

Government Takings

By John Martinez

Thomson/West, Eagan, MN, 2006. Looseleaf, \$225.00.

REVIEWED BY ROBERT MELTZ

Takings law is beginning to show its age. Its birth went largely unnoticed. The blessed event occurred in the late 19th century, when the Supreme Court first approved the use of the Fifth Amendment's Takings Clause in lawsuits against the government that were brought by property owners, as opposed to the then familiar suits in which the government formally invoked eminent domain to sue the property owner. Back then, however, the Court only recognized such property owner-initiated "takings actions" (later dubbed "inverse condemnation") for physical occupations of land, as by water backing up from a government dam.

Takings law entered its adolescence in 1922, when the Supreme Court expanded the availability of takings actions to include mere government restrictions of property use, in the absence of any physical invasion—what are now called "regulatory takings." And the law eased into adulthood in 1978, when the Court began a sustained effort, which continues today, to develop a coherent framework for discerning what a taking is. The first two decades of this period included several decisions setting out new per se rules for takings (specifying situations that automatically constitute takings), such as when the government engages in the permanent physical occupation of land or enacts a regulation that totally eliminates the economic use of land. Other decisions in these decades announced new types of takings, such as the exaction taking for dedication preconditions on land development approvals (requiring landowners to dedicate a portion of their parcel to public use). This period coincided with the rise of political conservatism and the appointment to the Supreme Court of justices who were intent on a more muscular Takings Clause. This was also a time when a robust "property rights

movement" saw in the Takings Clause a potential fetter on the regulatory state and supported litigation and legislation to achieve that result. For a while it looked as if this effort might succeed.

Beginning in 2001, however, the Supreme Court rendered a series of decisions suggesting its retreat from an expansive vision of the Takings Clause. These latest decisions make clear that the per se rules of takings law are confined to narrow special cases. The default test—the one to be used in the large majority of cases where no per se rule applies—is the ad hoc, case-by-case, multifactor balancing test announced in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), under which takings are rarely found. Even though the Supreme Court has lauded the balancing test, the Court has rarely applied it to find a taking, outside of some cases in which the Court found that special facts made one of the *Penn Central* balancing factors dispositive and thereby created a new per se rule. Moreover, a Supreme Court test announced in 1980, stating that a taking results when the government action fails to substantially advance a proper government interest, was completely jettisoned by the Court in 2005 as a mistake. Finally, in 2005 the Court prominently linked its takings tests, except for the exaction tests, to a single touchstone: the functional equivalence of the government action with an outright appropriation of property or a physical ouster from property. With the Court so anchored to the original 18th- and 19th-century understanding of the Takings Clause, it seems clear that government regulations will have to constrain property use to a rather severe degree before the Court will find that the action is a government taking.

This is not to say that takings claims are no longer being filed, or won, but only that the successful cases seem to principally involve either physical takings (the first type to be recognized) or regulatory takings with some kinship to physical takings. Establishing a taking claim based solely on a land use restriction that removes one or a few of the economic uses of a tract, leaving

others intact, is an uphill climb for the plaintiff.

With the bloom off the takings rose because of these recent decisions, one might think that law professor John Martinez's new treatise is a bit behind the curve. But it is not. *Government Takings* makes a unique contribution in the first part of the book by taking the perspective of the litigator, while most other treatises in the field confine themselves to recitations of substantive case law. More specifically, the author offers a ten-step process for preparing to litigate a takings case, stressing the many threshold issues that can derail a takings case before it reaches the merits. These issues include ripeness concerns, federal court abstention, and exhaustion of both administrative and judicial remedies. Ripeness in particular remains a *bête noir* of the property owner seeking to litigate a federal takings claim against a state or local government in federal court. Indeed, four of the Supreme Court's conservative justices recently opined that the current ripeness rule, requiring the plaintiff in federal court to first exhaust state court remedies, may be ready for the dust bin of history.

Takings law does not stand alone, of course. Takings claims are often joined with others alleging violations of substantive due process, equal protection, Fourth Amendment search-and-seizure restrictions, or breach of contract. Also, several states have adopted legislation dealing with property rights that offers the use-restricted landowner a lower-than-constitutional threshold for obtaining compensation. These alternative theories offer the landowner some possibility of relief in situations where the Takings Clause may not do so. Martinez carefully guides the reader through this neighboring terrain, notwithstanding the title of his work.

Government Takings also alerts the reader to the very different issues that may arise in takings claims against the federal government, as opposed to those against a state. Of course, there is

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the obvious difference that the United States is subject only to the Takings Clause in the U.S. Constitution, whereas the states are subject to takings clauses in both the federal and state constitutions. In addition, however, there are wide differences in ripeness requirements, the courts that have jurisdiction, and to some extent, the substantive law. The treatise reviews many of these divergences.

That said, however, the book contains some features that can only be described as quirky. Martinez cites Utah cases and statutes disproportionately, even though that state can hardly be described as the major wellspring of takings jurisprudence. (California probably holds that honor, along with the U.S. Court of Federal Claims and the Federal Circuit in Washington, D.C.) Unfortunately, the author's description of substantive takings law—the meaning of the all-important *Penn Central* factors, the bounds of the *Lucas* total-taking test, the concept of “background principles,” and so on—is on the light side, though this gap is filled by other treatises. In contrast, Martinez gives extended treatment to judicial takings and the role of sovereign immunity in establishing takings liability, though these issues arise in few cases. And almost half the book consists of reprinted court decisions.

At this point, it is unclear where takings law is headed. Some commentators hold that the Supreme Court's next focus will be the “parcel as a whole” doctrine: the principle that takings analysis must assess the impact of the government action on the entire parcel, not just on the affected portion. Defining the parcel as a whole in a given case is often outcome-determinative, and the conservatives on the Court have been expressing discomfort with the absolute, government-friendly nature of the doctrine for decades. Other possibilities for judicial examination in the foreseeable future include abandoning or confining the state exhaustion rule for ripening takings claims, which, as noted above, is criticized by the conservative justices. And there is always the possibility that maybe—just maybe—the Supreme Court will tell us

a little more about what the newly re-born, ubiquitous *Penn Central* factors mean. *Government Takings* is a useful and readable—but incomplete—contribution to understanding where we are now and suggests some options for how takings law might evolve in the future. **TFL**

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Cornerstone of Liberty: Property Rights in 21st Century America

By Timothy Sandefur

Cato Institute, Washington, DC, 2006. 155 pages, \$19.95.

REVIEWED BY CAROL A. SIGMOND

Timothy Sandefur's premise in *Cornerstone of Liberty: Property Rights in 21st Century America* is that *Kelo v. City of New London*, 545 U.S. 469 (2005), was wrongly analyzed and decided. In *Kelo*, the Supreme Court, by a vote of 5 to 4, found that a government's taking of private property, in order to transfer it to a private party for purposes of economic development, did not violate the Fifth Amendment's Takings Clause, which allows the government to take private property for *public* use. Reasonable people will no doubt continue to disagree as to whether, as Justice Kennedy said in his concurrence, a taking need only be “rationally related to a conceivable public purpose.” Even most critics, however, do not object to the Supreme Court's use of a balancing test to decide cases involving property rights. The usual objection to *Kelo* is that the Supreme Court did not evaluate the evidence properly and therefore struck the wrong balance.

Sandefur goes much further, however. He objects to the Supreme Court's use of balancing governmental and private interests at all in determining the limits of property rights, including whether a taking has occurred or was for public use. The debate about the propriety of *Kelo* will rage on for many years, but, because the adoption of

Sandefur's distorted analysis would further the *public* ownership of most land, this book will not be a central part of the discussion.

Sandefur begins his critique of *Kelo* by arguing that the right to private property is the most important premise underpinning our Constitution and, by extension, our culture. Giving strained and unrealistic interpretations of the writings of John Locke and Frederick Douglass—both eloquent spokesmen on the natural rights and liberty interests of man—Sandefur maintains that the only focus of their words is on private property. He ignores Locke's and Douglass' well-known devotion to personal liberty and freedom.

Debunking Sandefur's simplistic notions about private property's being the primary source of our political culture and system of government requires us to look no further than the Declaration of Independence, which speaks of “certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness.” In addition, the Preamble to the Constitution speaks of justice and liberty but does not mention property. Although the Founders clearly considered private property an important right, it was not the supreme right that Sandefur depicts it as.

Sandefur's distortions of history notwithstanding, the concept of private property—like tort, criminal, and contract law—arises out of notions of life and liberty interests expressed in the Magna Carta. In 1215, when English nobles forced Prince John to sign the Magna Carta, the concept of the liberty rights of the governed came into being. The principles articulated in the Magna Carta, such as the right of habeas corpus, trial by jury, freedom of religion, and due process of law, were born together and evolved together. More than 500 years later, these same liberty interests found expression in the U.S. Constitution. These interests, not property, form the cornerstone of liberty in our republic.

After ignoring the importance of the Magna Carta and the liberty interests described in the Declaration of Independence and Preamble to the Constitution, Sandefur argues that a central goal of

the Progressive movement was to limit property rights. According to Sandefur, President Theodore Roosevelt's establishment of the National Park System and Justice Louis Brandeis' dissent in *Truex v. Corrigan*, 257 U.S. 312 (1921), are evidence of "intrusive government" and of a systematic plan by Progressives to limit property rights.

Sandefur's view notwithstanding, Theodore Roosevelt's conservation efforts were prompted by his judgment that the United States needed to preserve its natural resources for the well-being of future generations. Roosevelt's National Park Service paid for private property that was incorporated into the parks system, and Roosevelt made no attack—direct or indirect—on private property rights. As for Brandeis' dissent in *Truex*, Sandefur takes it out of context. In *Truex*, restaurant employees had picketed their employer's establishment, and the employer sued, claiming conspiracy to damage its business. The employer lost in the Arizona trial and appeals courts and appealed to the U.S. Supreme Court. The Supreme Court reversed. According to the majority decision, the state law that permitted the workers to picket the employer's establishment—an action that caused the restaurant's annual gross receipts to drop from \$55,000 to \$12,000—amounted to a deprivation of property by the state without due process. The *Truex* majority found the associational and free speech rights of the workers subservient to the right of their employer to conduct business and therefore decided that the state statute that allowed the employees to picket violated the employer's property rights. In his dissent, Justice Brandeis observed that, although a business certainly has a right to operate, that right does not supersede workers' associational and other First Amendment rights. Brandeis believed that the legislature was entitled to strike a balance between the rights of the employer and employees, and that the courts should intervene only if that balance was irrational. Brandeis objected to the majority's substituting its judgment for the legislature's; he did not seek to subvert property rights.

After misunderstanding the Progressive movement and Brandeis' dissent in *Truex*, Sandefur undertakes an analysis

of *Kelo* and its precedents. Over the last 100 years, according to Sandefur, the meaning of "taking" has narrowed and the meaning of "public use" has broadened to the point that property owners cannot rely on the Constitution to protect their interests. Sandefur also complains that the courts' balancing of competing interests has impermissibly encroached on property rights.

Sandefur maintains that any limitation on the use of property by any type of land use plan or zoning is a taking that requires compensation. A taking, according to Sandefur, includes limitations on development intended to preserve clean air, clean water, or historic buildings. But zoning has been with us for nearly 100 years; the first citywide zoning statute was passed by New York City in 1916. Ironically, given Sandefur's premise that property rights are of paramount importance, New York City's zoning statute was enacted to protect the rights of adjacent property owners following the construction of the Equitable Building at 120 Broadway. Rather than offering an alternative to balancing to address the competing concerns of adjacent landowners, Sandefur would simply designate limits on property required by zoning as takings requiring compensation.

Having ignored the fact that zoning and land use regulations are often a legislative effort to balance the interests of competing property owners, Sandefur moves on to *Kelo*, focusing on two facets of the case: the property interests of the plaintiff and those similarly situated as well as the ultimate use of the property by a private company. Sandefur denigrates the reasons that motivate local governments to condemn blighted properties in order to promote development. Blighted property results in a reduction of revenue from property taxes, which causes services to decline and sets off a cycle of further decreases in property values. Given the importance of property tax revenues in local government, when local governments act to break the cycle of decline, they protect the interests of other property owners/taxpayers. This rationale underpins the theory of *Kelo* but points to a problem with the way the theory was applied: *Kelo*'s property was well maintained and was not causing a de-

cline in property tax revenues. This fact might support an argument that the Court struck the wrong balance in *Kelo*, but Sandefur goes beyond that argument to argue in favor of doing away with balancing altogether and either yielding to the unfettered rights of landowners or paying compensation for a taking. We need only look back to the Equitable Building and the zoning law it prompted to see a flaw in Sandefur's reasoning.

Having concluded that the Supreme Court used the wrong analytical tools to reach the wrong result in *Kelo*, Sandefur moves on to lament government seizure of property that was used in the commission of a crime. He details abuses of forfeiture statutes as a reason for voiding civil forfeiture altogether. Civil forfeiture statutes are intended to deny criminals the ability to use the proceeds of illegal enterprises either to compete with legitimate businesses or to engage in additional criminal enterprises. These statutes represent yet another balance struck between property interests and the liberty interests of others of which Sandefur does not approve. No doubt Sandefur is correct that some government employees have abused civil forfeiture and that these abuses should be overturned and prevented in the future, but this fact does not make the case for eliminating civil forfeiture statutes. Sandefur does not propose any other method of denying criminals their ill-gotten gains.

In the main, *Cornerstone of Liberty* is neither well reasoned nor persuasive. Almost by accident, Sandefur has correctly concluded that the reasoning underpinning *Kelo* is not supported by its facts. (As if any of us needed a reminder that bad facts make bad law.) But the premise of *Cornerstone of Liberty* that property interests are so primary that those interests should not be balanced even against competing property interests is preposterous. Although Sandefur's demand that all limitations of property rights be deemed a compensable taking would prevent some such limitations, it would also cause governments simply to take more property—to the extent that they can afford to pay just compensation—which would eventually lead to the public ownership of

most, if not all, real estate. I doubt that Sandefur would approve. **TFL**

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A Desktop Guide for Nonprofit Directors, Officers, and Advisors: Avoiding Trouble While Doing Good

By Jack B. Siegel

John Wiley & Sons, Hoboken, NJ, 2006. 705 pages plus CD-ROM, \$135.00.

REVIEWED BY **GEORGE W. GOWEN**

Even if you have no intention of ever engaging in this specialty that some perceive as a backwater of legal practice, a little knowledge of exempt organizations might well elevate your social standing and might even help you catch and keep clients. Face it: today there are several times more employees of not-for-profit organizations than there are union members making cars in Detroit, and not-for-profit organizations probably own one-tenth of all the property in the United States. If you need further encouragement to acquire Jack B. Siegel's *Desktop Guide for Nonprofit Directors, Officers, and Advisors*, consider that you, your spouse, your partners, or your best clients will undoubtedly be asked someday to serve on the board of a hospital, museum, or school. Help is at hand—for only \$135—but don't flinch, because it's worth every cent. Included with the book is a CD-ROM with 450 source documents, including leading cases, IRS forms, court pleadings, regulations, and other material.

Jack Siegel knows his way around this backwater. He's a lawyer and a certified public accountant, has served on the boards of numerous not-for-profits, created software programs, written books on taxes, and lectured widely.

Best of all, he doesn't write like an accountant (in deference to my brothers and sisters at the bar, I avoid adding lawyers to this assessment). His guide is to the point, practical, and readable.

Here is what you get for your money: (1) the way not-for-profit organizations are legally organized, (2) their directors' and officers' roles and duties (yes, they do have duties), (3) the basic tax rules affecting donors and charities, (4) fund-raising regulations, (5) insurance and risk management, and (6) ways for volunteer directors and officers to protect themselves from liabilities. The book is a good and well-organized package, and you can easily go right to a topic that interests you. As its title promises, it is useful to have on one's desktop.

Siegel states up front:

There are many reasons that directors check their good judgment at the boardroom door. Here are three possible explanations: First, too many directors take what might be called the "books-on-tape" approach to board membership, showing up once a month to hear the executive director tell a nice story about all of the good things the organization is doing. These meetings tend to be very relaxing with lots of carbohydrates consumed in the form of morning buns, scones, and doughnuts. If the directors are really lucky, they will receive a plate of scrambled eggs and bacon or a catered lunch of oversized sandwiches and fancy chips, but eating is not what governance is about, nor is passively watching a slick PowerPoint presentation.

Second, too many board members equate governance with fundraising, assuming that they have discharged their duties if they raise enough money. While the lifeblood of many organizations is money, fundraising is not governance. Those who are good at fundraising would do everybody a favor by not demanding

positions on boards unless they are willing to read financial statements, think about personnel issues, allocate resources, review budgets, and take on other difficult decisions that come with governing an organization.

Third and finally, some executive directors can be power hungry, carefully guarding their prerogatives and fiefdoms. The board may want information that is not forthcoming from the executive director. With only limited time to devote to the organization, few board members are willing to rock the boat, particularly if the executive director uses food and PowerPoint as part of the pacification process.

Although Siegel correctly points out that fund raising is not governance, the truth is that an organization's biggest donors often expect—if not demand—a position on the board, and they are rewarded with one in the hope that they will not be concerned with governance. Siegel might have added that too many directors are convinced that serving on the board of a leading hospital, museum, or college is recognition due them for their success in business or for their fame in the community. A seat on the board should be viewed, however, as an invitation to serve and on occasion do some heavy lifting—even to the extent of firing an incompetent or dishonest executive director.

Siegel mentions a case from more than 10 years ago that involved the United Way and its executive director based in Washington, D.C. The board, with its bank presidents and chief executive officers, reads like a "Who's Who" of business success. The executive director was paid \$390,000 a year, plus \$73,000 in other compensation, plus trips on the Concorde, plus chauffeured limousines, plus a \$430,000 condominium in New York (reputedly for his mistress). The man went to jail, but the directors, who should have been gatekeepers, suffered twinges of conscience at most. If that is ancient history, consider the recent case (that Siegel

does not mention) of American University (also in Washington, D.C.), in which the president received \$800,000 a year, a mansion, chauffeur, maid, social secretary, and a French chef, who took “personal development” expense-paid trips to Paris. Not wanting to appear cheap, the directors, on terminating the university’s president, gave him a \$3.8 million golden parachute.

Tales such as these, as well as the enactment of the Sarbanes-Oxley Act, have rightly served as a wake-up call to directors of not-for-profit organizations and their advisers. The alarm has sounded and a blissful sleep during service as a director is a luxury few should risk. Although the Sarbanes-Oxley Act was aimed at restoring integrity to capital markets and protecting shareholders of securities listed on the stock exchange, the impact of the law immediately spread to nonprofits—lawyers and accountants were quick to impose the act’s myriad provisions on their nonprofit clients, even where their application was not mandatory. Siegel is one of the few commentators who places Sarbanes-Oxley in perspective with respect to not-for-profits, outlining its principal provisions and discussing those that are beneficial to these organizations.

Because the Sarbanes-Oxley Act governs primarily certain business corporations, it has limited application to exempt organizations, which run the gamut from volunteer-driven garden clubs to massive health care institutions—none of which have stockholders. Siegel points out that the requirement for financial certification by the executive officers, which is so loathed by CEOs of for-profit corporations, is largely meaningless for most not-for-profit organizations. At the same time, he recognizes that auditor independence and audited financial statements are good business practices—whether or not the act requires them with respect to not-for-profits. As to an independent audit committee, Siegel goes further, stating that it “should be viewed as a basic rather than as a best practice.” As to the act’s requirement that the audit committee have financial expertise, Siegel notes that the provision applies to “any nonprofit having significant financial resources.” Al-

though he does not define “significant financial resources,” the implication is that financial expertise (and, unstated, perhaps even an audit committee) is a little much to expect of most nonprofit organizations, because an overwhelming number of them have less than \$25,000 in the bank.

As to the integrity of nonprofits that do have significant financial resources, Siegel mentions that some cultural institutions rarely “include complete financial statements in annual reports to their donors,” preferring instead “long lists of donors by categories,” because publicizing the existence of a large endowment might discourage contributions. “Enron accounting” inflates profits as a way to hook shareholders; the museum-style disclosure Siegel mentions deflates assets in order to better harvest donors. This reviewer was startled by one executive director’s suggestion that the organization’s needs would be more compelling and donors more enticed if only the size of the endowment was somehow shrunken by shifting it to another entity (that is, by creating two sets of books). Even more surprising was the reaction of more than one director that this was a good idea and should be pursued.

As to the whistle-blower provision in the Sarbanes-Oxley Act, Siegel concludes that “it clearly applies to all nonprofits”—a sweeping statement that does not recognize the diversity and volunteer-operated nature of many nonprofit organizations. “An organization’s board,” he correctly concludes, “should welcome any assistance in identifying fraud, theft, and other inappropriate behavior by senior executives and managers.” That said, smaller not-for-profit organizations should avoid the temptation to set up procedures that may not be mandated and for which they lack the machinery to ensure adherence.

Even though the subtitle of this worthy book is *Avoiding Trouble While Doing Good*, doing good *well* is the book’s operative theme. **TFL**

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leading sports organizations and as chair of environmental organizations; and was an adjunct professor at New York University Graduate School of Business, where he taught a course on not-for-profit organizations in which he emphasized the role and importance of volunteers and associations in America.

Supreme Conflict: The Inside Story of the Struggle for Control of the United States Supreme Court

By Jan Crawford Greenburg

The Penguin Press, New York, NY 2007. 340 pages, \$27.95.

REVIEWED BY JOHN C. HOLMES

The main theme of *Supreme Conflict* is the efforts of President George W. Bush and his conservative supporters to put their imprint on the U.S. Supreme Court. Despite the fact that seven of the nine justices who were on the Court when Bush took office had been appointed by Republican Presidents, conservatives were disappointed by the Rehnquist Court, which they saw as having enhanced, rather than swept away, the liberal rulings of the Warren Court.

To set the stage for the titanic battle that seemed destined to erupt after it became evident that not one but two seats would be up for appointment, Jan Crawford Greenburg goes back in time to examine prior justices’ appointments and subsequent roles on the Court. David Souter, for example, has been the most disappointing justice to conservatives. Appointed by President George H.W. Bush after assurances that he would be a reliable ally, Souter was easily confirmed by the Senate. He quickly joined the liberal wing of the Court, and he has consistently remained there.

Clarence Thomas has been the Supreme Court’s most misunderstood justice. He barely won a bruising confirmation battle, he began his tenure in near disgrace, and he was considered a lightweight by conservatives as well as by liberals. In his early votes he of-

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ten sided with Justice Scalia and was viewed as his lackey. Greenburg, however, describes how, in the third case Thomas considered, he was the lone dissenter initially, but, after the other justices read his dissent, three of them were persuaded to switch sides, making it a 5-4 decision. The case was *Foucha v. Louisiana*, 504 U.S. 71 (1992), which held that, after a person has been found not guilty by reason of insanity, has served time in a state mental institution, and then is determined no longer to be mentally ill, the state must let him go, without first requiring him to prove that he is not dangerous. In his dissent, Thomas argued in detail that Louisiana had denied Foucha neither procedural nor substantive due process. Far from being a mere follower, Thomas, whether in the majority or dissent, has been the justice who has most consistently and independently followed his principles, rather than making result-oriented decisions.

Thomas' firmness of conviction, however, more than occasionally antagonized the more accommodating and practical Justice O'Connor and nudged her toward the more liberal bloc on the Court. Appointed by President Reagan as the first female justice, O'Connor was initially considered a "safe" conservative vote, but later became the swing vote, authoring more majority opinions than any other justice.

Anthony Kennedy, who has succeeded O'Connor as the Court's swing vote, was appointed by President Reagan, even though Kennedy was thought to be a "wobbly" conservative, because Reagan's advisers believed that confirmation of a steadfast conservative in the Rehnquist and Scalia mold would be impossible. Kennedy has lived up to his initial billing, voting with Rehnquist as often as any other justice from 1992 through 2006—supporting limits on affirmative action in college admissions and on abortion, permitting more religion in public life, and joining the majority in *Bush v. Gore*—yet sometimes taking the liberal side on such issues as the death penalty, gay rights, and the consideration of international law in Supreme Court decisions.

In *Bush v. Gore*, although liberals

condemned the Supreme Court for stepping into a political debate, it was Gore, not Bush, as Greenburg notes, who sought court intervention. Greenburg also notes that "[t]he conservatives believed that the Florida Supreme Court had brazenly thumbed its nose at an earlier unanimous U.S. Supreme Court decision by ordering the recounts to continue without any standards for conducting them." Yet, she adds, "A judicial approach that had infuriated and motivated conservatives for decades was entirely pleasing to them as *Bush v. Gore* unfolded."

Greenburg then moves on to the current President Bush's appointments, describing the administration's determination, after prolonged and thorough vetting, to nominate John Roberts and Samuel Alito for the first Supreme Court openings in more than a decade. She also discusses the failed nomination of Harriet Miers and potential nominees who were bypassed, such as Judges J. Michael Luttig and Edith Brown Clement.

Judge Roberts' credentials, reputation, composure, and intellect were of such a high level that he was confirmed with relative ease. It fell upon Alito to bear the brunt of liberal attacks. He was portrayed as a right-wing zealot who would turn back the clock on civil liberties. "Earthjustice, an environmental law organization," Greenburg writes, "picked up on the day of the nomination, Halloween, and said Alito was a 'scary choice.' Bush had given a 'sweet treat' to the radical Right, the group said, and 'played a nasty trick' on the American people."

Greenburg writes that, at Alito's confirmation hearing, the Democratic senators on the Judiciary Committee "were aggressive in their opening statements," but then they heard Alito's opening statement, which he delivered in a low key and sincere manner, talking about his humble upbringing, the prejudice his father had faced as an Italian-American but had overcome through perseverance and hard work, and how a "judge's only obligation ... is to the rule of law." Greenburg writes: "The hearing room was still. The Democrats were quiet. Their expressions

had changed. Some, like Dianne Feinstein, seemed surprised. This was not the man they'd be subjecting to a brutal cross-examination, the one portrayed as so dangerous to the future of the nation. Halfway through Alito's introductory speech, the fight had completely left the room."

Although the material that *Supreme Conflict* covers may make the book especially appealing to conservatives, Greenburg's superb reporting is objective and high-minded, and it combines rich storytelling with penetrating analysis. **TFL**

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

The World Map, 1300–1492: The Persistence of Tradition and Transformation

By Evelyn Edson

Johns Hopkins University Press, Baltimore, MD, 2007. 312 pages, \$50.00.

REVIEWED BY HENRY S. COHN

Attorneys who study maps either for work or for pleasure—and many do—will enjoy Professor Evelyn Edson's *The World Map, 1300–1492*. Her thesis is that it is a mistake to date the modern map from Columbus' first voyage; rather, the world map as we know it came into being in the 14th and 15th centuries, initially developing 200 years before Columbus.

Edson meticulously sets forth the story of how cartographers changed their work product from one that portrayed "what, when, and why" to one that concerned only "where." Mapmakers prior to the 14th century produced what is known as a T-O map, so la-

beled because of the map's circular shape (the "O") and three continents separated by three water boundaries in a "T" formation. These maps, also known as "mappaemundi," provided information beyond mere place names. With mapmakers' major source of information being the Old and New Testaments, the maps were oriented with the east at the top (with paradise above it) and Jerusalem in the center. The only red color on the map denoted the Red Sea, and the map was surrounded by illustrations of sea monsters and dragons, as well as of a battle between Gog and Magog. There were references to a mysterious kingdom ruled over by Prester John and filled with riches and strange creatures. In many of these maps, each of the three continents was assigned to one of Noah's sons.

In the mid-14th century, the map began to change. The impetus for the new maps were portolans, which were charts that had been compiled over centuries of seafaring and contained maps of coast lines, locations of harbors, river mouths, and man-made features visible from the sea. At the same time, reports of travelers—including Marco Polo and his family, Jewish businessmen from Majorca, and the crusaders and their Muslim counterparts—began to influence mapmakers.

A few years later, the plague of the Black Death restricted travel, but knowledge of geography was circulated by nontravelers, who relied on secondary sources. The most popular travel book of the mid-14th century was written by John Mandeville, who claimed to have visited Armenia, India, Indonesia, Mongolia, Cathay, Tibet, the kingdom of Prester John, and near the rivers of paradise. Edson concludes that Mandeville simply plagiarized from writers such as Marco Polo, but Mandeville was so revered by the general population that he influenced mapmaking for the next 100 years.

In 1397, a copy of a map drawn by Ptolemy, the second-century Alexandrian scientist, came to light in Florence, Italy. This map was based on scientific principles, including longitude and latitude lines, and influenced mapmakers not only in Florence but also in Venice and Vienna. An important mapmaker

of the 15th century was Giorgio Antonio Vespucci, the uncle and mentor of Amerigo Vespucci. Another was Fra Mauro, a Venetian monk whose map of the world had a new look: The names of cities and countries are close to those in use today; there is no attempt to place paradise on the map; Jerusalem is not the prime focus; and the drawing of Africa is accurate. The map places the south at the top, rather than the east.

Interestingly, Edson points out that the new map did not initially win universal acceptance. The public reacted unfavorably to the change in orientation and also to the abandonment of biblical images. Thus, a mapmaker might produce a map like that of Fra Mauro for use by explorers but also produce mappaemundi for those devoted to the traditional forms. Edson includes a fascinating illustration of the Rudimentum Novitorium map of the late 15th century, which has a 13th-century form. She writes, "The map appears more earthlike with its hillocks and castles but bears little relation to the physical structure of the world. East is at the top, with the two mysterious [Middle Eastern men gesturing] in the walled garden, and the Mediterranean is not shown at all." It also shows a phoenix, a man-eating dragon, a river mentioned in Genesis, and a representation of St. Jerome (who was a major source for the map).

Eventually, as travelers relied on maps for trips to the Americas and for use in military campaigns, mapmakers accepted the practical realities and abandoned the traditional map for the modern form. Edson notes that, just as Columbus sailed in 1492, Martin Behaim made his globe, which attempted to represent the world in a new and different form. It was "brightly colored, ornamented with pictures, and burdened with lengthy inscriptions on trade, history, and the life of its maker." The globe made clear that sailing to the "land of the spices" was a simple affair for any navigator.

Edson has achieved her goal of presenting a history of early modern mapmaking. It is unfortunate that the publisher, probably for reasons of cost, did not print any of the multiple maps in this volume in color. A reader might

want to consult the Internet or a work such as *The World Through Maps: A History of Cartography*, by John R. Short, to see the original color versions of the maps.

The World Map, 1300-1492 supports remarks made by Vladimiro Valerio, an expert in the history of cartography at the University of Venice, that were quoted in the *New York Times* on Aug. 15, 2007. Valerio, the *Times* stated, "called mapmaking a blend of science and art. 'Maps aren't faithful portraits of reality but subjective constructions,' he said. 'Maps reflect the design for which they are used. They reflect who commissioned it. ...' [M]an 'began to modify the parameters of the map as his needs changed. ... All maps are good, but they are all different,' he said. 'And in this difference, you get a glimpse of our past and present.'" **TFL**

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UNCORRECTED PROOF. 12. Government Takings of Private Property. Janice Nadler, Shari Seidman Diamond, and Matthew M. Patton. In June 2005, the U.S. Supreme Court decided *Kelo v. City of New London*, which held that the government can force the sale of private property for the purpose of economic development. Although the ruling was largely in line with established legal precedent regarding “takings” the extent to which the government can take private property or otherwise regulate its use for a public.