this biography of Bingham.

John Bingham was born in 1815 in Mercer, Pennsylvania. When he was 12 his father sent him to live with relatives in Cadiz, Ohio, but Bingham returned to Mercer for a time when he was 16. He maintained contacts in both areas, and he eventually settled in Ohio to practice law. Like Abraham Lincoln, he was initially a member of the Whig party but joined the Republicans after the Whigs dissolved over the slavery issue in the 1850s. Magliocca stresses that the regions where Bingham grew up were centers of anti-slavery opinion, although he concedes that only in 1848 did Bingham speak out against slavery in public. His earliest private expression of opposition to slavery was in an 1845 letter to Salmon P. Chase. From 1855 onward Bingham had a distinguished career in the House of Representatives, and he ended his life of public service as minister to Japan from 1873 to 1885. Returning to Ohio, he died in relative obscurity in 1900.

The main focus of American Founding Son is on Bingham’s years in Congress, where he served as a Republican representative from Ohio from 1855 to 1862 and again from 1865 to 1873. During the first period of his congressional service, his speeches reflected an anti-slavery interpreta-

Many abolitionists believed that the U.S. Constitution was a pro-slavery document, a “covenant with death,” and “an agreement with Hell,” in the words of William Lloyd Garrison. Other opponents of slavery, including Frederick Douglass and Abraham Lincoln as well as Bingham, developed an anti-slavery reading of the document, pointing to the preamble’s statement that it was intended to “secure the Blessings of Liberty,” and that the Founders avoided explicitly referring to slavery. The most extreme proponents of this view argued that the Due Process Clause of the Fifth Amendment prohibited slavery in federal territories and the District of Columbia. Beyond this, they argued that the Bill of Rights applied to the states, relying on a rather tortured interpretation of the Privileges and Immunities Clause in Article IV, section 2, of the Constitution. Bingham eventually allied himself with this expansive theory of the Privileges and Immunities Clause.

Magliocca’s evidence that Bingham was the “founding son” who wrote the second sentence of the Fourteenth Amendment is circumstantial, based largely on Bingham’s longstanding position that the Bill of Rights already applied to the states through the Privileges and Immunities Clause, and his work on the Joint Committee on Reconstruction in 1865-1866, after he was reelected to Congress in 1864. Faced with President Andrew Johnson’s constant opposition to its reconstruction policy, the 86th Congress created the Joint Committee on Reconstruction to craft ways to avoid the President’s veto power over civil rights legislation. The committee of six senators and nine representatives eventually produced the text of the Fourteenth Amendment that was ratified by the states.

Unfortunately, the committee kept only summary minutes, so we do not have a detailed account of its debates similar to Madison’s record of the 1787 Constitutional Convention. Initially, Congressman Bingham proposed an amendment to “empower Congress to pass all necessary and proper laws to secure to all persons in every State of the Union equal protection in their rights, life, liberty, and property.” This proposal, which the committee rejected, would not have created new rights, but would merely have empowered Congress and the federal courts to enforce rights that Bingham believed already existed under the Privileges
and Immunities Clause. When the committee later considered a draft amendment that would have banned racial discrimination by the states, Bingham proposed adding “nor shall any state deny to any person within its jurisdiction the equal protection of the laws, nor take private property without just compensation.” After this language was also rejected, Magliocca states that Bingham “finally convinced his colleagues” to adopt the text now in the second sentence of the Fourteenth Amendment: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

We are not told what arguments Bingham used to convince the rest of the committee to adopt the final text, nor are we told why other committee members rejected Bingham’s earlier proposals. This may be due to the paucity of the evidence, as Magliocca undoubtedly would have included this information had it been available. Based on his earlier proposals, Bingham may well have originated the references to “privileges or immunities, “life, liberty, or property,” and “equal protection” in the Fourteenth Amendment.

What this work does not clarify is the source of the Due Process Clause, which has played such an important part in our constitutional jurisprudence. From what Magliocca has provided, we do not know whether Bingham or another member of the Joint Committee introduced that phrase, or what its author or other members of the Joint Committee thought it meant. Bingham himself seems not to have attached much importance to it. In an 1871 speech, Bingham asserted that the first section of the Fourteenth Amendment extended the Bill of Rights to the states. True to form, however, he attributed that effect to the Privileges or Immunities Clause, not the Due Process Clause.

Although American Founding Son provides valuable information on the origins of the Fourteenth Amendment, it is of limited utility as “a handy reference work about the Fourteenth Amendment.” In addition to underestimating the importance of the Due Process Clause, Bingham consistently asserted that the Fourteenth Amendment did not give the federal government the power to regulate voting in the states, an argument the Supreme Court rejected in Baker v. Carr (1962) and subsequent cases. Even if John Bingham was the primary drafter of the “most important sentence in the Constitution”—the second sentence of the Fourteenth Amendment—and thus a “founding son” of the post-Civil War Constitution, the Supreme Court has already gone far beyond his ideas.

That said, Magliocca has done valuable work in bringing to public attention the story of an interesting and important statesman of the mid-19th century. As an enemy of slavery and advocate for constitutional freedom, John Bingham has been too long neglected.

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testify. The trial court rejected his request for a no-adverse-inference jury instruction regarding his decision not to testify and recommended the death penalty, which the trial court accepted. After exhausting state court avenues, Woodall filed for and received habeas corpus relief from a federal district court. The Sixth Circuit affirmed, concluding that the trial court violated Woodall’s Fifth Amendment privilege against self-incrimination by rejecting his request for a no-adverse-inference jury instruction. In this case, the Supreme Court will have the opportunity to consider whether the rejection of a request for a no-adverse-inference at the penalty phase of a trial, even where the defendant has pled guilty to all charged crimes, violates the Fifth Amendment right against self-incrimination. This case will impact the rights of criminal defendants charged with capital crimes and will clarify prior Supreme Court precedent. www.law.cornell.edu/supct/cert/12-794.


ADDITIONAL BOOK REVIEWS

In addition to the book reviews in the paper copy of this issue of The Federal Lawyer, bonus reviews are included in the online version of the magazine. The following reviews are available at www.fedbar.org/magazine.

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BY RICHARD SANDER AND STUART TAYLOR JR.
Reviewed by Michael Ariens

THE DIVORCE PAPERS
BY SUSAN RIEGER
Reviewed by JoAnn Baca

THE FEDERALIST SOCIETY: HOW CONSERVATIVES TOOK THE LAW BACK FROM LIBERALS
BY MICHAEL AVERY AND DANIELLE McLAUGHLIN
Reviewed by Heidi Boghosian

MURDER AT THE SUPREME COURT: LETHAL CRIMES AND LANDMARK CASES
BY MARTIN CLANCY AND TIM O’BRIEN
Reviewed by Paula Mitchell