

work, and supported government-funded religious aid to the Indians without fail.

Ross and Smith conclude their outstanding treatise by contrasting what Washington, like most Founders, believed about the godly republic with how their ideas and ideals have been caricatured or twisted by many since the mid-twentieth century:

*Washington's approach to church-state relations differs from Jefferson's "wall-of-separation" and the line of modern-day legal decisions it has spawned. Washington's perspective on the First Amendment would permit a much more religion-friendly government, even as it emphasized the importance of religious freedom.*

If I have a criticism, it is that Ross and Smith at times wing the record to make Washington come off like an angelic staff lawyer for the contemporary Christian Right or one of its favorite legal beagle think tanks or advocacy groups. They do that rarely. The book, on the whole, is outstanding and well worth reading and heeding.

Still, let me conclude by reminding, should we need reminding, that Washington, like Jefferson, held slaves. Washington was less moved by Christian convictions than many among his contemporaries (both North and South) were to recognize and witness to slavery's immorality. He was better toward the Indians, but far from just to them. And his religious pluralism often had a distinctly or denominationally southern Protestant accent. It took successive religious movements, including the one led by Dr. Martin Luther King, Jr., to begin to right racial historic wrongs that had long had public law, and otherwise great leaders like Washington, behind them.

Secular liberals played a role in those curative religion-led movements too. The sad irony, however, is that today, aided and abetted by their opposite numbers—namely, some politically conservative Christians who would rather wage culture wars than serve the poor or solve social ills—it is they who distort history and deny to sacred places the public support with which they could freely, fairly, and constitutionally serve civic purposes. Neither Washington nor Jefferson, were they with us today, would join or bless either extreme church-state faction in this one nation under God.

## Mass Torts in a World of Settlement

BY RICHARD A. NAGAREDA

Reviewed by Mark A. Behrens\*

Vanderbilt Law Professor Richard Nagareda's recent book, *Mass Torts in a World of Settlement*, explores the evolution of tort law from individual cases involving idiosyncratic events to the modern era of "mass torts" affecting large numbers of broadly dispersed persons. The book thoroughly analyzes the role of lawyers in many important mass torts including asbestos, Agent Orange, silicone gel-filled breast implants, the fen-phen diet drug combination, the state attorneys general tobacco litigation, lawyer-manufactured silicosis claims, and Vioxx.

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The evolving response of the legal system to mass torts, as Professor Nagareda explains, has been to shift from tort to administration: "The sheer numbers of claims, their geographic breadth, their reach across time to unidentified future claimants, and their factual patterns, together, demand the kind of systematized treatment characteristic of administrative processes." Management of mass torts, he argues, has come to resemble the gridlike schemes set up to settle workers' compensation claims, except that mass tort settlements have primarily come through *ad hoc* experimentation by lawyers rather than through public legislation.

Professor Nagareda argues that mass settlements have transformed the tort system so acutely that rival teams of lawyers now operate as sophisticated governing powers rather than mere litigators. He explains: "The real story of mass torts today is the story of how these lawyers have come to function as a rival regime of legal reform, one that wields the power to replace the legal rights of affected persons with a new set of rights spelled out in some manner of settlement agreement." The agents who design the transactions to resolve mass torts, he concludes, have become endowed with the power of governance. Former Clinton Administration Labor Secretary Robert Reich called this phenomenon "regulation through litigation" in the context of the state attorneys general tobacco lawsuits.

Professor Nagareda's controversial and provocative solution to the administration of mass torts is the replacement of the existing tort system with a private administrative framework to address both current and future claims. His solution is pioneering and offers a path that avoids the inability of the court system to resolve such claims through the class action device post-*Amchem* as well as the failure of Congress to overcome political hurdles that have prevented the enactment of comprehensive legislative solutions to mass torts such as asbestos. As Yale Law Peter Schuck explained: "[Nagareda] offers an ingenious and attractive public law solution to what he sees as a public law problem—and shows us how to achieve it."

Professor Nagareda's book is a must-read for concerned citizens, policymakers, practicing lawyers, investors, academics, and executives that must grapple with the changing face of tort litigation in a mass action world.