Liberty of Conscience: In Defense of America’s Tradition of Religious Equality  

By Martha C. Nussbaum  

Reviewed by David M. Ackerman

Martha Nussbaum is not a lawyer; she is a political philosopher, who currently holds appointments in the Philosophy Department, Law School, and Divinity School at the University of Chicago. Reflecting her broad interests and competencies, her new book, Liberty of Conscience: In Defense of America’s Tradition of Religious Equality, seeks to do much more than parse the Supreme Court’s decisions involving the Establishment Clause and the Free Exercise Clause of the First Amendment—although she does that well. Instead, she identifies the animating principles that undergird our tradition of religious liberty, shows how they have developed in our history, and demonstrates how they have been tested—and sometimes repudiated—in the numerous controversies involving government and religion that permeate the American story. The book recounts some fascinating history and expertly analyzes a variety of judicial decisions. But, above all, this is a book of ideas—ideas that Nussbaum claims have created a tradition of religious fairness in our polity that is both fragile and enduring. Liberty of Conscience is eminently readable, perceptive, and provocative. It is well worth the time of anyone concerned about religious liberty.

From the outset, Nussbaum recognizes that no single idea can fully account for the complexities of how the American colonies, states, and nation have dealt with religion. Instead, she looks at six normative principles whose interplay, she says, has created “a distinctively American” tradition of religious liberty: (1) equality, (2) respect for conscience, (3) liberty, (4) accommodation, (5) nonestablishment, and (6) separation. All these principles are important, Nussbaum asserts, but the first two are particularly significant—the notions that, regardless of our religious commitments, we all stand as equals in our political system and that the public sphere needs to respect and protect the exercise of conscience.

Nussbaum looks primarily to American history both for the philosophical writings and the practices that gave rise to our “distinctively American” understanding of religious liberty. She concentrates in particular on the views and experiences of two remarkable men—Roger Williams in the 17th century and James Madison in the 18th century. Both men, she notes, were religious, and both lived in times marked by vigorous political and religious contention. Both men, she says, stand as the fundamental theoretical and practical architects of the principles that have shaped our tradition of religious liberty.

If Liberty of Conscience does nothing else (and it does much more), it convincingly rescues Roger Williams from the narrow philosophical confines to which he has been relegated by past scholarship. Indeed, Nussbaum finds Williams’ writings and actions to be the wellspring of all the principles of religious liberty identified above and especially of the principles of respect for conscience and civic equality. According to Nussbaum, some scholars—in particular, Mark Howe, in his book, The Garden and the Wilderness—have used Williams’ passing reference to a “wall of separation” between religion and the state to mean that his primary concern was to protect the “garden” of religion from the “worldly corruptions which might consume the churches if sturdy fences against the wilderness were not maintained.” Certainly, Williams wrote passionately about the preciousness and fragility of the individual conscience and its need for protection. But Nussbaum convincingly demonstrates that Williams was equally concerned with overreaching by the churches in the public domain and with the need to keep the political realm free from religious orthodoxy. Indeed, much of his writing was intended to rebut the views of John Cotton, a prominent minister in the Massachusetts Bay Colony, who vigorously defended the desirability of theocratic government and the necessity of persecuting dissenters. It is Williams, she contends, who first caught “hold of the whole family of principles that form … the distinctive American approach to religious fairness.” Moreover, she notes, he put these principles into practice in the colony of Rhode Island, which he founded after being forced into exile from the Massachusetts Bay Colony and which became a haven for religious dissenters in the 17th and 18th centuries and a model—albeit an imperfect one—of how persons of differing faiths could live together in peace.

The principle of human equality became even more central in the philosophical discourse of the 18th century, Nussbaum says, and she illustrates this contention with intriguing forays into Stoic philosophy—which, she says, was the foundation of classical education during the century—and the writings of John Locke, Adam Smith, and Immanuel Kant. The equality principle, she contends, gave powerful impetus to our rejection of the English monarchy and to our creation of a republic “that did not contain various baneful types of hierarchy.” “Salient among the rejected types of hierarchy,” she asserts, “was an establishment of religion, by which the framers meant governmental privileges … granted to one church or group of churches.” Such establishments, she shows, inevitably created favored and disfavored classes of citizens, rarely “protected religious liberty with an equal hand,” and often led to the persecution of those who were not part of the established church or churches.

Nussbaum examines in detail both the controversy in Virginia in 1784–1785 over whether a general tax ought to be levied for the support of teachers of the Christian religion and the adoption of the religion clauses of the First Amendment; Madison played an indispensable role in both controversies. On the former, Nussbaum finds the central argument of Madison’s famous Memorial and Remonstrance Against Religious Assessments, which turned the tide against the assessment bill, to be based on equality. The fact that the as-
sessment bill would endorse one religion—Christianity—and fund its teachers, Madison wrote, “degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority.” Madison’s Memorial uses other arguments as well but, Nussbaum says, its central argument was that the bill would set up a hierarchy of religious favorites and nonfavorites, insiders and outsiders.

Nussbaum writes that the principle of equality also underlies both the “no religious Test” clause in Article VI, section 3, of the Constitution and the Free Exercise and Establishment Clauses of the First Amendment. Indeed, she says, the principle was so widely accepted at the time that the “no religious Test” clause passed “without demur.” With respect to the religion clauses, Nussbaum notes that, even though Madison authored the original draft, the clauses ultimately were a product of congressional debate and compromise and that it may not be possible to determine their original meaning with absolute clarity. Nussbaum maintains, however, that the equality principle is implicit “in the idea that Congress may not prohibit free exercise—to anyone.” Moreover, the Establishment Clause, she says, embodied the widely held view (and the one Madison expressed in his Memorial) that “any establishment makes people’s civil rights unequal.”

Nussbaum spends considerable time on the question that has often bedeviled our political system: How should the beliefs and practices of religious minorities be handled? Religious minorities, she observes, rarely make laws that inhibit their practice of religion; but such laws may well burden religious minorities, especially those that are unfamiliar to others. Should religious minorities, she asks, be required to bear the burden as best they can (as Locke contended)? Or should the law accommodate the beliefs and practices of such minorities and excuse them from compliance when a law unduly burdens a religious practice (as Williams contended)? Which approach better serves religious liberty?

Nussbaum analyzes these questions not only by reviewing all the pertinent Supreme Court decisions and congressional enactments but also by recounting three instances in our history when “admirable principles of equal respect and equal liberty seemed to fly out the window, and politics was driven by fear and hate.” All are fascinating stories—the overt discrimination against Catholics that arose when their numbers burgeoned in the 19th century and persisted well into the 20th century; the suppression of the Mormon practice of polygamy in the latter half of the 19th century; and the violence against, and expulsion of, Jehovah’s Witnesses who refused to join in the Pledge of Allegiance and salute to the flag in the public schools in the 1930s and early 1940s. As Nussbaum makes clear, religious liberty was often crushed during these episodes. Yet, in what may be an overstatement, she claims that ultimately “the respect-conscience tradition triumphed.” (Interestingly, in the course of her analysis of the controversy over Mormon polygamy, she vigorously defends polygamy, particularly as compared to the legal status of women in monogamous marriages in the late 19th century.) Through these and other instances, Nussbaum builds a strong case that for religious liberty to be substantively equal, religious minorities ought to be accommodated.

Nussbaum also examines in detail all the knotty theoretical and practical issues and arguments that have arisen under the Establishment Clause, including religious exercises in the public schools, public aid to religious schools, the display of religious symbols by government entities, private religious speech, incorporation, nonpreferentialism, originalism, and others. In the course of that examination, she repeatedly critiques what she sees as excessive judicial reliance on the principle of separation of church and state—a principle she nonetheless considers to be an essential element of our tradition of religious liberty. The principle of separation of church and state, she argues, has often been an instrument of hostility toward people of faith and—particularly in the area of public aid to sectarian schools—has led the Supreme Court astray. She analyzes the various tests the Court has devised for cases involving the Establishment Clause—the Lemon test, coercion, and endorsement—and makes clear her view that Justice O’Connor’s endorsement test best embodies the principle of civic equality that ought to animate decision-making in this area of the law.

Nussbaum makes a glaring omission in her discussion of the cases involving school prayer. She critiques the Supreme Court’s decisions in Engel v. Vitale, Abington School District v. Schempp, Wallace v. Jaffree, and Lee v. Weisman, and finds much that is commendable in the Court’s reasoning. But because the last case she examines, Lee v. Weisman, relied only on the coercion test, she concludes that “the tradition that bases analysis of school prayer on a fundamental concern for fairness is now seriously at risk.” She seems unaware of the Court’s subsequent decision in Santa Fe Independent School District v. Doe, which held that student-led prayer at school football games violated the Establishment Clause. That ruling was based on the application not only of the coercion test but also the endorsement test and the Lemon test. It seems likely that analysis of that case would have changed Nussbaum’s conclusion about the state of the law on this issue; and because of her obvious familiarity with all of the pertinent Supreme Court decisions in the other areas she analyzes, its omission is surprising.

Nonetheless, that lacuna amounts to little more than a quibble in the context of the whole book. Liberty of Conscience is an excellent, thoughtful work. At the outset, Nussbaum describes its purpose to be “both to clarify and to warn.” The clarification is essentially related to how the principles underlying our distinctive tradition of religious liberty, and particularly the principle of equality, arose and how they have been used and sometimes abused in dealing with concrete issues. Nussbaum’s warning recalls the historical truth that our tradition of religious liberty has often been threatened, particularly at times when fear has been a major element of our national experience. Those threats, she says, have come from both the left and the right, and now seem to be coming from “an organized, highly funded, and
widespread political movement [that] wants the values of a particular brand of conservative evangelical Christianity to define the United States.” She concludes the book by saying that “Americans have done pretty well in forging a political order that exemplifies equal liberty of conscience. Given human frailty, however, we always need vigilance lest backsliding occur. . . .” This book fully accomplishes both its purposes. TFL

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David M. Ackerman recently retired after serving as legislative attorney with the Congressional Research Service at the Library of Congress. Among his legal specialties is the law of church and state.

The Next Justice: Repairing the Supreme Court Appointments Process

By Christopher L. Eisgruber

Reviewed by Charles S. Doskow

During the confirmation hearings of Chief Justice Roberts, a senator who was among the last to question the nominee made a most revealing comment: “There comes a time,” he said, “when everything has been said, but not everyone has said it.” As a senator, the questioner was entitled to his few minutes of national exposure, which he was not about to relinquish, but his comment amounted to an acknowledgment that by then there was no particular point to his personal bliviation. The same might have been said of the comments of the senators who had already questioned the nominee. Each of the hearings on the nominations of both Roberts and Samuel Alito was a grand Kabuki drama, with the senators expressing their opinions at length and then inserting a question mark at the end of their ramblings, followed by the nominee’s giving as minimalist an answer as he could get away with.

It was an awful process. As the Russian worker said, “We pretend to work, and they pretend to pay us.” During the hearings, the senators pretended to ask questions, and the candidates pretended to answer them. And this farce was all in the name of an attempt to determine the nominee’s “judicial philosophy.”

Christopher L. Eisgruber bills his book, The Next Justice: Repairing the Supreme Court Appointments Process, as a treatise that proposes a new and improved way to allow the Senate and the public to make informed judgments about the persons nominated to serve on the Supreme Court. Eisgruber does not really succeed at achieving that goal, but it is a pretty good book anyway.

Eisgruber, a former Supreme Court law clerk, is now provost and professor of public affairs at Princeton University. His observations on the Court, its justices, and past Senate confirmation processes, are lucid. Eisgruber describes approaches taken by senators on both sides of the aisle: Republicans asserting that only the nominee’s qualifications are at issue, and Democrats wanting to explore the nominee’s “legal philosophy and judicial ideology.” Eisgruber maintains that knowing the nominee’s judicial philosophy is essential to a making a sound decision.

But what is a judicial philosophy, and is it relevant? Eisgruber writes that the term refers to “the basic themes or values that govern [a nominee’s] attitude toward judicial enforcement of the Constitution.” The book provides excellent discussions of the philosophies of Justices William Brennan, Hugo Black, Stephen Breyer, Antonin Scalia, and Sandra Day O’Connor. Eisgruber’s comments on each justice buttress the point that there are such philosophies and that they are knowable, but that the present process does not lead to acquiring knowledge of them.

Eisgruber believes that the quest in choosing a justice should be for what he calls “moderation.” He describes a moderate judicial philosophy as “an open-mindedness toward novel claims of constitutional justice brought by disadvantaged groups or persons, and a lively and thoughtful understanding of the limits of the judicial role.” An effort to find a person with these qualities will not involve characterizations such as “strict construction” or “judicial restraint”; nor will the pejorative “activist judge” substitute for analysis and provide a basis for partisan attacks.

Eisgruber’s position is clear: the hearings as currently conducted are not the way for the Senate to inform itself or the public. Instead, prior to the hearings, the senators should study the record of the nominee with great care. At the hearings, they should ask about the nominee’s record and encourage the nominee to be candid about his or her beliefs. The senators should not allow the nominee to hide behind the excuses that he or she cannot comment on matters that may come before the Court, or that the question is too general or too hypothetical to answer. Eisgruber describes the Roberts and Alito hearings as “spectacular failures,” because the nominees were not required to define their judicial philosophies.

Eisgruber suggests that senators should ask nominees the following questions:

- What twentieth-century justice’s jurisprudence do you most admire and why?
- What purposes does judicial review serve?
- Do you believe that justices should defer to Congress and to state legislatures when the meaning of the Constitution is unclear or contestable?

These are all good questions, but would they assure getting meaningful answers?

Reliance on moderation is a wistful hope as long as the nomination process itself forces the inquiring senators to take extreme positions. The issues that have become touchstones in the nomination process—particularly abortion—do not, in the present state of our polity, lend themselves to moderate viewpoints. As long as senators must justify themselves to advocates on both sides of hot button issues, it is unlikely that the partisanship of the confirmation process as it stands today will be significantly diminished.

Also, of course, one person’s moderation is another’s extremism. Bill Clinton named two moderates to the Court, the last in 1994. When George W. Bush’s turn came, he named two individuals who were entirely acceptable to his conservative constituency.

The Next Justice contains many in-
teresting descriptions of the Court, including its inner workings, the role of the law clerks, and the process of decision-making. Eisgruber has a great deal of respect for the Supreme Court as an institution, and he would like to have a confirmation process worthy of the Court. So would we all. TFL

Charles S. Doskow is dean emeritus and professor of law at the University of La Verne College of Law in Ontario, Calif., and past president of the Inland Empire Chapter of the Federal Bar Association.

Striking First: Preemption and Prevention in International Conflict

By Michael W. Doyle

Reviewed by Todd Garvey

When to employ armed force in the interest of self-defense is perhaps the most important foreign policy issue of our time. Although the consequences of engaging in a pre-emptive or preventive war are great, the failure to act in the face of an imminent threat can be even more destructive. In Striking First, Professor Michael W. Doyle attempts to develop a paradigm for determining the point at which a country is justified in taking preventive military action. In the midst of the war on terror and the war in Iraq—two wars arising from the Bush doctrine of pre-emption—and a third potential preventive war in Iran on the horizon, Doyle’s analysis of what constitutes a just defensive war is timely.

In Doyle’s view, existing international standards for anticipatory self-defense are ineffective and have failed to evolve in the post-Sept. 11 world. He quickly distinguishes between the oft-confused principles of pre-emption and prevention. Pre-emption, the more narrow doctrine, was defined by Secretary of State Daniel Webster in 1841 to include only a response that is “(1) ‘overwhelming’ in its necessity; (2) leaving ‘no choice of means’; (3) facing so imminent a threat that there is ‘no moment for delibera-

tion’; and (4) proportional.” Very few scenarios can satisfy this standard: the enemy must be at your doorstep and on the verge of an attack. The broader prevention doctrine, by contrast, requires no imminent threat and allows acts intended only to forestall a distant threat from evolving into a real and active one. Doyle argues that current international law requires a state to prove the overly restrictive standards of pre-emption in order to be justified in attacking another state. The Bush administration, by contrast, uses its own far broader standard, known as the “one percent doctrine,” to justify its unilateral action. Neither pre-emption nor prevention has been successful as a standard in justifying action when it is warranted and barring it when it is not. Doyle’s purpose is to find an effective middle ground for the United Nations and individual states to use in determining whether to take or approve preventive action.

The Bush administration’s expansive one percent doctrine stands in drastic opposition to accepted international law. When intelligence shows even a one percent chance that a terrorist attack will be carried out on American soil, the Bush administration considers a pre-emptive response to be justified. A one percent risk is treated as a certainty. Doyle argues that the Bush doctrine is “subjective and open-ended” and fearfully open to abuse. The country is kept in a permanent state of fear, in which attacks of minute likelihood are treated as inevitable. The Bush administration’s lawyers, exaggerating the inevitability of potential attacks, fail to accurately weigh the costs and benefits of preventive action. Doyle adds that unilateral action based on a one percent risk courts “international instability” and weakens “moral restraints” by purporting to justify preventive action on a subjective belief that a threat exists. Were the Bush doctrine to become commonplace globally, the result would be constant military conflict between the most contentious border states, such as India and Pakistan, China and Taiwan, and Israel and Lebanon—all in the name of preventive war.

As little as Doyle likes the Bush doctrine, he freely admits that the tradition-

al alternatives to preventive war, which were successful during the Cold War, no longer work and mislead us when developing foreign policy. When the enemy is an irrational non-state actor, conventional tactics—such as deterrence, strong military defense systems, economic embargoes, and diplomacy—are ineffective. Groups such as Al Qaeda cannot be rationally deterred. Deterrence hinges on the looming threat of military retaliation, but when there is no defined entity to retaliate against and when, as Doyle notes, death in the war against the Western world “is for them, in effect, a reward, not a punishment,” deterrence through the threat of retaliation is futile. In addition, terrorists attack in ways that traditional military defenses cannot prevent, and terrorists are unaffected by economic embargoes and diplomatic ventures. Doyle argues that, for these reasons, “active preventive measures”—including unilateral or multilateral armed attack—may be a necessary and effective strategy. Recognizing this fact, Doyle attempts to provide a standard for determining when such action, whether unilateral or multilateral, is justified.

Doyle seeks to present a workable standard for anticipatory self-defense—a standard positioned between the “too strict” international standard and the “too loose” Bush doctrine. Doyle would have the United Nations Security Council use this standard when it considers whether preventive action is justified in a given situation, but he concedes that, when the U.N. fails to act, this standard may be used cautiously by a single nation contemplating unilateral action. Doyle’s proposed standard actually consists of four standards that would be used together to evaluate potential preventive actions: lethality, likelihood, legitimacy, and legality. Doyle’s formula is multiplicative, so when one standard is valued at zero, the net product is zero and no action is justified.

Doyle defines the first standard, lethality, as the amount of anticipated harm, discounted by the reversibility of the harm. Doyle does not measure harm solely in terms of lives lost or property destroyed, but he includes the loss of territorial integrity and political
independence. Any destruction that can subsequently be reversed (property that can be rebuilt, for example) would be discounted from the final evaluation.

The second standard, likelihood, refers to the probability that a perceived threat will occur. Doyle’s definition includes an assessment of the threatening actor’s capability to carry out an attack as well as the actor’s intentions or motives. The likelihood that potential harm will actually occur is incredibly hard to determine. Doyle argues, as have many modern international relations scholars, that liberal regimes are less likely to take aggressive action against other liberal regimes, whereas dictatorships are less predictable and more likely to engage in aggressive actions. Doyle settles on a definition of “likelihood” that includes an analysis of the regime in question—particularly its military capacity and its past behavioral patterns—and focuses on the explicitness and credibility of its threats.

The third standard, legitimacy, includes weighing a proportional response, limiting the response to the minimum necessary to mitigate the threat, and undertaking the requisite deliberation before deciding to act. When considering a proportional response, a nation must consider the entire gambit of preventive actions, including everything from a blockade and sanctions, to a surgical military strike, to a full-scale invasion and occupation. Doyle argues that to prevent civilian casualties, it is imperative that any proportional preventive measure discriminate between combatants and noncombatants and target only those who are most responsible for the threatened aggression. In addition, a claim of legitimacy requires that a state be able to explain why preventive action is immediately required to counter a threat.

The final and perhaps most complex standard, legality, focuses on whether the threatening actor has violated international law, and whether the proposed response comports with international law. Process provides the key to legality. Prior to taking preventive action a state must show that the aggressor has violated international law either domestically or extraterritorially. In addition, the preventive response itself must be legal, which means that the state must seek authorization from the U.N. Doyle argues that some unilateral acts may be legal and justified even when the U.N. refuses to authorize multilateral preventive action. This possibility exerts pressure on the U.N. to approve justified actions, because, as Doyle writes, “Rather than enjoying a monopoly, the [U.N. Security Council] will now know that its actions are subject to the ‘market’ of alternative judgment.”

Will Doyle’s idealistic standards for justified action really work? Will they lead a government to make the right decisions? Doyle attempts to answer these questions by applying his standards to historical instances of preventive action, including South African apartheid, the Cuban missile crisis, and Israel’s air strike on the Iraqi nuclear reactor in Osirak. Consider the Cuban missile crisis, perhaps the defining moment of John F. Kennedy’s presidency and perhaps the most dangerous event in human history. The assessment of lethality was high, with ballistic missiles in such close proximity to the mainland that U.S. cities were vulnerable to attack with little warning. The experience of the Cold War indicated that the likelihood that the Soviet Union would indeed use the missiles in Cuba was small, but the secrecy with which the Soviet Union placed the missiles in Cuba was alarming. Although Doyle writes that a proposed air strike would have been an illegitimate response to the missile threat, the more measured quarantine represented a justifiable use of preventive force. Although the blockade was technically a violation of international law, and there was nothing illegal in the Soviet Union’s shipping missiles to Cuba, “Kennedy appropriately chose the minimum proportional measure that forced the withdrawal of the missiles.”

In applying his standards to the invasion of Iraq by the United States in 2003, Doyle finds justification for the preventive action to be lacking. Although Iraq had clearly violated international law through a long record of human rights violations and defiance of U.N. resolutions, the American response broke the bounds of proportionality. Doyle argues that Saddam Hussein’s history of aggression and his destabilizing influence in the Middle East may have justified continued economic sanctions, inspections, and perhaps strategic and targeted air attacks, but the dubious evidence of the existence of weapons of mass destruction and the lack of a connection between Saddam and Al Qaeda made the U.S. invasion and subsequent occupation illegitimate, radically disproportionate, and unjustifiable. Iraq presented a low lethality threat that was not likely to come to fruition, and the response of the United States was excessive, illegitimate, and probably illegal.

With politicians openly discussing preventive action against Iran because of its nuclear program, we find ourselves in the midst of the latest debate over the potential use of anticipatory self-defense. If we apply Doyle’s four factors to the Iranian situation, how does it come out? In Doyle’s view, a preventive attack on Iran would not be justified. The Iranian military possesses the potential for significant lethality, but it is debatable whether President Ahmadinejad’s threats have merit or are simply bluster. Doyle also points out that Iran’s pursuit of nuclear capabilities seems to be within the scope of the Nuclear Non-Proliferation Treaty, and that, with the uncertainty over Iran’s ultimate goal—whether Tehran seeks to obtain nuclear power for military purposes or for energy use—only cautious, multilateral, and limited sanctions are currently justifiable. Thus, a preventive attack on Iran could not be justified even if one dismisses the enormous costs of any military action of sufficient capacity to remove Iran as a threat.

Striking First includes comments on Doyle’s standards by Harold Koh, the dean of Yale University Law School; Jeff McMahon, professor of philosophy at Rutgers University; and Richard Tuck, professor of government at Harvard University. Each commentator generally supports Doyle’s conclusion and none of them presents a strong critique of Doyle’s essays. Dean Koh’s chief concern is over Doyle’s contention that there are times when unilateral preventive action must be authorized. Koh argues that the premise of “anticipatory self-defense” is logically inconsistent; for Koh, all pre-

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emptive force is inherently unjustifiable. Koh would ban unilateral preventive military action and would require countries that engage in such conduct to submit their justifications as a defense to an illegal act. Professor Tuck identifies the classic barrier to internationally enforced standards: the lack of an entity, such as the U.N. Security Council, to enforce international law. Finally, Professor McMahon advises Doyle to consider more deeply the moral restraints on preventive military action. According to McMahon, no attack can be justified based on a potential future act—no matter how imminent it may appear. He goes so far as to argue, quite unrealistically, that no military action is justified unless each individual attacked is morally culpable for the threat posed by his or her nation or organization. McMahon bases culpability on action, which means that even an armed and uniformed Iranian soldier stationed at a nuclear facility or an Al Qaeda training camp full of new recruits would not qualify as a target of a justified preventive action.

Preventive military action is a fact of modern international military strategy—so much so that the public today elects leaders with the expectation that, if the country is threatened, the leader will take swift, decisive, and preventive action. If preventive military action is inevitable, world leaders are left only with the task of determining the point at which a threat becomes actionable. The line has yet to be drawn, but certainly the line must be drawn somewhere between imminent pre-emption and Bush’s reckless one percent doctrine. Doyle presents the reader with a set of truly idealistic standards to be applied in drawing that line, but perhaps a certain level of idealism is required—and indeed encouraging—in the face of the very real, very volatile, and very deadly doctrine of preventive war. TFL

Todd Garvey is a third-year law student at William and Mary School of Law, where he chairs the student division of the Institute of Bill of Rights Law and writes for its blog (www.ibrdsl.blogspot.com). He earned his undergraduate degree in political science from Colgate University.

Law Firm Fees & Compensation: Value & Growth Dynamics

By Edward Poll
LawBiz Management Co., Venice, CA, 2008. 150 pages, $47.00.

Reviewed by John C. Holmes

The goal of billing, Edward Poll states in Law Firm Fees and Compensation, “is to deliver value as perceived by the client for a total price deemed to be appropriate and reasonable by both client and attorney.” This how-to book gives a concise explanation of suggested methods of managing a law firm’s billing and discusses related issues as well.

Poll strongly advocates that lawyers use engagement letters that spell out the terms of their agreements with their clients, the means of payment, and other matters that will aid their clients in understanding the lawyer’s role in representing their interests. Throughout the book, Poll emphasizes that keeping clients informed and aware of the services being rendered on their behalf is crucial to making clients feel that the fees they are charged are justified. Lawyers do not want to leave clients with the impression that the lawyer’s primary goal is to bill hours.

But billing by the hour is only one method, of course, and Poll discusses them all, including a fixed or flat fee, contingent fees, retainers, and premium pricing. He considers the advantages and disadvantages of each, which type is most appropriate in certain circumstances, and how fee arrangements might be modified or combined. He recommends that, in many cases, lawyers should not bill for the time they spend discussing legal issues with their colleagues.

Retainers enable a law firm to serve its clients’ long-term interests while providing flexibility that will allow for different types of billing when a situation calls for an alternative. Flat or fixed fees for particular services are popular, but they should take into account all costs of doing business, including potential collection costs. Stating what may be obvious, Poll notes that contingency fees are usually associated with plaintiffs’ actions, particularly personal injury and collection cases. Contingent fees are useful not only because many plaintiffs are unable to make payments based on hourly rates but also because an experienced and shrewd lawyer can size up a case in a way that makes it possible to obtain maximum value at minimum cost. Poll also makes a less obvious point, however: defense lawyers may also use contingency fees. A defense lawyer may, for example, offer his or her services at a “discounted” hourly rate, supplemented by a contingent award based on settling or litigating an outcome in which the defendant must pay the plaintiff less compensation than an amount upon which the defense lawyer and the defendant had previously agreed.

Poll also discusses how to negotiate billing rates; when to adjust fees (up, if warranted, but rarely, if ever, down); and the nuts and bolts of billing, including collections. He addresses not only good management practices but also ethical requirements, including those that govern splitting fees with other attorneys. He briefly describes recent trends that have reduced lawyers’ earnings, for example, large corporate clients have pared down their use of outside law firms and have focused on settling cases for the lowest possible cost.

Although Poll purports that Law Firm Fees and Compensation is aimed at large law firms, his guidance can also benefit small and medium-sized firms, which may have less experience and expertise in billing. Yet I found the book disappointing in its lack of real-world examples of how actual law firms schedule their billing and in its lack of explanations of why various billing methods have succeeded or failed in actual cases. Readers looking for exciting revelations or insights into the legal profession will be disappointed by the book’s narrow focus. TFL

John C. Holmes served as a U.S. administrative law judge for 30 years, retiring in 2004 as chief administrative law judge at the U.S. Department of the Interior. He currently works part time as an arbitrator and mediator and can be reached at trvlnterry@aol.com.