

The Blind Side: Evolution of a Game

By Michael Lewis

W.W. Norton & Co., New York, NY, 2006. 299 pages, \$24.95.

REVIEWED BY JON M. SANDS

When it comes to football, God is prejudicial—toward big, fast kids.

—Chuck Mills, former football coach at Wake Forest

On the offensive line, equal protection is a myth. Not all offensive linemen are created equal, and not all quarterbacks get protected equally. The unheralded key to a successful professional football team is finding a behemoth with ballet-quick feet and the willingness to endure beatings and blitzes—and who will play left tackle. Michael Lewis' *The Blind Side* focuses on one athletic prodigy who plays left tackle and also discusses the position of left tackle itself. In this book, Lewis, the author of *Moneyball* (reviewed by this reviewer in the January 2004 issue of *The Federal Lawyer*), which is an account of the new approaches that baseball executives are taking to America's pastime, looks at football. He writes engagingly and lucidly, telling a gripping story of one individual and placing football in its social context and also describing aspects of professional and college football that are revealing and intriguing. The problem with *The Blind Side* is the nagging question of whether Michael Oher, the subject of the book, is worthy of the attention.

Michael Oher is a 6'5", 330-plus pound giant who moves with such grace and speed that scouts are momentarily left speechless before they quickly pick up their cell phones to call their head coaches. When we first meet Oher he is 16 years old; his mother is a crack addict and his father has been murdered. In addition to being huge, he is abandoned, destitute, nearly illiterate, has an IQ of 80, and is destined for a "security" position in a drug gang. He is living hand-to-mouth, when, be-

cause of his size and through good luck, he comes to the attention of "Big Tony" Henderson, who plucks him out and gives him a chance.

Henderson manages to get Oher enrolled in Briarcrest Christian School, an all-white, religious school and a sports power. Sean Tuohy, a former college basketball star and the parent of children attending Briarcrest, sees Oher, and Oher ends up a member of the Tuohy family, with Sean's wife Leigh Anne becoming the mother that Oher has lacked. The Tuohy family is white, Republican, devout, and all-embracing. With the family's support, an African-American youth receives the attention, efforts, and resources that the community offers—all of which lead to his graduating from high school and going on to play football for the University of Mississippi, with his future secured as a potential first-round draft pick with the National Football League.

Oher's story is unbelievable but true. It teaches one, though, that opportunities come to those who have the physical gifts that our sports-crazed society craves. As much as one is happy for Oher's success, it is disturbing that the benefits, such as tutoring, and the tremendous amount of attention he received were given to him because of his rare combination of size, speed, and agility. Oher is an awesome physical spectacle, leading his high school football team to a championship with his blocking ability and causing a frenzy of recruiting among Division One college football powers trying to bless themselves with his presence. But, if he were 100 pounds lighter or a few seconds slower, none of this good fortune would have come his way. Lewis recognizes this and wonders about the future of young people whose circumstances are similar to Oher's but whose gifts are intellectual or creative rather than physical. Lewis' focus on Oher does not blind the author to the inequities and the lost potential of others who are left behind.

The National Collegiate Athletic Association does not come off well in Lewis' account, either. Member schools

have grade-point requirements for enrollment, but these can be met with correspondence courses and with compliant curricula. Oher graduated from high school and is attending college, but his studies there are focused on keeping himself eligible to play football, as he looks forward to a place in the NFL, with its attendant riches. The sham of the NCAA schools—at least with respect to their football and basketball players—is that these students are not scholar-athletes but rather are indentured athletes, whom the schools use as revenue-making machines in exchange for preparing the athletes for the professional leagues.

Oher himself comes off as an enigma. Growing up deprived, he has learned to keep his thoughts to himself. This creates a difficulty for Lewis, because Oher does not offer any insight into what he, Oher, makes of his own transformation. Oher becomes the projection of everyone else's hopes.

The Blind Side enlightens the reader about others besides Oher. The Tuohy family's acceptance of Oher is absolute, which is striking when one realizes that Leigh Anne Tuohy, who becomes a protective mother to Oher, is the daughter of a man who regularly used the "N" word when speaking of African-Americans. Oh, yes, this man was a U.S. marshal. The acceptance of Oher was such that Leigh Anne joked that she had a black in her home before she had a Democrat. Briarcrest Christian School's administrator knew that the school was bending over backward for Oher because of his athletic ability, but the school did not accept him solely because of this; Briarcrest made him prove that he could handle academic work and provided him remedial help when necessary. Although Briarcrest served as a refuge for those engaged in "white flight" from the public schools, the school was committed to the success—at least on the football team—of a person of the sort from whom others had fled.

The most fascinating portions of *The Blind Side* are not those that focus on Oher; in fact, I found those to be the

least interesting, because one knows that Oher will succeed; otherwise, the book would not have been written. Rather, Lewis is best at describing the evolution of the position of left tackle. The left tackle is a key player, because he protects the quarterback's blind side. When the quarterback drops back to pass, he cannot see the rush from his left side. If the tackle cannot protect the quarterback, the vaunted "West Coast offense" is thrown off kilter, skilled receivers do not get the ball, and, most seriously, quarterbacks get crumpled by on-rushing defensive ends or linebackers. Lewis cites Lawrence Taylor, the former outstanding outside linebacker for the New York Giants, as an example of the new breed of pass rusher, whose speed and size blow past the slow massive tackles who had previously buttressed defensive lines. Lewis describes the changes to the West Coast offense that linebackers such as Taylor made necessary, and the need for offensive left tackles, such as the San Francisco 49ers' Steve Wallace, to invent new techniques to deal with the mayhem rushing at quarterback Joe Montana. Is it any wonder that, in professional football, the left tackle is now the second-highest paid player after the quarterback and, on some teams, the highest paid player?

The contest between pass rusher and left tackle illustrates the role of action and reaction in the evolution of professional football strategy. Litigation strategy develops along similar lines, with, for example, new techniques by the plaintiffs' bar, such as "day-in-the-life" videos to demonstrate plaintiffs' damages, being met or even bested by new approaches that defense lawyers develop in response.

Lewis ends the book with Oher at Ole Miss. Oher has some trouble adjusting, but he seems well on his way to a multimillion-dollar contract with in the NFL—provided, of course, that he does not run afoul of the law or become injured or otherwise tarnish his physical ability. The lesson we can take from Lewis' book is that all the attention paid to Oher, and all the helping hands pulling him up, did so not for the sweetness of his personality, nor for his intellect, but for his physical size. Once he is no longer useful, at the

collegiate athletic level or in the NFL, he will be disposed of.

It is also worth pondering that Oher was rescued by his guardian angel "Big Tony" and introduced to the Tuohy family. What if Big Tony had not been around? It is fairly clear what would have happened. Oher would have languished until he gravitated toward any number of criminal gangs, where his bulk would have been his ticket and where he would undoubtedly have run into trouble. He would have probably then found himself facing the criminal justice system, where laws trumpeted by politicians playing on the fear of crime and on racial animosity would have led to his spending years behind bars, where limited rehabilitation and educational opportunities would not have saved him. Ole Miss graduates would have cheered for this result just as loudly and lustily as they do on Saturday afternoons, when the real Michael Oher is winning their football games. **TFL**

Jon M. Sands is the federal public defender for the District of Arizona.

Exile: A Novel

By Richard North Patterson

Henry Holt and Co., New York, NY, 2007. 562 pages, \$26.00.

REVIEWED BY ELIZABETH KELLEY

I have a confession to make—one that I daresay even the most serious of readers will share—when I am reading a 500-plus page book, I often skip small chunks. However, I read every single page—every single word—of Richard North Patterson's latest legal thriller, *Exile*. The novel is one of those great reads that make you want to call in sick to the office or call the court at the last minute and ask to reschedule a hearing.

Briefly, *Exile* is the story of David Wolfe, a young attorney in San Francisco who has just opened his own practice after working several years in the U. S. attorney's office. David is politically ambitious and has been assiduously building a base of financial and political supporters. He is also engaged

to a smart, supportive woman, and they seem destined to live happily ever after. David's fiancée is the daughter of a Holocaust survivor and is deeply proud of her heritage. David, although also Jewish, is not observant, but respects his fiancée's faith and activism.

But David's perfectly constructed world is violently shattered by the re-appearance of Hanna, his former lover from law school. Hanna is a Palestinian woman, who is now married to a militant Palestinian. The prime minister of Israel, while visiting San Francisco, is assassinated and Hanna is charged with his murder. David ends up representing Hanna at her trial. At this point, I will cease giving any additional details about the plot, because *Exile* is, after all, a mystery, and this story is just too good to spoil.

Usually, an author dedicates a book to a spouse or to parents or children. Richard North Patterson, however, dedicates *Exile* to Alan Dershowitz and Jim Zogby. Alan Dershowitz is the renowned Harvard law professor whose clients have included Claus von Bulow and who is the author of many books, including *The Case for Israel*. Jim Zogby is the head of the Arab-American Institute. Patterson's dedication of *Exile* to these two men symbolizes the book's balance, or—more accurately—the effort Patterson makes to present both sides of the conflict in the Middle East.

As the mystery grows more and more tangled and as it eventually unravels, Patterson examines the sources of the Israeli-Palestinian conflict. He does this not through history lessons but by telling the individual stories of a panoply of characters, both fictional and nonfictional. As Patterson notes:

I hope the result does justice to both Alan and Jim in the only way I can—by telling people's stories, the better to impart the common humanity of the Jews and Arabs caught in this tragic conflict, as well as the historic, experiential, religious, and psychological barriers that divide them. ... [M]y aim in writing this novel was not to pass judgment on the "truth," or to map out a

REVIEWS *continued on page 60*

solution, or to make some implicit argument about moral equivalency between one side or faction and another. Rather, my aim was to craft a compelling narrative that interweaves the varying experiences and perspectives of Jews and Palestinians, and suggests why the prospect of a lasting peace remains so elusive.

But make no mistake: *Exile* is more than a discussion through fiction of the conflict in the Middle East. It is a legal thriller written by an attorney. As such, Patterson accurately and sensitively develops conflicts and crises that most of us face: philosophical disagreements with superiors, fear that our misjudgments and missteps might hurt a client, and the tension between our professional obligations and our personal lives. Patterson, moreover, realistically and vividly portrays pretrial and courtroom scenes.

Patterson acknowledges: "I have no doubt that many readers will find something in this novel to dislike. Indeed, some partisans on both sides are so committed to their own narrative that they are grossly offended by any deviation. But I believe that acknowledging each other's perspectives is essential to coexistence."

Here, however, Patterson is addressing only one aspect of *Exile*: its portrayal of the conflict in the Middle East. *Exile* is more than that; indeed, it is a top-notch legal thriller and a good love story. **TFL**

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

Master of Souls: A Mystery of Ancient Ireland

By Peter Tremayne

First St. Martin's Minotaur, New York, NY, 2006. 306 pages, \$24.95.

REVIEWED BY PATRICK O'KEEFE

It is January, A.D. 668, and the place is what is now called the Dingle Peninsula in the province of Munster, Ireland. In this, the 16th full-length mystery by Peter Tremayne (the nom de plume of Celtic scholar Peter Berresford Ellis), greed, political intrigue, and murder are again abroad in the land of saints and scholars. The principal character, now familiar to Tremayne readers, is Sister Fidelma of Cashel. She is the only sibling of Colgu, the Eoghanacht king of Munster, who reigned as high king of Ireland between A.D. 665 and A.D. 678. She is also a nun attached to the abbey of St. Bridgid of Kildare. Most important to the story, Fidelma is a *dalaigh*, or advocate, in the Brehon courts of the five provincial kingdoms of Ireland.

In *Master of Souls*, Tremayne weaves a sinister web of mayhem that begins with the showing of false lights to lure a merchant ship from Gaul onto the treacherous rocks of the Irish coast, followed by the slaughter of her crew and the looting of her cargo. In short order, the wreckers also brutally murder the Abbess of Ard Fhearta (now Ardfert, County Clare) and abduct six young novices in her traveling party. Fidelma is called to investigate these events but, on her arrival at the abbey of Ard Fhearta, she also learns that the scholarly Brother Cinaed has been murdered in the chapel. At the center of these sordid happenings is the mysterious figure known as the Master of Souls, an insurgent leader of shrouded identity who challenges the rule of Cashel.

Tremayne's formidable series of mysteries has used the character of Fidelma and her remarkable powers of logical deduction as a vehicle to illuminate a fascinating period of Irish cultural history. She was introduced to an appreciative reading public in four short stories published in 1993. The chronicle of her adventures began in A.D. 664, when she was a young religieuse who had been trained in Irish law—popularly known as the Brehon Laws—by Ireland's foremost legal scholar, Morann of Tara. Eight years of

study qualified Fidelma as *anruth*, a mark of proficiency only one below the highest degree conferred in legal studies in ancient Ireland. She had mastered both the criminal code of the *Senchus Mbor* and the civil code of the *Leabhar Acaill*. As a *dalaigh*, she is empowered to detain and question witnesses, to seize evidence, and to render a report of her investigative findings in court. A powerful tradition of deference protects her in these endeavors as both officer of the Ard Ri, or high king, and officer of the court. Her role as an investigator with plenary powers is similar to that of the modern French *juge d'instruction*.

Tremayne's mastery of ancient Irish culture enables him to entwine his plot line around lessons of Irish law. For example, he acquaints the reader with the fact that primogeniture was an alien concept in Ireland before the coming of Richard de Clare and his Norman brethren in the 12th century. Rather, leadership was partially hereditary, but largely electoral. Each leader was selected first as an under-chieftain, or *tanaiste*, who would serve as chieftain or king upon the demise of the current officeholder. The election was held by the *derbhfine* of the family or clan—a minimum of three generations gathered together to vote. Elected kings could be impeached and replaced, thus making Ireland unlike the European medieval monarchies but somewhat similar to the republics of ancient Greece and Rome.

Master of Souls contains a wealth of cultural vignettes, as Tremayne describes in vivid detail the strict observance of the Irish laws of hospitality and the bardic tradition at formal dinners, and he also provides subtle insights into the variety of food and drink consumed not only at the high table but also in daily life. In their daily lives, like the ordinary Romans in the age of the Caesars, the ancient Irish were scrupulously attentive to personal hygiene, with bathing a diurnal ritual associated with good health and social propriety. Strong drink was offered to guests and visitors in conformity with the rules of hospitality, but, contrary to the popular image of Irish character, abusing the

host's offer of alcoholic beverages by drinking to excess was considered a breach of these same rules.

Fidelma's character provides a rich study of the position and role of women in seventh-century Ireland. Tremayne faithfully and accurately places Fidelma in a society that afforded more rights and opportunities to women than any other European country did at that time. Women were political, military, legal, and professional leaders, and many served in the role of *breitheamb*, or judge. The law also protected women against sexual harassment, discrimination, and rape; and women had the right of divorce on equal terms with men and a claim on a part of the husband's property upon separation. Couples could agree to become *ban char-rthach* and *fer comtha*—partners for a year and a day—a temporary legal marriage that could be abandoned by either party at its expiration without blame or payment of compensation. Tremayne's story describes such an arrangement between Fidelma and Brother Eadulf, her Watson-like companion.

Some readers will be surprised not only by these relatively egalitarian domestic laws and practices but also by the fact that they were permitted freely by the Celtic Christian church. It is instructive that even in the Church of Rome it was not until the papacy of Leo IX (1049–1054) that an institutional effort was made to enforce universal celibacy among the clergy. In the Irish Christian church of the seventh century, both sexes inhabited abbeys and monasteries, and these religious establishments were known as *conbospitae*, where men and women of the cloth lived together and raised children in their religious communities. More ascetic members of the clergy advocated celibacy as the universal religious ideal, but the question was still vigorously debated, as Tremayne depicts in an argument between Fidelma and a celibate scholar at Ard Fearta. A subordinate theme of the novel turns on the doctrinal differences between Rome and the Celtic church and illustrates an often overlooked but significant historical conflict at the end of which, had the Celtic church prevailed at the Synod of Whitby in A.D. 664, Christianity might have worn a different face

today.

That Tremayne has cast Fidelma as a religieuse is not mere whimsical caprice, nor is it done simply to clothe the character. In that era, most of the professional or intellectual classes were members of the religious communities of what was called "The New Faith," just as in previous centuries they would have been Druids. It is therefore only natural that a *dalaigh* such as Fidelma would have harkened first to a religious calling.

Tremayne unapologetically uses the Old Irish place names, many of which have simply been anglicized, and the unsuspecting reader may find the archaic names a little confusing initially. Thus, what we know today as the Dingle Peninsula is represented as An Daingean. A few modern usages appear as well, however, such as Tara instead of the Old Irish name, Teamhair, and Cashel instead of Caiseal Muman. Tremayne also employs the Irish form, Muman, rather than the prolepsis form, Munster, formed when the Norse *stadr* (place) was added to the Irish name Muman in the ninth century and subsequently anglicized. To orient the reader geographically, Tremayne provides a map with characteristics of the lower Irish coast. In addition, he furnishes a pronunciation guide to assist with names that may be unfamiliar to the Anglo-Saxon ear. To some, these archaic names may prove distracting, but most readers will find that the use of Old Irish enhances the feeling of total envelopment in a bygone era.

Master of Souls is an entertaining murder mystery that might be enjoyed as light reading during a plane flight, but it also provides a fascinating and detailed immersion in a highly sophisticated culture as worthy of contemplation today as it was when that culture was the brightest beacon in the European Dark Ages. **TFL**

Patrick O'Keefe is in private practice in New Orleans and is a lifetime honorary member of the Dublin Solicitors Bar Association.

Civil Procedure

By Samuel Issacharoff

Foundation Press, New York, NY, 2005. 214 pages, \$30.00.

REVIEWED BY HARVEY GEE

Samuel Issacharoff's *Civil Procedure* is a much-needed and valuable resource for those who want to have a proper understanding of the increasingly complex rules of federal civil procedure. The scope of the book is wide, and its theme is that students can achieve a fuller understanding of civil procedure as something more than a regime of formal rules. Issacharoff writes, "While civil procedure shares with all aspects of law its technical wizardry, one aim of this book is to dispel the sense of distinctiveness of the realm of civil procedure." Rather than focusing on "daunting technical issues," Issacharoff notes "a deep intuitive logic that commands the field." Rather than bogging down the reader with details, the author attempts to make civil procedure more accessible for legal newcomers. Nevertheless, although aimed at law students, the book will be informative to practitioners and scholars as well.

Civil Procedure is a well-written analysis of the history of the major components of federal civil procedure: due process, pleading, factual development, parties, jurisdiction, federalism, repose, and case management. Issacharoff makes a persuasive case that "the constitutional command of due process and the specific rule applications of civil procedure" are both "placeholders for an animating conception of fairness that stands behind any system of process. *Process* assures regularity in the treatment of similarly situated parties ... , guarantees against the arbitrariness of either capricious conduct or tyranny ... , [and] imposes order. ... In theory, at least, it is *process itself* that constrains the powerful and protects the weak," serving as a "bulwark against the misuse of state authority."

Next, Issacharoff explains that due process has two central features. "First, it protects substantive rights independently secured by positive law by requiring procedural regularity in the exercise of all governmental power. Second, the requirement of procedural regularity may not be altered by the nor-

REVIEWS continued on page 62

mal operations of political power.” According to Issacharoff, “[t]here are five basic elements of due process that may be adduced from American case development, particularly after the post-Civil War amendments to the Constitution extended the due process command to the conduct of the states toward their citizens.” The five are the rights to notice, a hearing, an impartial arbiter, representation by counsel, and timely resolution of claims. Although this section of the book is fact-intensive, the historical background it presents will help the reader understand contemporary issues facing lower courts.

Issacharoff explains that “the most forceful introduction of due process ... came in the closing years of the nineteenth century with the emergence of the ‘substantive due process’ doctrine,” under which “[f]ederal courts gave independent substantive meaning to the Fourteenth Amendment’s prohibition on states’ restricting the enjoyment of life, liberty or property with due process of law.” He sees “[t]he second great phase of due process activism” as the Warren Court’s focus during the 1960s on “procedural due process,” as in *Goldberg v. Kelly*, 397 U.S. 254 (1970), which prohibited the termination of welfare benefits without a prior hearing. Issacharoff fails to note that the Warren Court has also been harshly criticized for pressing the outer bounds of constitutionalism.

Nonetheless, Issacharoff states emphatically that “all the critical elements of due process, from the right to an evidentiary hearing to the right to counsel, are now subject to a balancing of the magnitude of loss versus the likelihood of error versus the governmental interest in swift action.” He offers as examples “the ability of police to place a boot on illegally parked cars, even in the absence of notice and prior hearing,” and “the denial of the right to have counsel provided to an indigent prisoner facing civil proceedings for termination of parental rights.” Demonstrating the timeliness of the book, Issacharoff refers to the detention of foreign and U.S. citizens during today’s war on terror, as addressed in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), “con-

cerning an American-born individual taken prisoner in Afghanistan during the American military action in 2002, and subsequently held as an ‘enemy combatant’ in a military prison on United States soil.”

In the book’s chapter on parties, Issacharoff notes that “[t]he common law assumed a world of bipolar disputes in which all individuals with a legal interest in a proceeding would themselves be parties to the litigation. ... At the heart of the modern treatment of parties,” by contrast, is Rule 20 of the Federal Rules of Civil Procedure, “providing for the permissive joinder of parties” and allowing “litigation to be structured to bring in as many similarly situated parties as are deemed necessary to a fair and complete adjudication. The Rule allows the plaintiff, as master of the complaint, to initially join as many persons as necessary as plaintiffs who assert claims arising out of the same transaction or occurrence, or even out of a ‘series of transactions or occurrences and if any question of law or fact common to all those persons will arise in the action.’”

In his chapter on federalism, Issacharoff is at his most theoretical, visiting the confrontation between the legacy of *Swift v. Tyson*, 41 U.S. 1 (1842), and *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). *Erie* interpreted the Rules of Decision Act (RDA) to require federal courts exercising diversity jurisdiction to follow not only state statutes but state court rulings. “By making federal courts act as much as possible as if they were state courts,” Issacharoff writes, “the Court read the RDA as designed to thwart forum shopping and avoid the inequitable administration of the law.”

The chapter entitled “Repose” discusses “the enduring aim of achieving finality through dispute resolution ... so that life may proceed without being consumed by festering grudges and feuds which might reignite, even escalating into violence, as the slightest future provocation.” Among the methods to achieve this aim that Issacharoff discusses “are formal doctrines of preclusion—claim preclusion, issue preclusion, and the lesser variant of the law of the case—that foreclose reliti-

gation of issues or claims that were or could have been raised in the first proceeding.” This part of the book is by far the most intriguing. The material it covers applies equally to all civil actions—from prisoners’ civil rights lawsuits to corporate litigation.

Although *Civil Procedure* is an impressive scholarly achievement, it has its limitations. Readers expecting an exhaustive treatment of case law in the areas the book covers will be disappointed, as Issacharoff may cite a single case from a particular circuit, requiring practitioners to conduct further research in the law of their circuits to learn where the case fits within the book’s general propositions. In addition, the book includes only slight references to secondary sources. Nevertheless, on balance, *Civil Procedure* is a worthwhile read, containing many insights that should be developed further by other civil procedure scholars and civil litigators. **TFL**

Harvey Gee is a deputy public defender with the Colorado State Public Defender’s Office and was formerly a law clerk for Hon. Patricia A. Coan of the U.S. District Court for the District of Colorado. He has an LL.M. from the George Washington University Law School, a J.D. from St. Mary’s University School of Law, and a B.A. from Sonoma State University.

Reflections on Constitutional Law

By George Anastaplo

University Press of Kentucky, Lexington, KY, 2006. 268 pages, \$65.00 (cloth), \$24.95 (paper).

REVIEWED BY JOSEPH GOODMAN

Reflections on Constitutional Law is a collection of 26 essays containing Professor George Anastaplo’s legal, historical, and philosophical reflections on the Constitution, other key documents in American history, and important Supreme Court opinions. The book

follows Anastaplo's method of teaching constitutional law, which consists of spending several weeks discussing the Constitution itself prior to reviewing Supreme Court cases. "Only if one has a reliable grasp of the Constitution is one likely to be equipped to understand what the Supreme Court has done." Studying the Constitution itself, the "best-crafted legal document in the annals of this Country," is important, Anastaplo writes, for learning "to read legal documents properly."

Anastaplo believes that "[i]t is more important, in a study of constitutional law, to weigh what the United States Supreme Court said and how it was said—what considerations it weighed and how—than it is to know what the Court 'decided.'" One reason to focus on the text of the Constitution, as well as the reasoning of the Supreme Court, is "to put the ever-transitory cases in perspective." After all, the shelf life of many cases studied in constitutional law courses is short, with many that were taught a generation previously having become "obsolete."

Before he reaches the Constitution, Anastaplo examines the text of the Magna Carta as well as the texts of what he calls the three "Organic Laws of the United States" that influenced the Constitution: the Declaration of Independence, the Articles of Confederation, and the Northwest Ordinance. Indeed, one theme—if there can be a theme in such a collection of diverse essays—is how the philosophical and legal origins of the Constitution are rooted in these documents. Although innovations were proposed in the Constitution, these innovations are "only in the context of much that must have been familiar."

Because the essays in *Reflections on Constitutional Law* are typically only six or seven pages long, Anastaplo makes relatively few points with regard to each document he examines. Rather than providing an exhaustive analysis of any particular issue, he discusses aspects of constitutional provisions and of cases that other scholars and jurists typically bypass. Indeed, Anastaplo generally limits his analysis to a handful of key phrases in each document and their relation to our constitutional system. He explains, for example, that

"[t]he 'perpetual Union' insisted upon in the Articles of Confederation was perhaps as much a hope to be realized as a fact to be recognized. A decade of somewhat effective cooperation during very rough times prepared the way for the Constitution of 1787. The 'perpetual Union' of the Articles was elevated (in the Preamble to the Constitution) into 'a more perfect Union,' with the means provided in the new constitution for indeed keeping it so." In addition, whereas Article II of the Articles of Confederation provided that the states would retain every power not "expressly delegated" to the United States, the Tenth Amendment to the Constitution reserved to the states only the powers "not delegated to the United States by the Constitution." The omission of "expressly" in the Tenth Amendment made the powers of the federal government considerably greater under the Constitution than they were under the Articles of Confederation.

Anastaplo also examines the Confederate Constitution of 1861, under which "[t]he stature of the States is markedly enhanced." That constitution's preamble christens the association of seceding states as a "confederation" instead of a "union" and deliberately repudiates any dedication to the general welfare, which is evidenced "by limitations placed upon efforts by the new Congress to promote commerce." The most significant difference between the 1787 Constitution and the 1861 Constitution, however, is with respect to the institution of slavery. Whereas the 1787 Constitution merely tolerated slavery and refused to call it by name, the 1861 Constitution explicitly provided for it and repeatedly reaffirmed the controversial *Dred Scott* decision of 1857. "Indeed, it is, upon reading the 1861 Constitution, difficult to understand how anyone could doubt (as some scholars evidently do) the central place of the slavery controversy among the causes of the Civil War."

The second part of *Reflections on Constitutional Law* turns more philosophical, at least initially, with a pair of essays titled "Realism and the Study of Constitutional Law" and "The Challenges of Skepticism for the Constitutionalist." The book then reads more like a traditional constitutional law casebook,

with almost all the remaining essays discussing cases that are generally covered in law school, including the *Slaughter-House Cases* (1872), the *Civil Rights Cases* (1883), and the *Japanese Relocation Cases* (1943). Anastaplo offers interesting insights into these cases and offers suggestions as to how they might be read by those who focus on the text of the Constitution. The book also contains essays on less familiar cases, including *Calder v. Bull* (1798), which held that the prohibition on ex post facto laws applies only to criminal matters, and *Barron v. Baltimore* (1833), which considered the application of the Bill of Rights to the states. Anastaplo poses thought-provoking questions, such as a whether correcting abuses by state governments is "best left to the State courts, especially when the operations of the General Government are not threatened."

The brevity of the essays in the book caused me to wish sometimes that Anastaplo had discussed some subjects in greater depth. The essay titled "Affirmative Action and the Fourteenth Amendment," for example, offers interesting observations regarding racial differences in our society and critiques affirmative action cases such as *Regents of the University of California Board v. Baake* (1978), *Gratz v. Bollinger* (2003), and *Grutter v. Bollinger* (2003). Anastaplo discusses "Justice Harlan's suggestion in his 1883 *Civil Rights Cases* dissent, that Congress should be permitted to do as much on behalf of emancipated slaves as Congress had once been permitted to do on behalf of slaveowners," and an observation in 2004 by a University of Chicago administrator that, even though diversity at the school had increased over the last 30 years with respect Asian, Middle Eastern, and Latino students, the number of African-American students had not increased. Yet, although Anastaplo repeatedly emphasizes that the federal government has the duty to assist African-Americans, he does not suggest any specific steps that it might take. Instead, he merely urges "recourse to race-conscious mandates that take account of the ever-changing circumstances of the day."

Anastaplo's unique approach to

REVIEWS *continued on page 64*

teaching constitutional law—particularly, his focus on the text of the Constitution—led me to ponder phrases in the Constitution and other documents he discusses, as well as aspects of Supreme Court cases, in ways that I had not done before. *Reflections on Constitutional Law* raises questions that should lead to further research. **TFL**

Joseph Goodman is a visiting scholar at Georgetown University and an associate at Skadden, Arps, Slate, Meagher & Flom LLP. The contents of this review do not represent the views of the law firm. Beginning in fall 2007, Goodman will be clerking for Judge David Thompson of the U.S. Court of Appeals for the Ninth Circuit.

The Cold War: A New History

By John Lewis Gaddis

Penguin Press, New York, NY, 2005. 333 pages, \$27.95 (cloth), \$16.00 (paper).

REVIEWED BY JOHN C. HOLMES

Professor John Lewis Gaddis' undergraduate students at Yale University are too young to remember the Cold War. To them it is history, and they view it not much differently from the way they view the Peloponnesian War. This, Gaddis states, inspired him to write this book, which supplements his earlier works on the Cold War, explaining how it started, what it was about, and why it ended as it did. Gaddis has the additional advantages of access to formerly secret documents—particularly from Soviet archives—as well as of the passage of time, permitting him to gain perspective on the relevant events and allowing his readers to approach these events less emotionally than they would have when the Cold War was in force.

The Cold War, of course, grew out of the end of World War II, which the United States and Great Britain looked forward to as a triumph for democracy and freedom over totalitarianism. The Allies, however, included not only the United States and Britain but also the Soviet Union, without which vic-

tory would probably not have been achieved. The Soviet Union, in fact, lost in the range of 12 million soldiers in the war and perhaps as many civilians, whereas the United States lost fewer than a half-million soldiers. Stalin, therefore, believed that the Soviet Union was entitled to its share of the spoils and, in any event, had no intention of withdrawing the Soviet troops that were stationed in many Eastern European countries. As Winston Churchill eloquently put it, “an iron curtain has descended across the Continent. Behind that line lie all the capitals of the ancient states of Central and Eastern Europe. Warsaw, Berlin, Prague, Vienna, Budapest, Belgrade, Bucharest and Sofia, all these famous cities and the populations around them lie in what I must call the Soviet sphere.”

Not content with dominating Central and Eastern Europe, Stalin and his successors sought to promote Communist control of Western European countries through political manipulation. To counteract sympathy for the Soviet Union, which many in the West believed was a beneficent “classless” society, the United States created the Marshall Plan, through which the nations of war-devastated Western Europe received economic assistance in an amount never before seen in history. The Marshall Plan helped rebuild these nations, which their people and governments greatly appreciated, and it probably saved many of them from falling under Soviet control.

Though tyrannical and brutal at home, Stalin, according to Gaddis, was sometimes timid in furthering his expansionist foreign policy. Nevertheless, Stalin's bold moves in demanding territorial concessions from Turkey in 1946 and his coup in Czechoslovakia in 1948 made clear to most Western leaders that he was far more interested in territorial expansion than in furthering Marxist ideology. Henceforth U.S. strategy became one of containment, as George F. Kennan had proposed in his famous “Long Telegram” of 1946.

Further complicating the Western position was the arrival of a Communist government in China in 1949 and the retreat of Chiang Kai-shek and his

government to Taiwan. Mao Zedong, China's new leader, rivaled Stalin in his brutality to his countrymen as well as in his attempts to organize his nation's economy and society as a command or top-down system, as illustrated by the disastrous Cultural Revolution and Great Leap Forward during the 1960s and 1970s. At first Stalin viewed Mao with suspicion as a former antagonist, but subsequent Soviet leaders found China a willing ally in furthering the expansion of communism.

Gaddis does not believe, as some other scholars do, that the outcome of the Cold War was preordained. To the contrary, as the Soviet Union acquired nuclear weapons and the missiles to deliver them, the outcome became very much in doubt. President Eisenhower, far from attempting the reduction of nuclear armaments, engaged in military and nuclear buildups, dubbing the policy Mutual Assured Destruction (MAD) and relying on both sides to realize the absurdity of nuclear war. President Kennedy's confrontation with Nikita Khrushchev over the Cuban Missile Crisis for weeks left the world anxious about a possible nuclear conflagration, and Soviet expansionism seemed inexorable during President Carter's administration, in light of Carter's feeble defensive efforts.

Of those contributing to the victory in the Cold War, Gaddis gives credit to President Reagan for steadfastly and resolutely dedicating his efforts and communication skills to moving beyond détente, or acceptance of Soviet communism, to defeating the “evil empire.” Gaddis also praises Margaret Thatcher for articulating the intellectual foundation of the superiority of democratic capitalism over autocratic communism and for her strong support of Reagan and his policies. Pope John Paul II, who was of Polish extraction and had personally experienced the oppressiveness of communism, lent moral and spiritual support to opponents of the Soviet Union. Gaddis also praises Mikhail Gorbachev for not suppressing the freedom movements in Eastern Europe in the 1980s and

Jerome C. Pandell
Federick Parks
Brady K. Paton
Margaret G. Patton
Scott R. Patton
L. W. Pearl
Danielle Pellegrin
Erin E. Pelleteri
Jerry F. Pepper
Richard G. Perque
Carla M. Perron
Elizabeth C. Peterson
Keidra J. Phillips
Rosemary J. Piergiovanni
Estela O. Pino
Frank M. Pitre
Sarah L. Plavner
Daniel J. Poolson
Sara C. Porsia
Tammy P. Pratt
Theodore L. Press
Michelle Purchner
Nina A. Rabito
Brian L. Radcliffe
David S. Rainwater
Sheila D. Rajabiun
Daniel M. Redmann

Andrew B. Reid
Seth J. Reidenberg
Steven K. Rendell
Carrie L. Richardson
Jennifer A. Rikoski
Kellie M. Rish
Amanda B. Rizzo
April R. Roberts
Philp E. Roberts
Thomas A. Robichaux
Brian W. Robinson
Jon B. Robinson
Frank J. Romaguera IV
Francine J. Rosenberger
Timothy A. Rothberg
Jonathan M. Rotter
Jeremy D. Rush
Amanda C. Russo
Jamal Saleh
Lori P. Sarageno
Christy C. Schinka
D. Brandt Schmolke
Robert S. Schneider
David J. Schwister
Jason D. Scott
Stephen P. Scullin
Matthew D. Segal

Tim C. Selander
Arthur A. Severance
Marc D. Sharp
Norma J. Shcrock
Jeremy B. Shealy
Eulis Simien Jr
Ravi Sinha
Amelia K. Smith
Bradley T. Smith
David B. Smith Jr
Diane A. Smith
Kathy L. Smith
Oliver Smith III
Philip G. Smith
Steven R. Smith
Amanda L. Snoke
Monte' T. Squire
Andrew M. Stakelum
Patrick CR Stedman
Pamela J. Stendahl
Jennifer C. Stokes
Stacey E. Stringer
Shana A. Stumpf
Dana E. Stutzman
Eamonn M. Sullivan
Adam J. Swensek
Bryan T. Symes

Christopher E. Taulbee
Beryll F. Thompson II
Shelley L. Thompson
James G. Thornton
Bernard H. Ticer
Michelle L. Tolle
Etienne Totti del Toro
Robin P. Toups
Matthew A. Treuting
Stephen E. Trimboli
Deborah R. Trotter
Kevin F. Truxillo
Laurence A. Turbow
Brett W. Tweedel
Michael R. Ufferman
Steven S. Vahidi
Sara C. Valentine
Abaigeal L. VanDeerlin
Karla M. Vehrs
Lauren Venturatos
Juliette B. Wade
Jennifer L. Wadsworth
Ann E. Walther
Craig R. Watson
Amber H. Watt
Tyler L. Weidlich
Leah R. Westervelt

David K. Wiggins
Katherine S. Wiik
Michael S. Wilcox
Katherine A. Wilkinson
Fred G. Willhoft
Christie Williams
David J. Williams
Heidi L. Williams
Alexander J. Williamson
Krista A. Wilshusen
Daniel B. Winslow
R. Cameron Winton
Eva L. Wise
Tracey N. Wise
Peter C. Wolff Jr
Ariana K. Wolyne-Werner
Jonathan B. Womack
Christian T. Wood
Susan F. Wyderko
Rachel S. Zahniser
Benjamin M. Zarzycki
Lisa J. Zastrow
Christopher L. Zaunbrecher
George J. Zornada

Have you recently moved? Please give us your new address!

For fastest results, please include a copy of your label and mail it to:

The Federal Bar Association
Attn: ADDRESS CHANGE
2011 Crystal Drive, Suite 400
Arlington, VA 22202

REVIEWS *continued from page 64*

for his attempts to improve the Soviet system—measures that ultimately ushered in its demise. Most important to the outcome, Gaddis states, were the people of Eastern Europe—symbolized by Polish union leader, Lech Walesa—who courageously stood up against Soviet might to fight for freedom and independence for their countries, fully aware of past consequences for those who did so.

In the preface to the book, Gaddis writes with respect to the Cold War:

The world, I am quite sure, is a better place for that conflict having been fought in the way that it was and won by the side that won it. No one today worries about a new global war, or a total triumph of dictators, or the prospect that civilization itself might end. That was not the case when the Cold War began. For all its dangers, atrocities, costs, distrac-

tions, and moral compromises, the Cold War—like the American Civil War—was a necessary contest that settled fundamental issues once and for all. We have no reason to miss it. But given the alternatives, we have little reason either to regret its having occurred. **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 TRV-LNTERRY@aol.com.