Book Reviews

ABRAHAM LINCOLN: PHILOSOPHER STATESMAN

BY JOSEPH R. FORNIERI

Southern Illinois University Press, Carbondale, IL, 2014. 216 pages, $34.50.

LINCOLN'S CAMPAIGN BIOGRAPHIES

BY THOMAS A. HORROCKS

Southern Illinois University Press, Carbondale, IL, 2014. 148 pages, $24.95.

Reviewed by Henry S. Cohn

In *Abraham Lincoln: Philosopher Statesman,* political science professor Joseph R. Fornieri contends that Abraham Lincoln was a great statesman. He identifies six factors that make one a statesman—(1) wisdom, (2) prudence, (3) duty, (4) magnanimity, (5) rhetoric, and (6) patriotism—and he makes the case that Lincoln excelled in them all.

With respect to wisdom, Fornieri shows that Lincoln had knowledge of and respect for Euclidean reasoning. Lincoln read Euclid on his lonely travels through Illinois' Eighth Judicial Circuit, and, according to Fornieri, through his use of Euclidean reasoning, "became adept at reducing a case in terms of its core principle and persuading juries through tersely reasoned arguments. ..."

But Lincoln's wisdom, Fornieri writes, "comes to light not only in his understanding of Euclidean logic, but in his profound knowledge of the Bible in vindicating [the right to govern oneself] against the claims of proslavery theology. ... The self-evident truth of equality was not only known by reason and affirmed by Euclidean logic; it was also confirmed by the biblical teaching of Genesis 1:27, of 'man created in the image of God.'" Lincoln believed that this belief underlay Founders' assertion that all men—not just rich men or white men—were entitled to life, liberty, and the pursuit of happiness.

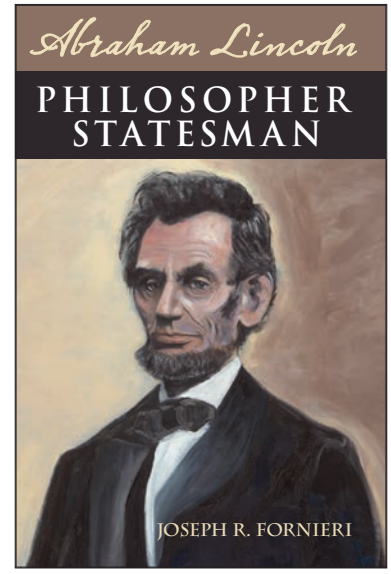
Lincoln's wisdom also consisted in an ability to avoid extreme positions. Relying on Doris Kearns Goodwin's *Team of Rivals*, Fornieri shows Lincoln's great ability to mediate among his strong-willed cabinet members, Secretary of State William H. Seward, Secretary of the Treasury Salmon P. Chase, and Secretary of War Edwin M. Stanton.

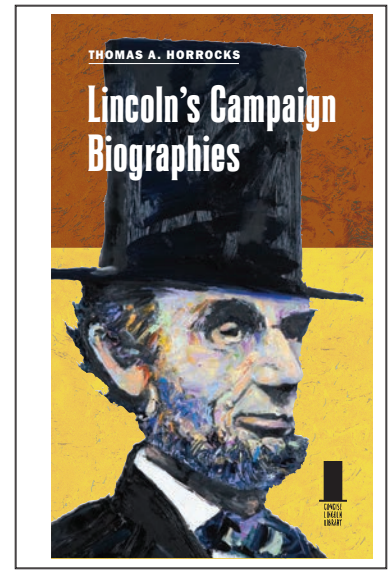
Lincoln, in his wisdom, was interested in science and discovery. Like all ex-Whigs, he urged support for entrepreneurial ventures. Lincoln held a patent on an invention to raise the level of a barge traveling through shallow water. Fornieri quotes from a speech Lincoln gave in New Haven, Connecticut, on March 6, 1860, advocating that every man—black or white—have the chance to "better his condition," to "look forward and hope to be a hired laborer this year and the next, work for himself afterward, and finally to hire men to work for him!"

Fornieri's second principle of statesmanship is prudence, which Lincoln exhibited in issuing the Emancipation Proclamation. He had failed to convince the border states that remained in the union to agree to gradual emancipation. He refused to proclaim that all slaves in the United States were free, believing it not within his authority as President. Under his Article II power as commander in chief, however, he could, as a war measure, free the slaves in the states in rebellion, and, on Jan. 1, 1863, that is what he did in the Emancipation Proclamation. After he issued the proclamation, however, he continued to lobby Congress to enact legislation to fund the voluntary colonization of African-Americans.

Regarding his third principle, duty, Fornieri notes that Lincoln battled to preserve the Union, drawing this duty from the oath of office he took when he became President. Fornieri contrasts Lincoln's recognition of his duty to save the Union with his predecessor James Buchanan's weak response when South Carolina seceded. Lincoln saw his duty to require him to use his full authority under the Constitution and to take extra-constitutional measures as needed. Referring to his suspension of habeas corpus, he asked, "are all the laws, *but one*, to go unexecuted, and the government itself go to pieces, lest that one be violated?"

With regard to the fourth principle of statemanship—magnanimity—Lincoln, according to Fornieri, believed in "Christian humility." Fornieri gives the example of Lincoln's sparing the life of an Indian scout who had stumbled into his camp of volunteers during the Black Hawk War of 1832. Other militia volunteers would have killed the Indian, but Lincoln, who was their captain, intervened. Another example of Lincoln's magnanimity came in 1858, when, after the Illinois legislature chose Stephen A. Douglas over Lincoln for the U.S. Senate, Lincoln expressed pride, "in my passing speck of time, to contribute an humble mite" toward ending slavery. The crowning example is Lincoln's second inaugural address ("With malice toward none; with charity for all"), which, as religious historian Mark Noll points out, is filled





"with humility and charity" as opposed to "the self-righteousness and vindictiveness of northern clergy members," such as Henry Ward Beecher.

The strongest section of the book is Fornieri's discussion of Lincoln's rhetorical ability. He contrasts Lincoln's straightforwardness with Douglas' pandering and deceit during the 1858 debates. A good example of Lincoln's rhetorical ability occurred in the March 5, 1860, speech in Hartford, Conn., in which he compared slavery to a venomous snake. He noted that, whereas he might seize a stick and kill the snake if he saw it crawling in the road, "if I found that snake in bed with my children, that would be another question. I might hurt the children more than the snake, and it might bite them." And he certainly wouldn't take a batch of snakes and put them in "a bed newly made up, to which the children were to be taken." The snake in a bed with the children represented slavery in the states where it existed, and the newly made-up bed represented the territories. Fornieri writes that, while the speech "rejects the moral relativism of popular sovereignty [Stephen Douglas' plan to allow each territory to vote whether to allow slavery] by likening slavery to a snake, a symbol of evil in the Bible, it also conveys the need for prudence in how to handle this evil in different circumstances."

Fornieri's last principle is patriotism. Even Alexander Stevens, the vice president of the Confederacy, declared that Lincoln was a devoted patriot. Fornieri also shows that Lincoln endorsed patriotism in his 1852 eulogy for Henry Clay: "He burned with zeal for [the country's] advancement, prosperity and glory. ..." In addition, Lincoln always treasured Parson Weems' biography of George Washington, from which the tale of the cherry tree derives. Thus concludes Fornieri's demonstration of Lincoln's statesmanship.

Less philosophical but more practical views of Lincoln's stature were presented in the numerous campaign biographies of Lincoln issued in the years that he ran for President: 1860 and 1864. These biographies are the subject of *Lincoln's Campaign Biographies,* an excellent book by Thomas A. Horrocks, a librarian at Brown University. Horrocks describes presidential campaign publications such as almanacs, broadsides, newspapers published by political parties, illustrated magazines, sheet music, and songsters, which were collections of songs in booklets ranging from 20 to 75 pages. In 1824, the first campaign biography appeared in the election contest between John Quincy Adams and Andrew Jackson, which Adams won by a narrow margin. "The famous 1840 'Log Cabin' presidential campaign," writes Horrock, "is a prime example of a political party, in this case the Whigs, using print in innovative and remarkably effective ways. ... Linked to a popular slogan, 'Tippecanoe and Tyler Too,' the party promoted its candidate, General William Henry Harrison, a man born into a wealthy Virginia family, as a rustic, hard-cider-drinking man who wore a coonskin hat and lived in a simple log cabin. His opponent, President Martin Van Buren, whose origins were more humble than those of Harrison, was portrayed by the Whigs as an elite fop. ..."

The earliest attempt at a biography of Lincoln occurred just after the Lincoln-Douglas debates of 1858. The first draft was by Lincoln himself and sent to his friend, attorney Jesse Fell. It had only 606 words. The biography was then revised by Joseph J. Lewis, a Pennsylvania Republican activist, and printed in the *Chester County Times* in February 1860. This account became a major source for the multiple biographies issued immediately after Lincoln's nomination at the Wigwam convention center in Chicago in May 1860. One of the biographies was written by William Dean Howells, later appointed by Lincoln as consul to Venice, and also a novelist and confidant of Mark Twain.

The first Lincoln biography in 1860 was a pamphlet written in haste by John Locke Scripps. It gave Lincoln's first name as "Abram." Later in the campaign, Scripps decided to turn it into a book, and he asked Lincoln for more information about himself. Lincoln at first declined: "[I]t is a great piece of folly to attempt to make anything out of my early life. It can all be condensed into a single sentence, and that sentence you will find in Gray's Elegy: 'The short and simple annals of the poor.'" Lincoln later relented and sent Scripps an expanded draft of the 1858 Fell-Lewis biography.

Lincoln expected all his biographers to be accurate, but they filled their books with exaggerated tales about his studying as a boy by the firelight, his mighty efforts to split rails, his military successes in the Black Hawk War, and his trips by flatboat to New Orleans. Scripps claimed in his book that Lincoln had studied *Plutarch's Lives*, and when Lincoln told him that he had not, Scripps begged him to read it. Scripps' book sold more than 100,000 copies, and Lincoln rewarded him by appointing him postmaster of Chicago.

Horrocks details the subjects that the various Lincoln biographies addressed. Lincoln's early life in New Salem was an essential. This would include his wrestling victory over the "Clary Grove Boys" that earned him notoriety and led to his first successful campaign for the Illinois House of Representatives. The biographies ignored Lincoln's legal career, except for the story of the "Almanac Trial," in which Lincoln cross-examined the main prosecution witness about visibility under moonlight.

The biographies were careful in their telling of Lincoln's sole term in the U.S. House of Representatives, from 1847 to 1849. They admitted that Lincoln opposed the Mexican War, as did many Whigs, but also declared that he never voted against providing financial support to the soldiers in battle. Other than giving the names of Lincoln's wife and children, most biographies ignored Lincoln's family life. Of course, Lincoln's propensity for telling "little stories," some off-color, never found its way into these volumes.

The 1864 biographies had to deal with the difficulties that the Union army was facing in the war. These books did not abandon the earlier "rail-splitter" image, but they added the touch that the President was "Father Abraham," and they trumpeted the successes of Lincoln's first administration.

Books published in opposition to Lincoln in 1864 portrayed him with negative images, including one with racist drawings as an African king. Horrocks shows that the attempt of Lincoln's opponent George McClellan at biography backfired when his political writers related that he supported a negotiated settlement to the war. When Sherman burned Atlanta, the public turned on McClellan, rejuvenating the Lincoln campaign.

In their books, Horrocks and Fornieri both show how others saw Lincoln in a most positive light. Horrocks' *Lincoln's Campaign Biographies* is a vivid and well-organized review of 19th-century writings, whereas Fornieri's *Abraham Lincoln: Philosopher Statesman* is a looser collection of favorable information designed to prove that Lincoln satisfies Fornieri's criteria for being a statesman. ⊙

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DO GREAT CASES MAKE BAD LAW?

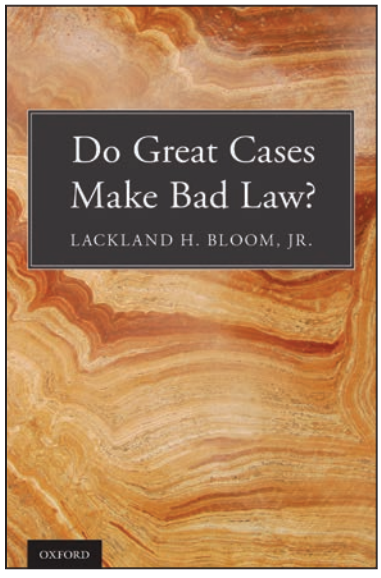
BY LACKLAND H. BLOOM JR.

Oxford University Press, New York, NY, 2014.
435 pages, $99.95.

Reviewed by Louis Fisher

As one might expect from its title and from a table of contents that identifies 24 major Supreme Court cases, from *Marbury v. Madison* to the recent Affordable Care Act case, *National Federation of Independent Business v. Sebelius*, this book by Lackland Bloom is one of exceptional breadth and depth. It explores great cases not only with legal analysis but within their social, historical, and political framework. No matter how familiar these cases are to you, you will find the book stimulating, rich, and perceptive, provoking fresh thoughts about core constitutional issues. Thoroughly researched, with close analyses of lower court decisions and briefs and oral arguments before the Supreme Court, it includes citations of value to any researcher.

Bloom takes direction from the familiar language in Justice Oliver Wendell Holmes' dissent in *Northern Securities Company v. United States* (1904). Holmes wrote: "Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend."



A major task for Bloom is to identify great cases that made bad law and those that helped create more positive and enduring constitutional principles. Although he recognizes substantial shortcomings with Chief Justice John Marshall's opinion in *Marbury v. Madison*, he describes it as "a masterwork of the greatest justice. Its prestige has grown over time." It "did not simply produce good law" but also "profound and enduring law." But its shortcomings, in fact, are quite pronounced. William Marbury and his colleagues had no legal grounds to take their case directly to the Supreme Court, as it did not fall within the Court's original jurisdiction. Bloom explains that Marshall, writing for a unanimous Court, dismissed Marbury's suit "for lack of jurisdiction." Bloom continues: "It has long been a precept of Anglo-American jurisprudence that a court's first duty is to determine whether it has jurisdiction and if it does not, to dismiss the case."

Under that understanding of the clear limits on judicial authority, the Court should have rejected Marbury's case with a half-page explanation. Everything Marshall said later in the opinion was pure dicta, including Marbury's "right" to his commission, the lecture Marshall decided to deliver to President Jefferson, and Marshall's analysis of section 13 of the Judiciary Act of 1789, which he supposedly struck down (having no jurisdiction to do so). Bloom writes: "With no analysis whatsoever, Marshall declared that the Judiciary Act of 1789 gave the Supreme Court original jurisdiction in a case in which a party was seeking a writ of mandamus against a government official. This is arguably the weakest link in Marshall's chain of reasoning." First, the Court had no jurisdiction to find supposed defects in a statutory provision. Second, section 13 clearly states that federal courts have power to issue writs of mandamus in cases of "appellate jurisdiction from the circuit courts and courts of several states." Marbury's suit was not one of appellate jurisdiction.

To Bloom, Marshall's interpretation of the Judiciary Act of 1789 "was eccentric." Eccentric means deviating from established patterns. Marshall went beyond that. With no jurisdiction, he proceeded to find fault with a statutory provision. That is not being eccentric; it is judicial overreach and abuse. How would we respond today if a court decided it lacked jurisdiction to hear a case but proceeded to make new law and invalidate a statutory provision? Bloom remarks: "It is difficult to resist the conclusion that Marshall was determined to reach the issue of constitutionality no matter what." "No matter what" is not the kind of jurisprudence or legal reasoning we should tolerate in courts. Why is *Marbury*, in Bloom's words, "a highly revered decision," or, as Leonard Baker called it, "one of civilizations finest hours, one of mankind's greatest achievements"?

Bloom observes that Marshall himself found fault with *Marbury*, protesting in *Cohens v. Virginia* (1821) about its "overly broad dicta." In *Cohens*, Marshall objected that litigants read his 1803 opinion carelessly, failing to limit themselves to its core holding: that the Court did not have jurisdiction to hear the case. Some of the language in *Marbury*, Marshall said, was not only too broad "but in some instances contradictory to its principle." Yet the legal profession continues to pay more attention to Marshall's dicta than to his holding.

Courts and scholars regularly claim that *Marbury* established the Supreme Court as the final word on the meaning of the Constitution, relying on this sentence by Marshall: "It is emphatically the province and duty of the judicial department to say what the law is." Repeat that as often as you like, but it simply means that courts decide cases, which we all know. Try rewriting the sentence in this manner: "It is emphatically the province and duty of the legislative department to say what the law is." That's another truism, but it does not establish legislative supremacy over the meaning of the Constitution.

During the Senate impeachment trial of Justice Samuel Chase, Marshall wrote to Chase on Jan. 23, 1805, recommending that the modern doctrine of impeachment "should yield to an appellate jurisdiction in the legislature. A reversal of those legal opinions deemed unsound by the legislature would certainly better comport with the mildness of our character than [would] a removal of the Judge who has rendered them unknowing of his fault." Those are not the words of someone who championed judicial supremacy.

Bloom describes *McCulloch v. Maryland* (1819) as "[a]rguably ... the greatest of the great cases ever decided by the Supreme Court," an opinion "widely considered to be one of if not the greatest in Supreme Court history." Instead of declaring the U.S. Bank illegal, a step Bloom says "would be quite destabilizing," Marshall "declared that greater deference should be accorded congressional legislation." Bloom properly says that, in *Marbury v. Madison*, Marshall gave no such

deference to section 13: "It is worth noting that Marshall hardly gave Congress the benefit of the doubt 16 years earlier when deciding *Marbury v. Madison*." No doubt *McCulloch* is an important case in interpreting federal-state powers and the Necessary and Proper Clause, but Bloom finds parts of Marshall's decision "disingenuous and unpersuasive." Great as the case may have been, "it was simply not the type of issue that could be settled by a Supreme Court opinion." Bloom notes that President Andrew Jackson would later veto a bill authorizing the U.S. Bank, using independent presidential power to interpret a bill rather than be bound by *McCulloch*. Also, Congress could at any time decide independently whether to authorize or discontinue the bank, a judgment over which the Court had no control.

Into the category of bad law Bloom places *Dred Scott v. Sandford*. Chief Justice Roger Taney's "reliance on history was so selective as to be disingenuous" and needlessly fashioned a broad opinion when a more narrow approach was available and more prudent. The breadth of Taney's ruling was an effort to impose a judicial solution on a divisive issue that went "well beyond the Court's ability to resolve." The Court reached out to decide "crucial issues that it could have and should have avoided."

Hepburn v. Griswold (1870), which struck down the Legal Tender Act to the extent that it authorized the use of paper money to discharge debts, is another case that Bloom says "made bad law." After the retirement of one justice and the appointment of two new ones, the Court a year later in the *Legal Tender Cases* reversed itself and upheld the statute. Because of this quick turnaround, Chief Justice Charles Evans Hughes selected these two cases as one of three self-inflicted wounds on the Supreme Court.

In the Civil Rights Act of 1875, Congress passed legislation to provide blacks equal accommodation to such public facilities as restaurants, hotels, railroads, and theaters. Eight years later, in the *Civil Rights Cases*, the Court struck down the statute. It was not until the Civil Rights Act of 1964 that the nation had an equal accommodations law. From the "standpoint of the quest for racial equality," Bloom says the Court "made very bad law." Yet he maintains that the Court released "an arguably correct decision," even though he concedes that Justice John Harlan issued a "vigorous dissent," which, he adds, was "dismissed as strange and eccentric at the time." In fact, Harlan's legal reasoning was meticulous, well-argued, and persuasively rejected the majority's conclusion that the statute impermissibly interfered with private relationships. To Bloom, the movement to expunge racial injustice would have been easier had the Court not invalidated the 1875 statute: "From that standpoint, the case made bad law."

In *Pollock v. Farmers' Loan & Trust Co.* (1895), the Court initially split 4-4 on the constitutionality of a federal income tax. Justice Howell Jackson was ill and did not participate. Six weeks later, the Court issued a second decision in the case, with Jackson voting to uphold the tax, but the Court struck it down 5-4. It appears that someone had switched his vote, but Bloom raises the possibility that the tabulation of votes might have been incorrect in the initial decision. Bloom regards the second *Pollock* decision as great but "bad in the sense that it was almost certainly wrong as a matter of precedent and from the standpoint of the appropriate institutional role of the Court." Chief Justice Hughes selected this decision as another self-inflicted judicial wound. In any event, the Sixteenth Amendment, ratified in 1913, overturned the second *Pollock* decision and empowered Congress to tax incomes.

Turning to the Steel Seizure Case of 1952, *Youngstown Co. v. Sawyer*, Bloom praises Justice Robert Jackson's concurrence as "elegant and nuanced." He sees it as representing "the starting point for separation of powers analysis," and finds it "one of the most influential opinions of the twentieth century." Well put. The concurrence is a starting point, and nothing more. Before itemizing his three categories to analyze presidential power, Jackson called his itemization "over-simplified," as indeed it is. His framework is easily gamed, as evident when *The New York Times* broke the story that the Bush administration, after Sept. 11, 2001, had been conducting warrantless electronic surveillance. Two attorneys from the Congressional Research Service concluded that the activity fell into the lowest of Jackson's categories because President George W. Bush was acting against statutory policy, the Foreign Intelligence Surveillance Act of 1978. A month later, however, the Justice Department relied on Jackson's framework to place Bush's action in the highest category, because he was acting with the support of the Authorization for Use of Military Force of Sept. 18, 2001.

To Bloom, *Brown v. Board of Education* (1954) is "the most important" case of the 20th century "and arguably the most significant case in the Court's history." The Court, as an institution, could not claim too much credit for it. The Court was, after all, reversing its "separate but equal" doctrine of racial discrimination announced in *Plessy v. Ferguson* (1896). Also, Bloom acknowledges that the "gradualism" endorsed in the implementation decision of *Brown v. Board of Education* (1955) "has been widely criticized; however it seems to have been the inevitable price of unanimity in *Brown I*." *Brown I*, he says, "provided little doctrinal guidance. As such it did not make great law so much as light the way to it." Significant progress came not from the courts but from the elected branches when they passed such legislation as the Civil Rights Act of 1964 and the Voting Rights Act of 1965.

As for *Roe v. Wade* (1973), Bloom regards it as "the most controversial case" decided by the Court since *Dred Scott*. "There is a consensus that Justice Blackmun wrote a very bad opinion" and that the decision, whether right or wrong, advanced a legal justification that was "wholly inadequate." The widely attacked trimester framework in *Roe* was jettisoned by *Planned Parenthood of Pennsylvania v. Casey* almost two decades later, in 1992.

Space does not permit treatment of other decisions that Bloom analyzes, including *Gibbons v. Ogden* (1824), *Prigg v. Pennsylvania* (1842), *The Slaughter-House Cases* (1873), *NLRB v. Jones & Laughlin Steel Corp.* (1937), *Dennis v. United States* (1951), reapportionment cases including *Baker v. Carr* (1962) and *Reynolds v. Sims* (1964), *New York Times v. Sullivan* (1964), *Miranda v. Arizona* (1966), the Pentagon Papers Case (1971), *United States v. Nixon* (1974), four affirmative action cases (*Regents of the University of California v. Bakke* (1978), *Grutter v. Bollinger* (2003), *Gratz v. Bollinger* (2003), and *Fisher v. University of Texas* (2013)), *Bush v. Gore* (2000), and *National Federation of Independent Business v. Sebelius* (2012). As with the other cases, the quality of those decisions depended in large part on contributions made in briefs and oral arguments, the decisiveness (or lack of it) of certain justices, time available to write a coherent opinion and build a consensus, and political influences on the Court captured in Holmes' reference to "hydraulic pressure." ⊙

Louis Fisher is scholar in residence at the Constitution Project and visiting professor at the William & Mary Law School. From 1970–2010, he served at the Library of Congress as a senior specialist in separation of powers with the Congressional Research Service and specialist in constitutional law with the Law Library. He is the author of more than 20 books, including The Law of the Executive Branch: Presidential Power *(Oxford University Press, 2014). His personal Web page can be found at loufisher.org.*

JUDGING STATUTES

BY ROBERT A. KATZMANN

Oxford University Press, New York, NY, 2014.
171 pages, $24.95.

Reviewed by Paul Vamvas

Ask even most educated Americans what the Supreme Court does, and they will likely answer that it decides questions of constitutional law. But in fact the high court and most lower federal courts spend much more time parsing the meaning of laws passed by Congress, and in doing so they have a much more direct effect on our lives than they do when deciding most big constitutional questions. A case in point: the Supreme Court's recent decision to hear a challenge to the federal subsidies in the Affordable Care Act.

The question in this case is whether the statute provides the subsidies only to people who bought insurance through state-run exchanges, or also to people who bought insurance through the federal government's marketplace. The language of the statute suggests one possible answer, the history of the legislation might suggest another. Hence the need for statutory interpretation and, more to the point here, the value of reading Robert Katzmann's new book, *Judging Statutes*.

Katzmann is chief judge of the U.S. Court of Appeals for the Second Circuit and has a Ph.D. in political science. His background may lead non-lawyers to shy away from the book for fear of drowning in a morass of legal and scholarly terminology and the kind of arcane distinctions that only the deeply geeky would care about. That would be a mistake, because in only 105 pages of text *Judging Statutes* ably explains the major questions judges face when they interpret the nation's laws.

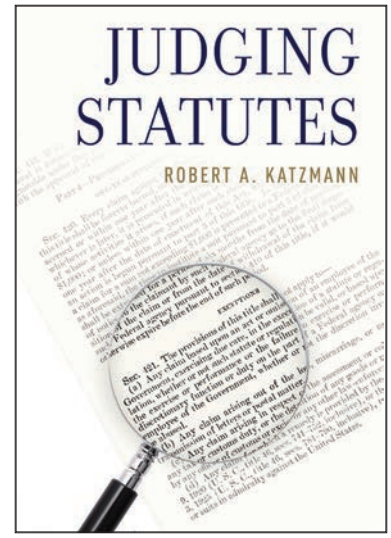
Katzmann addresses the debate between those who believe that the text of a statute is all that a judge needs to consider, and those who see value in looking at the legislative history of an ambiguous law. He leaves no doubt of his opinion, writing, "It seems to me that the fundamental task for the judge is to determine what Congress was trying to do in passing the law. In other words the task is to interpret language in light of the statute's purpose(s) as enacted by legislators, with particular attention to those legislative materials that reliably contribute to understanding the statute's meaning." He concedes that this "purposive" approach can be difficult, but, to abandon it, he writes, "means that judges will interpret statutes unmoored from the reality of the legislative process and what the legislators were seeking to do."

But, though he makes his purposive preference clear, Katzmann gives the "textualist" approach a fair description and hearing. The textualist critique of legislative history, he notes, has at least four elements. The first is that "the only legitimate law is text that both chambers and the President have approved." Those who rely on this claim argue that, because "legislators do not review legislative history, that history lacks authority." The second part of the textualist critique is that using legislative history "impermissibly increases the discretion of judges to roam through the wide range of often inconsistent materials and rely on those that suit their position." The third component argues that legislators will be forced to write less ambiguous statutes if they know that the courts cannot consult legislative history as an interpretive aid. Finally, the textualist critique charges that judges' use of legislative history encourages legislators to write unclear statutes (expecting courts and administrators to clarify them) in order to serve interest groups that contribute money to their re-election. Katzmann cites "Justice Scalia's lament about committee report language written by lawyer-lobbyists at the behest of client groups, and about committees that serve client interests" by "using committee reports to memorialize transactions about which the whole Congress is not aware." This last argument Katzmann says has become a less important part of the textualist critique, which has come to focus more on the first two of the four elements.

Whichever side of the purposive/textualist divide one is on, Katzmann performs a service by examining how legislative history is developed and why some types of it are more credible and helpful than others. Here he finds support even from the conservative end of the judicial spectrum, quoting Chief Justice John Robert's statement at his confirmation hearings that "[a]ll legislative history is not created equal. There's a difference between the weight you give a conference report and the weight you give the statement of one legislator on the floor." Indeed, Katzmann argues, there are all sorts of differences and nuances in the value of a law's legislative history and the process by which it came to be. There are committee reports, conference committee reports, and joint statements of conferees who drafted the final version of the bill. There are time pressures, compromises made to reach an agreement, and the work of the legislative counsel offices. "The degree to which these norms and practices shape both the drafting process and also legislative expectations about how laws should be understood is not commonly known within the judiciary," Katzmann observes unhappily, and "[h]aving a better understanding of legislative lawmaking can only better prepare judges to undertake their interpretive responsibilities."

Katzmann also talks about the effect that agencies have on the laws they are charged with implementing and how judges should look at that process when they interpret a statute. He demystifies the canons of statutory construction that judges use to address ambiguity and looks at whether judges and members of Congress even speak the same language. Finally, preventing the book from becoming too abstract, Katzmann examines three decisions he wrote and how they fared when they got to the Supreme Court.

Judging Statutes leaves the reader with a better understanding of lawmaking, legal



interpretation, and the roles of the various actors in this ongoing drama that affects all our lives. ⊙

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A SPY AMONG FRIENDS: KIM PHILBY AND THE GREAT BETRAYAL

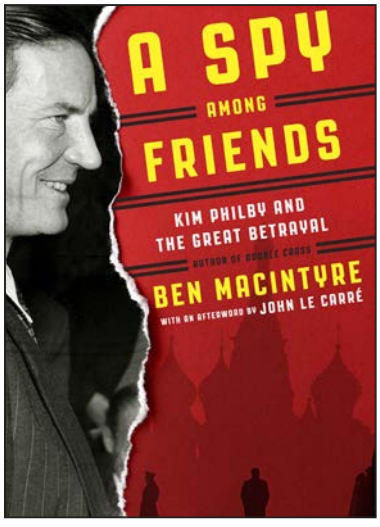
BY BEN MACINTYRE

Crown Publishers, New York, NY, 2014.
368 pages, $27.

Reviewed by Elizabeth Kelley

If you enjoyed John Le Carré's *Tinker Tailor Soldier Spy* or PBS' production of *The Bletchley Circle,* then you will surely enjoy *A Spy Among Friends: Kim Philby and The Great Betrayal*, by Ben Macintyre. Harold Adrian Russell ("Kim") Philby, was born into a British upper-crust family in 1912 and died in 1988. The book jacket notes that he was "the greatest spy in history," and this is not an exaggeration. While working for MI6, Britain's foreign intelligence agency, Philby was also providing information to the Soviet Union. As Macintyre points out, the nickname "Kim" coined by his father was particularly apt, as Rudyard Kipling's character of that name also had the ability to move between two worlds.

Macintyre is the author of several best-selling books about espionage, but *A Spy Among Friends* is much more than a spy thriller or even a biography of Philby. Rather, the book is about the complex relationship between Philby; his colleague at MI6, Nicholas Elliott; and American James Angleton, who eventually rose to become the CIA's counterintelligence chief. For decades, Elliott was a close friend of Philby's. When suspicion of Philby's life as a double agent began to emerge, Elliott was his staunchest defender. Angleton had met Philby early in his career, and idolized him. When Philby was stationed in the United States from 1949 until 1951, Angleton regularly lunched with him at Washington, D.C.'s Harvey's Restaurant. Over martinis and oysters, Angleton freely and without reservation shared information with him on CIA activities, and Philby no doubt passed this intelligence on to the Soviets. When Philby defected to the Soviet Union in 1963 and the full extent of his espionage was exposed, both Elliott and Angleton felt personally and supremely betrayed.



How, then, was Philby able to move so easily between two worlds, particularly at the height of the Cold War? Macintyre does a fine job of painting the manners and mores of English society of that era and showing how Philby's pedigree, education, and conduct preserved his cover, or covers. Philby's father was Sir John Philby, a member of the Indian Civil Service and an advisor to King Ibn Saud of Saudi Arabia. Philby was educated at Cambridge. He belonged to the right clubs and socialized with the right people. He cut a handsome and charming figure. Certainly, no one who so perfectly embodied the establishment could betray the establishment.

If *A Spy Among Friends* has any weakness, it is that it devotes too little time to examining why Philby worked for the Soviets. We are told that he was repulsed by the Nazis, and that is a plausible explanation until the end of World War II. But why, then, did he continue, particularly during the remaining brutal years of Stalin's regime?

Just as we marvel at how Philby was able to escape detection, so, too, we wonder about how he was able to avoid prosecution by either the British or American governments. Again, much can be explained by England's vaunted sense of pride and decorum. Had Philby been tried in London, the extent and length of his perfidy would have been hugely embarrassing. So British authorities offered him immunity in return for a complete confession and full cooperation, and they insisted, all evidence to the contrary, that Philby's espionage had ceased in 1949—before he was stationed in the United States. This was done in order to avoid his extradition to the United States, which would have made the offer of immunity meaningless.

For those of us who are used to having our clients taken into custody, Philby's final years are extraordinary. He was initially under investigation as early as 1951, after the escape from America of a British spy whom he allegedly had tipped off. Philby was eventually cleared, but he still lived under suspicion. Although he had resigned from MI6 and had difficulty maintaining stable employment, he preserved the patina of a gentleman. Approximately 10 years later, his treachery was fully revealed. Even after being confronted by and confessing to Elliott, Philby was allowed to remain free and roam the streets of Beirut, where he was worked as a journalist until he escaped to Moscow. *A Spy Among Friends* makes the case that this was exactly what Britain wanted and intended—that Philby would disappear and gradually fade from memory, with Britain preserving as much dignity and suffering as little embarrassment as possible. Given the lifelong friendship between Elliott and Philby, one can also argue that neither Elliott nor any of the others in his orbit wanted to see Philby's head placed in a noose. ⊙

Elizabeth Kelley is a criminal defense lawyer based in Spokane, Washington. 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.

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