BOOK REVIEWS

A Historical Introduction to the Law of Obligations. By D.J. IBBETSON

This book, as the author explains in his preface, is “a history of legal categories, concepts and doctrines; the mechanisms used by lawyers to organize their thoughts.” It is a valuable contribution to the literature of legal history for at least two reasons. First, it traces the evolution, growth and decay, in the fields of contract, tort and restitution, with many insights upon these changes. Secondly, it has the comparatively rare quality of inviting reflection on the modern treatment of the subject; it is perhaps as much a signpost as a milestone.

The book is divided into parts, to which the fifteen chapters are subsidiary. There is a prologue, of “prehistory”, followed by four parts: Form and Substance in Medieval Law, The Triumph of Trespass on the Case, The Modern Law of Contract and Tort, and Unjust Enrichment. The final, fifteenth, chapter is a summing-up on the nature of legal change and continuity in the English law of obligations.

The “prehistory” is a short survey of the basic building blocks, native ideas, or folk notions and practices for rights and wrongs, and, on the other hand, sophisticated Roman Law. The first area is dark territory but is partly illuminated by the author’s investigations into the litigation of local courts of the thirteenth and fourteenth centuries, over sixty cases which illustrate these matters at grassroots level (many of them extracted from unpublished records). The use of Roman Law has been largely in the organisation of legal ideas rather than in specific transplants; the author has enlarged upon these functions of the civil law in his Selden Society lecture in July 2000, and this lecture, when published, should be read alongside this book.

Part I, on the medieval law of obligations, is arranged by form and substance. The yearbook lawyer knew that there was a difference between covenant (our contract) and trespass (our tort), but he did not arrange his legal thinking around Roman categories. He might arrange his law alphabetically, chronologically, and classify by writs and remedies, but to import earlier or later categorisation would be anachronism. Indeed, there are difficulties even in modern terms in allocating rights and remedies in medieval law: there are actions for wrongs not only vindicating contractual rights but protecting proprietorial interests. Thus in the middle ages that which to-day would be a matter of contract to make periodic payments would be matters of rents, annuities, corrodies, that is, matters of land law.

In this first part the author’s earlier research work begins to appear, or rather reappear: the action of covenant, and later on other contract topics, as consideration, and standards of contractual liability. But seemingly new is a very interesting passage in the discussion of the origins of trespass on the case as a form of action (p. 50 et seq.). The author declines to side
with either of the currently opposed views, but draws attention to the
desirability from the plaintiff's point of view of getting the nature of his
complaint to the sheriff before the jury were summoned. Once one
recognises that the medieval jury made inquest and inquiry before the day
of nisi prius, that they examined the case (parties, witnesses, etc.) before
going to court to give their verdict, then the insertion of the alleged facts
into the writ becomes an intelligible means of pointing the jury in the right
direction for inquiry. This view of the matter is of course more Milsomian
than that which depends on governmental policy, though all explanations
necessarily suffer from the difficulty that we do not know who gave the
orders in the cursitors' office. But this explanation has the right ring to it,
being founded on known jury practice of the time.

Part II, on the triumph of the action on the case, takes us through the
transition from medieval to early modern times, when Case was the solvent
which largely liquified the old law and allowed a re-casting in terms of
substantive principles rather than remedial categories, though the forms
themselves exerted an influence upon development till the nineteenth
century. At this stage Assumpsit holds the centre stage in interest for the
legal historian. It is a commonplace that Assumpsit became contractual and
so it did, but nevertheless retaining much of its old character. In the
sixteenth century the action could be brought for negligent performance of
a gratuitous undertaking, but not for non-performance. “Two centuries
later this would be the springboard from which the tort of negligence took
off” (p. 134). By the early seventeenth century lawyers were not only
beginning to use the language but even to think the thoughts of the
categories of Contract and Tort.

Part III, by far the longest, on the modern law stretches from the early
modern period to the present day. In the field of tort the principal theme is
the ever-enlarging area of negligence liability. The history of this general
take-over is one which has lessons for us to-day. It is common knowledge
that English law (unlike Roman law) adopted the notion of duty of care.
Originally judges recognised duties as they arose in practice, and “this
approach to duties of care meant that from the beginning the tort of
negligence has a coarse granular quality. The casuistic nature of legal
reasoning meant that the grains became even smaller and the texture of the
tort even finer, but it was only in the twentieth century that it emulsified
into a single duty situation” (p. 179). The metaphor might be extended to
the quicksand of contemporary case-law. But there have been wider
influences at work. If culpable fault is a moral position, then there has
been a shift towards a policy based upon allocation of loss with regard to
social need. With regard to contract, where the civilian influence (through
Pothier and other authors) had been more pronounced, will-theory, or the
autonomy of parties, has given way to the pressures of consumerism and
considerations of equity, if not equality, between contractors. The general
theories of liability predominate in these later pages: they are still with us
and by no means matters of the past. It seems that two influences have
predominated, the decline and disappearance of the civil jury and the rise
of the modern textbook. The former has resulted in law reports being filled
with reasoned verdicts and the judges forced to make law where formerly
decisions were left to lay jurors. The latter is evident for a couple of
hundred years past, and in more recent times conspicuously so in the field
of unjust enrichment. The final Part, on unjust enrichment, is
comparatively brief, mainly because the history is shorter rather than on account of intrinsic interest.

In the final chapter on Legal Change and Legal Continuity the author winds up his work with some general reflections and a few value judgments. That the total result is over-complex it is difficult to disagree with the author, and to quote Milsom on the common law shifts and sidesteps, these “will look odd to one brought up on the categories of Roman origin.” But from another angle one might see the qualities of flexibility and adaptability. As the author remarks, “in a system so heavily dependent upon case law, it is change that needs to be explained, not continuity.” Explanations are the strength of this book. In some three hundred pages there is not room for everything, all the extraneous transplants, let alone the side-effects, but in this field of common law obligations (common law and equity alike) the general impression is that of indigenous legal culture.

This book is significant coming as it does about a century since the subject of English legal history took on a modern form. The production of literature has accelerated during the last fifty years. Textbooks and journals have proliferated; the monograph style has been less cultivated, though Cambridge University Press has maintained its monograph series for three quarters of the century. This work is therefore to be welcomed on this account, for every advanced student of the subject will need to read, and digest, the book. Those primarily concerned with current and contemporary law will find matter for reflection in it, especially in the latter pages, for as is written in the preface, “legal history is too important to remain within the domain of specialist legal historians.”

D.E.C. YALE


“We in England find it difficult to adopt a general concept of good faith. It may sound astonishing to you, but we do not know quite what it means,” Professor Goode once announced to a doubtless dumbfounded Italian audience (The Concept of “Good Faith” in English Law, 1992). For as Lord Bingham once explained in Interfoto Library Ltd. v. Stiletto Ltd. [1989] 1 Q.B. 433, 439, unlike the majority of legal systems outside the common law family, “English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness.” It is certainly correct that English law possesses no broad good faith provisions similar to, say, para. 242 of the German BGB or art. 1134 of the French Civil Code. Nor is it attuned to the allied notion of abuse of right. Indeed, even ignoring the fact that to a degree general notions of good faith have come to be incorporated into English law via E.C. legislation on unfair contract terms and on commercial agency, that our approach to contractual obligation appears to be at such variance with that of most European jurisdictions is what lends Zimmermann and Whittaker’s subject particular interest for the English lawyer, a circumstance which is only confirmed by the considerable
scholarly attention “good faith” has received in recent years: thus, 1999
witnessed the publication of Brownsword, Hird and Howells (eds.), Good
Faith in Contract, whilst in 1997 Harrison published her substantial study,
Good Faith in Sales.

Good Faith in European Contract Law is the first fruit of the “Common
Core of European Private Law” project—although the editors are anxious
to stress that their study is “not (to) be interpreted as reflecting a particular
position on the appropriateness of harmonisation or codification of private
law in Europe” (pp. 61–62). “Good faith” is a notoriously slippery
expression—one, many would argue, incapable of precise definition, either
“spiral(ing) into the Charybdis of vacuous generality or collid(ing) with the
Scylla of restrictive specificity” (per Summers: p. 128). To surmount this
problem, the editors have adopted an approach which owes much to
Summers’ “excluder” conceptualisation of good faith (which, in turn, may
explain why a study in European contract law incorporates a chapter by
Summers on “The Conceptualisation of Good Faith in American Contract
Law”). This approach contends that although “good faith” is without
general meaning(s), it does serve to exclude a wide range of heterogeneous
forms of bad faith. Thus, one should concentrate on the latter excluder
cases in order to illuminate the “meaning” of the concept. (See “Good
Faith” in General Contract Law and the Sales Provisions of the Uniform
Commercial Code, 54 Va.L.Rev. 195 (1968)). The first part of this book
consists of four introductory chapters: a general introduction by the
editors, followed by studies of bona fides in Roman law (Schermaier) and
good faith in the medieval jus commune (Gordley) and in modern American
law (Summers). The meat of the book, Part 2, is then taken up with thirty
practical case studies in which notions of good faith can play a role. Many
of these will be familiar to students of German law. Each case is concisely
considered in turn by fourteen reporters, who represent fifteen European
jurisdictions, much after the manner of Schlesinger’s path-breaking study,
Formation of Contracts: A Study of the Common Core of Legal Systems
(1968), and at the end of each set of national reports the editors supply a
brief comparative summary based upon the individual reporters’ returns.
The cases examined range over such topics as the duty to inform, parties’
freedom to break off negotiations, standing unreasonably upon one’s
contractual rights, failing to comply with contractual formalities, the effect
of inflation on long-term contracts, and penalty clauses. Two important
areas of inquiry which had to be excluded, simply to keep the study of
manageable proportions, were standard form contracts and malicious
breaches of contract. Even in the absence of these topics, this book
contains a rich trawl of data and affords authoritative guidance on the way
in which fifteen European systems approach cases that can raise questions
of good faith.

The final chapter, largely the work of Whittaker, provides a general
analysis. Not altogether surprisingly, the participating legal systems very
largely agree in the solutions they adopt in response to the thirty situations
posed. In no less than twenty of them, we discover that jurisdictions are
virtually unanimous in reaching a particular result. It is perhaps even more
significant that in only one situation—predictably, a case concerning the
applicability of our idiosyncratic doctrine of mistake and our rules of
misrepresentation in a context a French lawyer would identify as involving
la réticence dolosive—does English law march to a completely different
drumbeat to all its fellow European jurisdictions. Therefore, at a superficial level one could say that the absence of a general principle of good faith in English law has not produced rules which are self-evidently unfair or even at wide variance with the laws of our neighbours. Not that many would have doubted this, anyway. However, as the editors acknowledge, this limited level of analysis conceals as much as it reveals. The fact is that legal systems arrive at largely coincident solutions by a wide variety of different means. The greater interest therefore lies in the diversity of the intellectual routes they pursue, as well as in the range of remedies they afford parties diagnosed victims of breaches of good faith, rather than in the brute solutions. One thing that this study amply demonstrates, again unsurprisingly, is that even systems which do expressly espouse principles of good faith may apply them in radically different ways: in short, whilst it would be mistaken to conclude that “good faith” is devoid of meaning (p. 699), “recognition of a principle of good faith (or of the abuse of rights) does not determine the outcome of particular cases” (p. 669). Indeed, the picture is far more complex because, as the national reports show, there is considerable interplay between jurisdictions’ various interpretations of good faith and any number of other legal doctrines, such as culpa in contrahendo, lesion, laches, abuse of rights, obligations contra bonos mores, the exceptio doli, force majeure, rules of contractual construction, etc., some of which do the very work that in other jurisdictions would fall within the province of good faith itself. Similarly, it should be added, some systems have recourse to the law of tort to resolve what others would treat as matters of contractual good faith. And many routinely employ drafting practices which avoid some of the very problems posed in this study.

Having opened this review by featuring English law’s apparent perversity in eschewing any general conception of good faith, how do the editors believe that English law compensates for this omission? The question is important because we can see that in other systems good faith is often the battleground upon which contract law has to balance the autonomy of individual contracting parties against general communitarian values which would outlaw behaviour felt to amount to bad faith. In the main, the editors fall in with received wisdom that English methods of contractual interpretation and, notably, the device of implied terms import a quality not dissimilar to good faith into our law of contract. Thus, to select just one commentator at random, Lord Steyn, writing extrajudicially, has variously suggested that in English law the implied term largely substitutes for good faith in the performance of contracts (The Role of Good Faith and Fair Dealing in Contract Law: A Hair-Shirt Philosophy [1991] Denning L.J. 131, 133) and that, more generally, giving effect to the reasonable expectations of the parties broadly equates with an objective requirement of good faith (Contract Law: Fulfilling the Reasonable Expectations of Honest Men (1997) 113 L.Q.R. 446, 450).

It is impossible within the span of a short review to do full justice to the quantity of information amassed in Good Faith in European Contract Law. The project was well-conceived, the data is well-presented and the analysis, which seems comfortingly agnostic about the merits of general good faith provisions, is balanced and shrewd. This book sets a high standard for future volumes in the “Common Core” project to emulate as
well as providing scholars and teachers of comparative law with a fund of instructive materials.

RODERICK MUNDAY


The twenty-eighth edition of Chitty on Contracts, the first under the General Editorship of Professor Hugh Beale, is excellent. All the old virtues are there on display: a clearly written text; thorough and penetrating analysis of the law; informative paragraph headings and a user-friendly index, which makes the work easy to navigate. There may be new kids on the block challenging for her crown, but Chitty still leads the field, and by some margin.

Chitty is organic: it grows, adapts, changes over time. New developments are absorbed into the text rather than merely bolted on as some afterthought. This is best illustrated by the measured way in which Professor Treitel integrates the Contracts (Rights of Third Parties) Bill into chapter 19 (Chitty was published before the Bill was enacted). A subtle change to the chapter heading, away from “Privity” to that of “Third Parties”, signposts the shift towards easier enforcement of rights by third parties. However, the common law doctrine of privity has not been abolished, and there will be numerous occasions when the new legislation does not apply, not least because “contracting-out” is likely to be widespread. Chapter 19 emphasises this point and ensures that the doctrine, its traditional exceptions and the new legislation all receive equal treatment. There is a particularly useful paragraph (at para. 19–079) speculating on how the legislation would apply to some of the leading cases in which the doctrine of privity has been applied in the past. The overriding message is that in many cases there will be no change at all: a thought that practitioner might like to keep in mind as they probe the legislation with speculative actions relying on subsection 1(1)(b), which allows the third party to enforce a term of the contract if “the term purports to confer a benefit on him”. It will be particularly interesting to see how the courts react when the contracting parties have expressly excluded the new legislation from their contract and the third party attempts to rely on one of the other traditional exceptions to get around the privity rule. In theory, express exclusion of the legislation does not of itself exclude reliance on other exceptions to the privity rule but, in practice, it may well increase the burden on the third party as he tries to bring himself within one of those exceptions.

Two new chapters have been added to the twenty-eighth edition. The Unfair Terms in Consumer Contracts Regulations have been given separate treatment in a new chapter (Chapter 15) written by Dr. Simon Whittaker. This chapter deals with the 1999 version of the Regulations, which is no mean feat as they appeared only just before Chitty was published. It is much to Dr. Whittaker’s credit that he was able to take them on board so
late in the day. Just how late is illustrated by the fact that the Table of Contents still refers to the 1994 Regulations, and other references outside chapter 15 are to the old version.

Chapter 15 has two particular strengths. First, it considers the Regulations in their European context. This is clearly the right approach, although it produces some odd results so far as an English lawyer is concerned. For example, if the ECJ takes an autonomous view of what qualifies as a “contract” within the Regulations, an English court may be forced to classify as contractual something that English law considers as non-contractual (see para. 15–020). Secondly, frequent reference to various OFT bulletins on the Regulations provide guidance as to which terms are likely to fall foul of that body. Unfortunately, judicial guidance on the issue, set out by the Court of Appeal in Director General of Fair Trading v. First National Bank plc [2000] 1 All E.R. (Comm) 371, came too late for inclusion in the chapter.

If one minor complaint can be levelled at chapter 15, it is that it fails to address the fundamental question of whether the 1999 Regulations preserve the dual approach of the original Directive (reflected in the 1994 Regulations), namely that a term (a) must be expressed in plain and intelligible language, and (b) must not be unfair. Under the 1999 Regulations, however, the requirement that terms be plain and intelligible is presented as no more than one aspect of fairness. The question is raised, and answered, by Professor Malcolm Clarke in his Law of Insurance Contracts (1999, looseleaf edition), para. 19–5A1.

The second new chapter appears in Volume 2. Professor John Uff and Simon Hughes have produced a useful chapter on construction contracts (Chapter 37). Those writing for Volume 2 face a particular challenge when trying to cover the specific contracts assigned to them without repeating those general principles covered in detail in Volume 1. Chapter sub-headings such as “Formation of Contract”, “Contract Terms” and “Breach and Non-performance” in chapter 37 show that some overlap is inevitable. The danger is, however, that treatment of these issues looks flimsy when compared to that provided in Volume 1 (compare, e.g., the different treatment of Linden Gardens and its progeny in chapters 19 and 37). However, the real strength of Volume 2, exemplified by chapter 37, is the way that general principles are analysed in context. If Volume 1 represents “pure” contract law, Volume 2 is the “applied” version.

A novel feature of the twenty-eighth edition is that it is now possible to purchase Volume 1 separately from Volume 2. The practical impact of this, so far as the text is concerned, is that the index at the back of Volume 1 only relates to that volume, whereas the index at the back of Volume 2 covers both volumes. Does this spell the end for Volume 2? Who uses it? Why read Professor Reynold’s views on agency, or Professor Ellinger’s on banking, when more detailed accounts appear in their own specialist works on those subjects? Yet many readers do not have ready access to a University law library or anything like it. The High Street solicitor, in particular, will often be grateful to have Volume 2 on his bookshelf. At an additional cost of only £70, Volume 2 probably represents the best bargain in the bookshop!

RICHARD HOOLEY

The Podsnappish complacency with which British lawyers have for centuries boasted of the fearless invigilation by independent courts of executive activity under the tutelage of a watchful legislature has probably been at its least defensible, in England and Wales at least, in two main periods since the settlement of 1689. One was the years of the anti-Jacobin panic and the Black Acts. The other was the period between the two world wars which is Ewing’s and Gearty’s principal topic. Wartime itself of course posits special conditions; but the authors believe that then too liberty was sacrificed on the altar of emergency, a view easier to sustain in some respects for the First World War than for the Second. For Ireland and Scotland, both of which are valuably included in the study, the historical pattern was different, but these too experienced in the first part of the twentieth century—Ireland, for well-known reasons, to a far sharper degree—the same discrepancy between the theoretical rule of law and the determination of the state to curb serious political dissent.

The book sets out to locate a series of detailed studies of events within a theory of the rule of law. It reasons, unsurprisingly, that the rule of law is a necessary but insufficient condition of personal and political liberty in a democracy. Without acknowledging any European debt, the authors redefine the rule of law as the principle of legality; but to it they add—something now familiar from the jurisprudence of the European Court of Human Rights—that government action ought also to require clear, prior and prospective legal authority. In the United Kingdom this is highly problematical, because great tranches of public power continue to be exercised by virtue of a prerogative function which government has since 1689 taken to have passed from the Crown itself into the hands of its ministers. This, in fact, was the source of much of the police and Home Office action against dissent which Ewing and Gearty castigate as unlawful but which the executive (with occasional embarrassing exceptions) took to be within its discretion.

In this belief, and in the consequent risks they took with citizens’ liberties, ministers and the police were upheld with unfailing consistency by the courts. It is here that Ewing’s and Gearty’s critique bites hardest. Far from standing between the citizen and the state, Lord Hewart’s divisional court and every other court called upon to adjudicate on issues of public order and political dissent sided with the central administration. But these were, precisely, exercises of judicial choice—and nobody would have been more surprised, and possibly felt more cheated, by libertarian decisions than the communists who were their principal target and whose belief was that the bench was populated by puppets of the capitalist state. Hewart, at least, did what he could to prove them right.

On one major case, Duncan v. Jones [1936] 1 K.B. 218 I believe that Ewing and Gearty have carried their critique further than the facts permit. While the Home Office records now make it clear that this was a set-piece arrest, the case went off on the (probably fanciful) finding of the courts below that the police reasonably apprehended a breach of the peace (a disturbance in the nearby training centre for the unemployed) if Katherine
Duncan’s speech went ahead at the chosen spot. The dismissive extempore judgments in Hewart’s divisional court do little to enhance reputations, but they chime perfectly well with the seminal reasoning in Beatty v. Gillbanks (1882) 9 Q.B.D. 308 that there is a critical difference between public activity which is the occasion of a disturbance by others and that which is a cause of it. This was precisely the basis on which the conviction of an anti-Catholic speaker in Liverpool had been upheld in Wise v. Dunning [1902] 1 K.B. 167, a decision oddly omitted from Ewing’s and Gearty’s critique. The real vice of Duncan v. Jones may well be a failure of judicial insistence that the reasonableness of a police officer’s belief is a question for the court.

Perhaps the worst consequences of judicial quietism between the wars are to be found in the partial and often unlawful conduct of the police; spying on and raiding political dissenters; attacking and riding down demonstrations of the unemployed; and assiduously and often violently protecting Mosley’s Blackshirts from obstruction and counter-demonstration. But while the courts could have done something, the Home Office could have done more. Instead, Home Secretaries defended the indefensible in Parliament (sometimes at the expense of veracity) and administratively encouraged action of doubtful legality in the justified belief that the courts would make it all right. One revealing vignette is an article published in the Police Journal in 1936 (“... the police are better served by the common law—with all its elasticity and adaptability—than they would be by any rigid statutory code ...”) which the authors have established from the records was anonymously contributed by a Home Office official.

I have spoken so far only of the period between the wars. The book does not in fact take more than a cursory look at the period of the Second World War—a pity, since the political world was turned upside down, with Mosley interned, the Blackshirts disbanded, and the recently excreted Communist Party putting its now considerable industrial muscle into the war effort following the lifting of the initial ban on the Daily Worker. It is a tenable view that it was the outbreak and conduct of the First World War, to which the book devotes valuable attention, which triggered a descent into moral and political authoritarianism that carried the courts unresistingly with it and all but neutered the rule of law until after 1945.

Ewing and Gearty make a distinction, perhaps more useful in theory than in practice and admittedly incomplete, between human rights (droits de l’homme) and civil rights or liberties (droits du citoyen), the former assuring individual autonomy, the latter promising participation in society and politics. Their conclusion is that so far as such rights and liberties were protected in this period, it was by Parliament. Their evidence for this, which is nebulous (though even nebulae have their reality), would have been fortified if their account of “Red Clydeside” had included the remarkable history of how organised resistance to rent profiteering on the back of overtime earnings in the munitions industry during the First World War led to the passing in a matter of weeks of the first Rent Act—perhaps the only example in the entire period covered by the book of popular pressure producing legislation of lasting benefit to working people.

Stephen Sedley
Regrettably, professional legal ethics do not attract much attention in this or any “adversarial” jurisdiction except America, and what writing it does attract tends to be expository rather than analytical. Consequently, Nicolson and Webb’s lucid exploration of specifically Anglo-Welsh professional ethics is extremely valuable, both for its comprehensive coverage of the issues and for its critical appraisal of them.

The first three chapters create from various scattered sources an outline of the philosophic and social context of legal practice. Chapter two outlines the standard schools of thought regarding ethics generally, locating legal ethics in a formalistic liberal tradition deriving from Kantian philosophy. Chapters three and four then give succinct and authoritative descriptions of the professions’ ethnographic make-up and its various disciplinary codes and regimes, suggesting a profession with a limited world-view driven by deep self-interest. The authors then in chapter five consider the other crucial context of professional legal work: the relationship with the client. They criticise the emptiness of the current concept of the relationship as a commercial contract between equal individuals, a concept with very little content beyond a one-way obligation of loyalty from lawyer to client and which fails to regulate the relationship’s potential for inequality and exploitation.

The end of this discussion begins the book’s main concern: the ethic of neutral partisanship which they see neutral partisanship as the natural product of a formalistic and self-interested ethical system. “Neutral partisanship” describes what are traditionally considered the lawyer’s obligatory duties to accept any client (or any able to pay, a limitation the authors rightly find curious) regardless of the morality of their cause and to use the utmost zeal and any method (short of outright lies) in pursuit of that cause. They are pleasingly blunt in their dismissal of the putative ethical limits on lawyers’ actions, noting such limits are vague and easily avoided. Their concern is instead with actions that can be undertaken within these limitations: facilitating a polluter’s desire to pollute or defending clients by humiliating witnesses.

Nicolson and Webb conclude that, despite our assumptions, there is no philosophic justification for a blanket duty of neutral partisanship. The crux of this assessment is their discussion of rule consequentialist ethics, the strongest argument justifying traditional legal ethics. The authors discuss the three different groups of goals that are usually used to justify obligatory neutral partisanship and dispose of all of them convincingly.

The first argument for traditional ethics is that neutral partisanship is necessary to the adversarial system, a system assumed to be of the greatest value in obtaining truthful decisions and protecting individual rights. The authors first note that this argument is of limited use as the only pure adversarial system is that in the civil courts. It therefore does not avail criminal or commercial lawyers. However, even considered in civil litigation, neutral partisanship, with its obligations to conceal and distort information, is more likely to frustrate the search for truth, denigrate citizen’s rights and cause public suspicion. Similarly, the authors dismiss
notions that a duty of neutral partisanship protects the rule of law and democracy because refusing to facilitate someone to act in an unpalatable but legal way usurps the roles of the legislature and the judiciary to decide the law. Nicolson and Webb retort that merely because a thing is permissible does not imply a right to assistance to achieve it, otherwise scientists are as morally obliged to help companies create pollutants as lawyers consider themselves obliged to help those companies achieve permits to pollute. The one set of values the authors believe may justify lawyers adopting a neutral partisan stance are those of “individual dignity, autonomy and equality”. Nonetheless, there is no blanket justification for neutral partisanship: the generality of legal work does not show that neutral partisanship brings benefits to individual dignity etc outweighing its disadvantages. Only in the criminal context do the huge imbalance in resources between opponents and serious penalties of a wrong decision for the defendant mean that defence counsel would usually be justified in adopting a position of neutral partisanship (unless the client were a powerful corporation). However, on the same basis, criminal prosecutors should refuse to act where they believed that the defendant was innocent or that the law and procedure were unjust. Thus lawyers may sometimes be able to adopt neutral partisanship but are morally obliged to assess the costs of that stance in every case.

The authors then describe the principles on which they say the decision to adopt neutral partisanship should depend. As is clear from their endorsement of traditional ethics in the criminal sphere, the crucial issue are the consequences likely to flow from the decision. They argue for a contextualised ethics in which lawyers must consider the power imbalance between the client and opponent and the harm caused the client by a refusal to act as well as the evils consequent on accepting the actual case or instructions.

Taking account of circumstances, the authors suggest that lawyers have three options where a moral problem arises. The first is to engage in a “moral dialogue” with the client and argue against the mooted action, although the level of persuasion needs to be tailored to the client’s suggestibility to avoid unduly influencing their decisions. Second the lawyer may refuse to act at all, provided they ensure they can refer the client to a suitable and willing alternative. Lastly, the lawyer could take the case but refuse to act using immoral means, provided the lawyer obtains the client’s full consent to those limitations. Failure to obtain consent would oblige the lawyer either to withdraw or to carry out the client’s instructions fully. The likely inconvenience to the client caused by their lawyer withdrawing during a case would require that the lawyer only do so if the withdrawal would not cause the client significant harm and may oblige a lawyer to continue in the most difficult situations. However, on this consequentialist model, even confidentiality can be broken where the threatened harm outweighs the value of its preservation.

Finally the authors outline a proposal for a three-tiered code of ethics beginning with two levels of general principles followed by a list of specific factors relevant to decisions regarding the general principles.

Although traditionalists will find this book challenging, its basic approach and most of its specific arguments are standard criticisms of adversarial advocacy. This does not however invalidate it—there is a strong need for an overview of these arguments and the book meets that need
admirably. What the book does not do is advance the actual debate and arguments much further than previous writings. I was disappointed that the authors did not challenge the criminal defence paradigm more strongly. Further, some early suggestions appeared unrealistic, particularly those dealing with lawyers’ rights to refuse to act. The authors ignore that economic considerations mean that many lawyers will be too fearful of alienating paying clients to attempt persuasion let alone to withdraw from acting. However, the authors’ specific proposals for reforming the code of ethics are far more considered and thorough than most previous suggestions.

This is an excellent book. Its assessments are clear-eyed and convincing, dispensing with the usual blarney passing for analysis which marks conventional writings on professional practice. It works both as an outstanding primer on the current debate on adversarial ethics and as a serious proposal for their future. I highly recommend it.

EMILY HENDERSON


There is an undoubted need for a comprehensive work on remedies in international human rights law and this impressive study goes a long way to meeting that need. It claims to be the first comprehensive treatment of the topic, to review the jurisprudence of international tribunals and to provide a theoretical framework as well as a practical guide to the subject. In the first, second and fourth of these claims it is of undoubted value. The theoretical framework provided is rather more skeletal. However with such a diversity of sources of human rights jurisprudence it would be difficult to achieve more in what is first and foremost a descriptive work of great detail.

The first of three parts of the book is entitled “The Conceptual and Historical Framework”. Chapter 1 is a descriptive review of the various global and regional human rights instruments, focussing in particular on the European and Inter-American systems, with some attention given to the emerging African system. It also considers in particular the remedy facilities under the ICCPR. Shelton demonstrates that there is a clear gap between the aspirations of these instruments and their effectiveness, not least because of a lack of clarification of the meaning of “effective” remedies. The Inter-American court has gone further than its European counterpart in articulating the remedies that should follow from human rights violations. Shelton concludes that a coherent approach, presently lacking, is necessary to “help avoid forum shopping, provide remedies for victims and bring wrongdoers to justice, and enhance the legitimacy of international tribunals”. It is with those goals in mind that she turns to remedy theory in Chapter 2.

Chapter 2 is an account of the problems involved in tailoring remedies to human rights violations, given the specific character of the norms involved, the identity of the perpetrators and public interests to be met, taking into account the compensatory, retributive and deterrent functions of potential remedies. It is mostly a very good account. However, central
to such a discussion must be the extent to which public interest in the rec	
rectification of human rights violations alters the potential nature of such reme
dies. Shelton recognises this as an important consideration and connects this to the notion of obligations *erga omnes* (p. 49). Yet this reviewer was left with a sense that the question of the nature of public interest itself as a matter of theory was rather glanced over. Shelton bases moral order on a principle of mutual restraint “to allow personal development through pursuance of individual goals and projects” and argues that this is the “moral baseline” that human rights law is designed to protect (p. 39). Yet a similar argument can be made for the law of tort. Important observations are made on the relationship between upholding public interest, maintaining social cohesion and deterring governments from behaviour that erodes the public order. However, more could have been said on the terms of existence of this order and the nature of “fundamental” interests as opposed to other human interests, questions that could have ramifications for what later emerges as an assessment of remedies largely in terms of their utility.

Chapter 3 considers remedies in national law, in particular the right to a remedy in national laws generally, and remedies that have evolved against the state. This is with the stated aim of identifying general principles of the law of remedies that are drawn on in national and international human rights cases. There are some very perceptive sections, such as that on attorneys’ fees and costs. Finally, the chapter considers international human rights cases in national courts, such as those brought in the US under the Alien Tort Claim Statute and does so in impressive detail.

Chapter 4 considers reparations in the law of state responsibility for injury to aliens. The coverage of the ILC draft articles is out of date, not just because of further developments since the publication of the book, but also in that it does not go beyond the completion of the first reading in 1996, referring to Arangio-Ruiz as “the present special rapporteur” (p. 101). In any event, the coverage of the ILC’s work is a little superficial. For example, Shelton observes that Arangio-Ruiz was most concerned with the role of fault in connection with satisfaction, but fails to note that this concern was not shared by the rest of the ILC, a fact that was significant in the final formulation of the draft article on satisfaction. Furthermore, while she notes Anzilotti’s idea that harm is contained in the illegality of the act itself and connects this to the idea of obligations *erga omnes*, these observations are not developed to any great extent, save for that already mentioned in relation to Chapter 2. This is a pity, because the rationale behind obligations *erga omnes* needs deep exploration in order to develop a coherent attitude towards relevant remedies, which will have important ramifications for theories of remedies in international human rights law. The second part of the chapter is devoted to the reparations in this area of law themselves, and this is a strong and detailed part, covering the legal basis of claims and the various forms of reparations themselves.

Part Two of the book is entitled “The Institutional Framework” and contains two chapters. Chapter 5 is devoted to international institutions and tribunals and is useful and detailed. It covers their evolution and effectiveness, beginning with the United Nations system, and then turning to regional systems, in particular the European human rights system. It compares the present system with the role of the former Commission, it
looks at the Court’s interpretation of Article 50 (now article 41) of the European Convention providing for “just satisfaction”, reaching a compelling conclusion as to the former court’s lack of coherence in construing this provision. The chapter also covers the European Social Charter, the ECJ, the Inter-American system, the African system and international administrative tribunals. Each is assessed (as far as possible) as to its effectiveness, Shelton concluding that tribunals generally must pay greater attention to remedies. The ECHR, for example, has broader powers than it uses, and she draws on her analysis of the law of state responsibility to support this. The reader is left with a convincing understanding of the operation and effectiveness of each system. In the case of the UN Human Rights Committee it would have been useful to have, in addition to the detailed coverage of the recommendations that have been made, an assessment of the responses of states. Chapter 6 covers procedural issues, in particular the issues of who may claim, the presentation of claims and supervision of the execution of judgment. The treatment of who may claim is useful indeed in its demonstration of inconsistent approaches to succession. This chapter exemplifies the strength of the book, in presenting a detailed and readable assessment of an aspect of remedies in human rights law, demonstrating the differences between jurisdictions and commenting upon problems with the various jurisdictions’ treatment of that aspect.

This strength is maintained throughout the whole of Part Three, entitled “Jurisprudence and Practice”. This Part looks at declaratory judgments (Chapter 7), compensation (Chapter 8), punitive or exemplary damages (Chapter 9), non-monetary remedies (Chapter 10), costs and fees (Chapter 11). These chapters, although almost wholly descriptive, provide an excellent account of the various remedies available (or not) in various jurisdictions in the case of breaches of international human rights law. By far the longest is the chapter on compensation, beginning with an overview of the European and Inter-American systems, and covering not only the incidence of pecuniary and non-pecuniary damages, but other issues such as causation, calculation of damages, interest, taxation, inflation and the approach by the ECHR to procedural delays. Again, different treatments in different jurisdictions are highlighted and Shelton makes significant observations of an apparent bias by the ECHR towards certain types of applicants. Finally, in Chapter 12, the particular case of gross and systematic violations is given thorough consideration, looking at prosecutions, truth commissions and internal investigations, lustration laws and the special incidences of compensation and non-monetary remedies that have been employed in cases of particular gravity and breadth.

In summary, the greatest strength of this book lies in its ability to digest a hugely disparate range of remedial jurisprudence and present it in a fashion that is not only accessible, but which is of such detail as to be most useful for academics, practitioners and students. It is predominantly descriptive, but this is no great criticism given its achievement. There is scope to develop the theory of human rights remedies beyond the touchstone of utility that is employed here. The book is expensive, but the release of a paperback edition in 2001 will make it a most attractive purchase.

CHRIS BLEBY
"The aim of this book is to challenge the view ... that 'rights' are, in general, a 'good thing'" (p. 1) and "to consider how constitutionally entrenched and judicially applied rights have benefited or disadvantaged women" (p. 32). The claim is that statutory schemes are preferable to "entrenched" or 'constitutional' rights, such as those introduced into UK law by the Human Rights Act 1998," because they are more effective in protecting women and other disadvantaged groups (pp. 1–2).

Methodologically, the book analyses the legal status of women in three areas—reproduction, employment, and violence by and against women—and claims that the conclusions drawn apply to other disadvantaged groups and other areas of law. The United States and Canada are used to illustrate the constitutional approach to rights, while Britain exemplifies the statutory approach.

Though McColgan’s book promises much, it fails to persuade the reader for several reasons. First, a number of the examples used to demonstrate the inferiority of entrenched rights actually suggest the opposite. For instance, the book criticises entrenched rights because they allow the judiciary to strike down legislation, thus thwarting the expression of democratic will. Because McColgan views the judiciary as an essentially conservative institution, accountable to no one, she prefers to trust the legislature to protect the rights of disadvantaged groups. To demonstrate the soundness of her theory, McColgan compares the status of abortion in the US and Ireland, claiming that the backlash against the landmark 1973 US decision of Roe v. Wade has proven detrimental to women. Had the US opted for statutory rather than constitutional change, women might have had to wait longer for the right to control their procreative lives, but would have had a more secure status once the right was recognised. The 1992 Irish case of X v. Attorney General is used to illustrate the alternative approach; although abortion was absolutely prohibited in Ireland, the horror of forcing a 14 year-old victim of rape to return to Ireland from England to await the birth of an unwanted child led the country to modify its law.

The case is an odd one to use to demonstrate the superiority of statutory rights, since the individual’s right to travel for an abortion was established by the Irish Supreme Court, based on the language of the Constitution. The legislative action McColgan alludes to took the form of a constitutional amendment that merely reinforced the judiciary’s stance. The politicization of the abortion issue that McColgan finds so problematic in the US might have come about not because constitutional rights are inherently suspect but because, as many commentators have recognised, Roe v. Wade did not constitute the ideal test case. X v. Attorney General, with its innocent child victim, did. In addition, the US recognised the right to abortion relatively early, while Ireland did so only after most other Western nations had done so, and only to a very limited extent. Therefore, there are other reasons besides the constitutional-statutory dichotomy that would explain the differences in the two nations’ approaches to abortion.

McColgan’s distrust of the judiciary leads to other dubious arguments. For example, she claims that legislators in systems with entrenched rights
often pass laws that they know will be stricken by the courts as unconstitutional, since they believe that such tactics gain them credibility with conservative voters without alienating those of a more liberal bent. Again, this conclusion seems unwarranted, since liberal voters are not likely to forget their representatives’ acts, symbolic or otherwise, merely because those acts have been judicially overruled. McColgan also fails to acknowledge that lawmakers in nations without entrenched rights may pass oppressive laws if they think their constituents want such laws; however, in those cases, those who are disadvantaged as a result are without a remedy. Again, *X v. Attorney General* suggests that constitutional regimes, even those that appear highly restrictive of certain rights, can be superior to statutory schemes, since the judiciary can step in to protect individuals when necessary.

The second reason why McColgan fails to persuade results from her forcing constitutional arguments where there are none. For example, she insists on analyzing whether the US Constitution offers any protection to women who want to raise a “battered woman” defence or who want to limit intensely personal and arguably irrelevant cross-examination in rape cases. Such an approach suggests either a misunderstanding of the US Constitution or the construction of a straw man argument, easily overcome in rebuttal. Constitutions are not meant to be comprehensive and do not necessarily bear on all situations. The cited examples cannot demonstrate the ills of entrenched systems of rights because they are not constitutional issues: they are instead matters of state criminal law and procedure.

The inappropriate application of constitutional law is troubling in a book that is intended to compare such systems of law to statutory regimes. While one expects (and indeed hopes) to find unusual arguments in a book of this sort, such arguments must be based on reasonable interpretations of existing law. Otherwise, they are too easily discounted. Fundamental errors about one of the primary jurisdictions under discussion (such as the claim that there are 52 US states when there are only 50) also do little to convince the reader of the author’s point of view.

The third problem with this book is its failure to extrapolate its arguments about women to other disadvantaged groups. Although there are some references to ethnic and racial minorities in the discussion of affirmative action, there is no mention of what other groups might benefit from the author’s analysis. Similarly, the author fails to tell the reader what areas of law other than reproduction, employment, and violence by and against women would benefit from her analysis. This omission is unfortunate, since the wider applicability of the study would have been one of its major benefits.

Despite these shortcomings, there is much in McColgan’s book to recommend it. Her prose is fluid, her presentation of US and Canadian law, particularly regarding abortion, is extensive, and her arguments are clearly made. In fact, the author’s ability to introduce such a large amount of information may work against her, for it gives the impression that she is cataloguing the laws in the various jurisdictions rather than comparing them. Indeed, the absence of a more rigorous comparative analysis of the two approaches leaves one with the sense that the most important work has yet to be done. Had the author been able to deliver what was promised, this book would have posed a powerful challenge to notions of human rights and constitutional protections as traditionally conceived.
Nevertheless, McColgan has produced a work that, while falling short of its goal, provides the reader with a great deal of information and considerable food for thought.

S.I. Strong


These two books mark quite different stages in Oxonian jurisprudence during the second half of the twentieth century. The first edition of Joseph Raz’s book, published in 1975, appeared in a decade when H.L.A. Hart was still productive and when some of Hart’s former students (Raz, Ronald Dworkin, John Finnis, Neil MacCormick) published a number of important works. By contrast, the volume edited by Jeremy Horder has appeared eight years after Hart’s death, at a juncture when most of Hart’s prominent jurisprudential students are no longer at Oxford or are splitting their time between Oxford and other institutions. One striking feature of the fourth series of the Oxford Essays in Jurisprudence is that nine of the thirteen contributors are erstwhile rather than current Oxonians. A tenth contributor, John Finnis, divides his time between Oxford and the University of Notre Dame in Indiana. (To be sure, one of the nine ex-Oxonians John Gardner will return to Oxford in 2001.)

Practical Reason and Norms is unchanged from the second edition, which was published by the Princeton University Press in 1990 and which included for the first time a Postscript on the book’s central idea of exclusionary reasons. Any serious reader should recognize the volume’s rigor, sophistication, subtlety, and admirably ambitious sweep. It remains Raz’s most impressive achievement. Although the present reviewer has elsewhere endeavored to show that a number of the book’s central arguments are unsuccessful, the very forcefulness of those arguments is what makes them worthy of being sustainedly challenged.

One regrettable aspect of the second edition of Practical Reason and Norms is the shift in Raz’s citational practice between 1975 and 1990. Whereas the main part of the book contains citations to numerous works on practical reason and related topics, the 1990 Postscript cites hardly any writings other than those of Raz himself. Though Hart was surely correct to maintain (in the Preface to The Concept of Law) that the development of jurisprudential thought cannot flourish if books on the subject are written primarily in order to encapsulate what other books contain, the work of Hart himself and of the early Raz is a testament to the fruitfulness of engaging directly with the writings and arguments of other scholars.

The fourth series of the Oxford Essays in Jurisprudence is a more modest undertaking than Raz’s book, but on the whole it is a good volume. Most of the essays are thoughtful, careful, and lucid, though virtually every one of them is open to a number of objections (sometimes far-reaching objections). Because there is no room here to evaluate the essays one by one, and because it would be invidious to single out only a
couple of them for detailed criticism—or commendation—this review will
merely sketch the general character of the collection, with a handful of
passing remarks about individual contributions.

Though the latest edition of the Oxford Essays in Jurisprudence does
not include any piece by Raz, his name figures more prominently than
anyone else's in the footnotes and Index of the book. Indeed, his influence
is sometimes felt even when he is not explicitly credited. For example,
Horder attributes to Gardner a distinction between explanatory reasons
and guiding reasons (p. 173 n. 3), yet that distinction is taken directly
from the opening pages of the first chapter of Practical Reason and Norms.
(At one or two other junctures, however, Raz receives excessive credit for
the originality of some of his insights. For instance, Stephen Smith claims
that the special relationship between a promisor and a promisee “was first
described by Raz” [p. 128].)

Raz is duly credited with devising the Oxford postgraduate course that
has given Horder's volume its focus: a course entitled “Philosophical
Foundations of the Common Law.” Save for Finnis’s opening piece, each
of the essays concentrates its attention on an area of the common law. Not
every essay is really philosophical—indeed, portions of Nicola Lacey’s
contribution are aggressively anti-philosophical in quite a woolly manner—
but most of the authors wrestle with deep theoretical problems pertaining
to common-law doctrines and principles.

Four of the essays devote their scrutiny chiefly or exclusively to
criminal law. Lacey focusses on the status of groups in the criminal law;
Andrew Simester asks whether and why negligent conduct can be culpable;
Horder inquires into the ostensible irrelevance of motives in criminal law;
and Gardner and Stephen Shute seek to specify the distinctive wrongness
of rape. Five of the remaining essays investigate aspects of tort law (which
also receives considerable attention from Simester, inevitably). Peter Cane
explores the increasing tendency of the courts to resort to public-policy
arguments in support of their decisions; Jane Stapleton considers the
complexities of legal causation; Roderick Bagshaw tries to uphold the
Lumley v. Guy position concerning the tortiousness of inducing a breach of
contract; Nicholas McBride ponders the distinctive functions of tort law’s
obligations and remedies; and Stephen Perry plumbs the relationship
between corrective justice and distributive justice. Contract law, which of
course figures prominently in Bagshaw’s piece, is the principal object of
attention for two other essays. Smith outlines a general theory of contract
by analogizing the law of contract to the law of property; and Timothy
Endicott argues that courts must often give concrete substance to the terms
of incomplete contractual agreements in order to carry out the intentions
of contractual parties who have not actually agreed on the concrete
substance. Finally, the contribution that opens the volume by Finnis is
somewhat in a category of its own, as it concentrates not on any particular
area of the law but on the status of persons within the law generally.

In a longer review, every chapter in the Oxford Essays would deserve
some detailed comments. Here two brief observations must suffice. First,
the contributions to the volume can sometimes be pitted against one
another rewardingly. Among the several examples of illuminating contrasts
is the disaccordance between Cane and Smith with regard to utilitarian
accounts of practices such as promising and adjudication. Cane rightly
notes that those accounts are put forward as underlying justifications rather
than as interpretive explications. With perfect consistency, a theorist can submit that the utilitarian tenor of the justification for a practice should not be matched (and is not matched) by utilitarian attitudes on the part of participants in the practice. As Cane observes: “It is certainly possible to argue that incessant attention to consequences is not obviously the best way to promote valued objectives” (p. 43). Smith misses this point when he rejects a utilitarian account of the practice of promising, as he explains that “such an account is inconsistent with how promising ... is understood from the internal perspective, by the participants in the practice” (p. 127).

Second, Finnis’s essay propagates a misunderstanding that should be corrected. Finnis suggests that Hart’s legal-positivist insistence on the separability of law and morality is concerned with mere “logical possibilities” (p. 3). If legal positivism’s denial of necessary connections between law and morality were tantamount to the thesis that heinous legal systems are logically possible, it would constitute a doctrine too jejune to be worth defending. In fact, however, when legal positivists issue such a denial, they are advancing several claims that are bolder and therefore more interesting than an assertion about logical possibilities. Among those claims is the thesis that, in evil regimes where officials care only about maximizing their own power and exploiting the citizenry, they will have solid prudential reasons for abiding by rule-of-law requirements to quite a considerable extent even if the officials are not inclined to disguise the wickedness of their regime. Since Finnis gainsaid this thesis in his Natural Law and Natural Rights, he presumably does not regard it as trivial. (The present reviewer has elsewhere defended the legal-positivist stance at length.)

In sum, the republication of Practical Reason and Norms in a reasonably priced paperback edition is a welcome event. Anyone interested in legal or moral philosophy who has not already read the book would be well advised to peruse it. The fourth series of the Oxford Essays in Jurisprudence is also generally commendable. It especially merits the attention of people who engage in teaching or research relating to the philosophy of private law.

MATTHEW H. KRAMER

Legal Reductionism and Freedom. By MARTIN VAN HEES. [Amsterdam: Kluwers. 2000. vii, 177, (Bibliography) 6, and (Index) 5 pp. Hardback. £38.00 net. ISBN 0–7923–6491–0.]

MARTIN VAN HEES has written an interesting and challenging book that takes up a number of important issues in legal and political philosophy. The volume draws on several sources of inspiration for its analyses of those issues: legal positivism, social-choice theory, analytic political philosophy, and (above all) game theory. A number of the discussions are perceptive and enlightening, and even the less persuasive portions of the book are thought-provoking. The volume as a whole certainly repays attention.

The first two chapters, which are focused on legal positivism, might mislead Anglo-American legal philosophers (at least initially). In those chapters, van Hees purports to be engaged in the project of explanatorily reducing the normativity of law to factual regularities. Were he indeed
undertaking a reductionist enterprise of that sort—an enterprise that would mark a return to the bad old days of John Austin—he would be retreating from the hard-won insights of H.L.A. Hart and the analytic tradition of legal philosophy. In fact, however, the reductionist stance of van Hees turns out to consist in nothing more than the thesis that the functional existence of a legal regime depends on the occurrence of certain broad patterns of behavior. He explicitly disavows the view that the existence of any particular legal mandate or any particular legal obligation is reducible to the actual or probable occurrence of certain patterns of behavior focused specifically on that mandate or obligation. That is, he does not embrace the Benthamite/Austrian view that a state of being legally obligated to do \( X \) is perforce a state of being likely to suffer punishment in the event of one's failure to do \( X \). Consequently, his putatively reductionist project is nothing to which any present-day legal positivist should object. It amounts to no more than the Hartian claim that officials' acceptance of a system-underpinning Rule of Recognition is a matter of fact.

Chapters 3 and 4 expound a game-theoretical approach to the analysis of legal institutions and legal entitlements. Though many portions of these chapters will serve as a useful introduction to the techniques of game theory for students of jurisprudence, some of the discussion is too abstract and laconic to convey fully the analytical trenchancy of those techniques. Moreover, the chapters suffer from a wholesale absence of citations to the immense American literature on game-theoretical models of law. Quite strikingly, for example, van Hees makes no mention of Douglas Baird, Robert Gertner, and Randal Picker, *Game Theory and the Law* (Harvard University Press, 1994). This failure to take account of the huge American literature on the topic is unfortunate, since many of the contributions to that literature apply game-theoretical techniques to the study of law with illuminating concreteness. In comparison, van Hees's own expositions of game theory occasionally come across as slightly ungainly. (For instance, his game-theoretical analyses of legal entitlements may lead a reader to question why anyone would opt for such analyses in preference to the equally rigorous and much less cumbersome accounts of legal entitlements that can be developed with Hohfeldian categories.) Moreover, the lack of engagement with any of the multitudinous germane American writings will very likely limit the influence of van Hees's book in the English-speaking world. Still, as has been mentioned, van Hees does go quite a way toward revealing the power and fruitfulness of game theory as a method for the investigation of legal and jurisprudential problems. Although his analyses are not always sufficiently elaborated, they are generally limpid and instructive.

The second half of *Legal Reductionism and Freedom*—which focusses on the nature, measurement, and value of legal freedom—is more sustainedly impressive than the first. Though not without some dubious lines of argument, the final four chapters of the book adopt a robustly "negative" conception of liberty that is largely sound. Van Hees draws sophisticatedly both on analytic legal/political philosophy (especially the work of Hillel Steiner and Ian Carter) and on social-choice theory. His discussions of difficult issues are commendably clear.

After Chapter 5 outlines van Hees's general conception of legal freedom, Chapter 6 turns to the problem of measuring the level of the overall freedom of each individual. In that latter chapter, van Hees
concentrates chiefly on some of the relevant social-choice literature, and he valuably summarizes many of the key themes in that literature with remarkable lucidity. Taking the basic units of freedom to be opportunities or options, he explains several of the principal conditions for the measurement of freedom in those units. Although the conditions for measurement can initially appear elementary and wholly unproblematic, they in fact engender certain cruxes—or perceived cruxes—that have to be addressed by a proponent of the doctrine of negative liberty. One salient issue that is tackled at this juncture in the book is the desire-dependence or desire-independence of freedom. Van Hees wisely maintains that the existence of any particular freedom-to-do-X is desire-independent; that is, he maintains that the question whether some person possesses or lacks the freedom-to-do-X is entirely distinct from the question whether the person takes a favorable view of that particular freedom (or of doing X). Less advisably, van Hees presumes that evaluative considerations likewise have no bearing on measurements of overall freedom. Although such considerations play an ancillary role in the undertaking of those measurements, and although desires as subjective evaluations play a particularly small part, the relative importance of various freedoms must indeed be taken into account when we are calculating the levels of people’s overall freedom. Van Hees repeatedly submits that to take into account the factor of importance is to conflate the extent of freedom and the value of freedom. Such a contention, however, is at best question-begging. The matter cannot be pursued in this short review, but the relationship between the extent of freedom and the value of freedom is not as uncomplicated as van Hees implies. In other words, it is not as uncomplicated as the relationship between the existence of freedom and the value of freedom.

Chapters 7 and 8 benefit greatly from Ian Carter’s penetrating work on liberty, as van Hees closes his book by exploring a number of interesting topics relating to the measurement and value of freedom. His discussions offer much food for thought, notwithstanding that they are somewhat marred by several missteps. Let us look briefly at just one of those missteps. Distinguishing between freedom’s content-independent value and its specific value, van Hees at more than one juncture declares that the specific value of freedom “derives from the value of the particular things that the person is free to do” (p. 152). Such an assertion runs together the specific value of the freedom-to-do-X and the specific value of doing X. Since the sizeableness of the former value does not entail the sizeableness of the latter, this conflation is regrettable.

All in all, however, Legal Reductionism and Freedom is an admirable piece of work: rigorous, clear, and stimulating. Its discussions of freedom are especially thought-provoking, and the book as a whole can be recommended to anyone interested in legal or political philosophy.

MATTHEW H. KRAMER


In the political quicksands of statutory protection for tenancies, Part II of the Landlord and Tenant Act 1954 is remarkable for its longevity. Other
statutory schemes come and—sometimes quite rapidly—go, but for nearly half a century Part II has survived with only minimal amendment. Even more surprisingly, the demands or suggestions for reform have been merely sporadic and generally muted. Since the Law Commission last reviewed the legislation in 1992, there has been little clamour for change, and it seems unlikely that the Law Commission’s latest recommendations will be implemented or indeed that any radical statutory amendments will be introduced in the foreseeable future. The reasons for such apparent satisfaction with the provisions are debatable, but the result is that the statutory protection of business tenancies is a bastion of continuity in this world of change, and allows the judiciary, academics and practitioners alike to come to grips with its provisions in a methodical and unhurried way.

And this is the approach that Michael Haley has adopted. He has produced a handsome and well-written book that deals sensibly and carefully with the statutory provisions. The structure of the book is logical—it is divided into ten, self-explanatory chapters that discuss chronologically the issues which may arise if a landlord or tenant wants to avail himself of the relevant statutes. Generous appendices contain not only the Landlord and Tenant Act 1927 and Part II of the 1954 Act, but also the notorious forms, the timely service of which is so crucial for any party involved, and so onerous a responsibility for any professional advisor. (As Haley wryly explains, the renewal of a lease “has to be earned by the tenant through timely form filling and process serving” (at p. 22).)

The book is eminently readable. Haley has a straightforward and accessible style which is very pleasing. His content is also interesting. One of the happier incidental results of Pepper v. Hart is that even books for hard-pressed and pragmatic practitioners can no longer afford to focus narrowly on statute and caselaw alone. Haley has fully realised this, and that the antecedents and purposes of legislation are now crucial components of any exercise in statutory interpretation. And so he begins with a fascinating explanation of the origins of statutory protection for business tenancies; this chapter is excellent and provides a very valuable oversight of the many political and economic factors which combined to produce the 1927 and 1954 provisions.

Haley continues by considering policy and peripheral issues throughout the text. Thus he addresses the question of why there has been so little demand for reform. He explains this general satisfaction with the Act as stemming from the market rents available to the landlord, and also that for the last thirty years, market forces have been kind to the tenant, and so new tenants have been able to contract on favourable terms. Thus he thinks that the contracting out provision, which was introduced by the Law of Property Act 1969, and which in effect makes the Act optional, has not in practice been detrimental to business tenants. This is just as well, because contracting out was introduced without a great deal of thought and has been used much more widely than was envisaged. Haley points out that the Law Commission, in its 1969 Report on the Landlord and Tenant Act 1954 Part II (Law Com. 17), devoted only two paragraphs to the issue of contracting out, which was then not the subject of full debate in Parliament. The provision was intended as an encouragement to landlords to grant short lets of properties which would otherwise stand empty, but of course it has been used far more widely than that. The (sadly out of date) statistic which Haley provides is for 1989, when 24,070 applications were...
made to contract out, and of these, 18,879 were granted by the court.
Maybe optional protection is the secret of a successful Act. Certainly, in
1992 when the Law Commission again reviewed the legislation, it endorsed
contracting out to the extent of recommending a simplified procedure based
on agreement and excluding the courts. Haley considered briefly the
implications of this, and the implications of contracting out for tenants
generally should market forces change, and I would have welcomed more
discussion of this whole area.

Indeed, I was disappointed that there was no concluding chapter to
balance the excellent introduction and to draw the threads of argument
together and provide an overview of the suitability of the legislation for the
twenty-first century. The book just ended, and left the reader feeling
strangely abandoned. Perhaps the feeling of unease came in part from a
lack of focus. It seems unclear for whom the book is written. The
publisher's catalogue states that the book is for practitioners, and certainly
its price and hardback format support this proposition, as do the long
explanations of procedure and the extensive appendix of forms. But the
author himself hopes that “the text will appeal to anyone whose work,
research or studies concern business leases” (p. viii). This apparent lack of
communication between publisher and author has resulted in a readable
book, but one which ultimately fails to cater satisfactorily for either
practitioner or student. The problem is that practitioners are already well
served with the loose-leaf books, and although it is much easier to read a
hardback, and Haley’s writing style is more elegant than that in the
mammoth compendia, I doubt that any practitioner will feel able to rely
upon Haley alone, or indeed that the format will seem sufficiently
accessible to an advisor in a hurry with a knotty problem to solve. Also,
certain issues of potentially great practical significance are dealt with rather
peremptorily. The problem of whether, once a lease is lawfully contracted
out, a variation in the terms will take the lease out of the scope of the
order is mentioned (p. 31) but not elaborated. The text refers to the
unreported case of Shops Centres Plc v. Derby City Council (1996) October
11 HC, but then does not explain why the case is cited. This would
manage to do no more than annoy and frustrate a practitioner. Perhaps a
professional will enjoy the book as a general read, and the book is
readable, but the text will not really provide a sufficiently detailed and
focussed source of information for someone with an involved client.
Likewise, a student of landlord and tenant law also requires something a
little different. He or she will search for a more rigorously academic text,
with more detailed examination of key cases, and will not be so interested
in the precise explanations of procedure.

Another (perennial) problem is that the editing is not as sharp as it
should be. Such infelicitous statements as—“although it can be regarded as
a term of years, a periodic tenancy falls outside the 1954 Act because such
tenancies are not certain” (p. 33)—should never have escaped the eye of a
careful editor. The book is well presented, and without typographical
errors, but editors need to check meaning as well.

So, in conclusion, this is a good book, with many strengths, and Haley
is to be congratulated on an interesting analysis of the law. But its target
readership is unclear, and this means that the book may not be as widely used as the publishers no doubt hope.

LOUISE TEE


With bold images of the globe on both covers, a publication date of the year 2000, and the author’s well-known name on the front, this is a volume on international economic law for which one instinctively reaches. The purposes of the publication are referred to on the flyleaf and in the author’s preface. The book displays in an organised and enjoyable way carefully chosen items of Jackson’s work over the past four decades. Items are included according to their usefulness, selected by the criteria of relevance, scope, uniqueness, and their relative physical inaccessibility in the journals and books where originally they were published. The selection is not intended to be representative either of the author’s work or of all dimensions of GATT and WTO law.

There are six sections to the book. Part I sets out a view of the landscape of global economics from where Jackson stands, and introduces the book. Part II describes the awkward child that was GATT, and its surprising and rapid growth and development. Part III consists of pieces focussing specifically on certain elements of trade policy including the most favoured nation principle, export restraint arrangements, subsidies and countervailing duties, and the accommodation of regional trade blocs by the GATT. The book begins to build to a central plateau with Parts IV and V. Part IV is the middle section, and the largest up to that point, focusing on mechanisms for dispute settlement under the GATT and in the WTO. Part V is considerably longer again, and, interestingly for a book on international law, discusses at length the place of treaties within domestic legal systems, especially that of the US. This includes Jackson’s piece “The Great 1994 Sovereignty Debate”, originally published in the Columbia Journal of Transnational Law, which deconstructs concerns about sovereignty in the context of international trade law—a concept which as Jackson says “puzzles many of us toiling in the international legal vineyards.” Part VI deals with the Uruguay Round, and looks to the future.

Putting together a collection such as this poses certain technical issues. By and large abridgements seem successful, keeping the depth and rhythm of the work even. Naturally some repetition remains, and each article must be taken as representing the situation at the time it was written, leaving developments since largely to be gleaned from elsewhere. The level of technicality sustained through the book should generally be sufficient to retain the interest of most readers. Only once does the author identify himself overtly as a United States scholar, participant and observer, but this should be taken as read, and the significance of the US in international economic terms must in any event be recognised as justifying a certain focus on the US.

Most striking is the consistency of style, approach and content apparent
throughout the book. The author’s engaging but clear style is the corollary of his long experience and complete understanding of the subject matter. Jackson’s approach to economic policy remains moderate and balanced, and his thorough grasp of the context in which international economic law sits ensures that readers can be confident of a straight steer on most matters. The depth of knowledge with which the book is written is reflected in its drawing out of those threads of international law and society which run right through the 30 or 40 years covered. Jackson emphasises international cooperation, the constitutional place of international law and institutions, the significance of processes of decision-making and dispute resolution, the importance of multilateralism and plurilateralism, and the now increased rule-orientation of international economic law in practice.

The collection is capable of satisfying a very broad and mixed audience of international and non-international lawyers, US and non-US readers, lawyers and non-lawyers. Different readers may identify various items as being of special interest, and the book can either be delved into from time to time or read more or less as a whole. Among the articles which may be particularly informative and stimulating for the casual reader are Chapter 17 on the effect of treaties in domestic law in the United States and Chapter 21 on world trade rules and environmental policies. The latter brings out the very real and difficult nature of issues involved in the present discord in trade and environmental policies, and the need for their careful and responsible resolution. The paper symbolises many of the challenges faced by the multilateral trading system, and is well positioned as the key feature of Part VI of the edition.

In summary, the book is both testimony and testament. It is testimony in the sense of offering a series of roughly chronological insights into topics of evolving GATT and WTO law from the pen of a skilful writer immersed in the events as they took place. It is a testament to the experience and ability of the author, his prolific and continuing contribution to scholarship of international trade law, and his appreciation of the systemic issues involved in the evolution of the GATT and now the WTO. While its publication is therefore a celebration, this volume is also practical, and its intelligent and friendly style recommends it as a valuable acquisition for many libraries.

CAROLINE E. FOSTER


The law relating to the transfer of movables is a riveting subject, central to every legal system. How does the law ensure that purchasers obtain good title; that sellers are protected from non-payment and other defects; and that third parties’ rights are respected? What effect does insolvency of one or other party have on their respective rights and liabilities? Freedom and certainty of trade must be maintained to form the basis of economic growth while ensuring the best balance between the interests of all the actors in the economy. These actors are not as simply characterised as sellers and purchasers but include owners of various interests in the goods
(such as beneficiaries under a trust or lienholders), transferors, volunteers and third parties such as creditors or later purchasers. Each legal system answers these questions apparently differently but the problems are essentially the same. I was delighted to see this book which sets out to compare the law on the subject in four legal systems. It is an ambitious topic and a rather slight book (only 204 pages of text) so inevitably the author has had to adopt a broad brush. Nevertheless, it is a fascinating read. Van Vliet looks at German, French, English and lastly Dutch law. He chose these because they typify what he characterises as the two main distinctive systems and their subdivisions: the tradition/consensual system and the causal/abstract system. Chapters 2, 3, 4 and 5 outline the law of personal property in each of the four Systems. Chapters 6 and 7 follow on with looking at two areas gifts and *iusta causa traditionis*. Neither of these pay much attention to English law. This is a shame in respect of gifts. Often, it is the equitable nature of the way in which English law deals with these which makes it stand out from the other systems. The concluding chapter is superficial and this reviewer was, perhaps inevitably, disappointed. The work sets out to do so much but it achieves rather little. The appetite is whetted but not satisfied. The book reads as the PhD thesis it is. A great deal still remains to be thought about and written in the area but at least a start has been made.

Pippa Rogerson


At the centenary of Australian Federation a detailed, accessible history of the processes which led to that event is appropriate not just as a commemorative work, but also as a reflective foil against which to consider the current state of Australian republicanism, following the constitutional convention of 1999. Even without such an immediate touchstone, however, this book provides intrinsically interesting and readable accounts of those political, social and economic processes.

The book claims two purposes: “to make the story of Federation accessible to popular readership, and to be the first comprehensive account of Federation”. It is both accessible and comprehensive, although it does not claim to be definitive. It is unlikely that a “definitive” account could ever be written, given the complexity of the strands that led to the achievement of Federation on 1 January 1901. The structure of the book reflects that complexity and provides various insights into the one story. The first part consists of six chapters, each devoted to one colony’s role in achieving Federation. They cover not only the efforts of each colony’s political and intellectual leaders either for or against Federation, but also the economic and social processes within each colony that contributed to popular and political movements and the manner in which such processes were incorporated into more or less formal dialogues between colonies. Most significant of these are the conventions of 1891 and 1897–98. These six chapters are linked by a short introduction by Irving, as well as by a most useful timeline and a note on terms. The second part of the book contains
over two hundred short entries, being sources of information and brief accounts of aspects of colonial life that had relevant associations with the Federation process. These entries vary from issues such as tariffs, railways, “coloured” labour and telecommunications through the relevant contributions of various federal leagues, the church and sport, to short biographical entries.

The first part dominates the book, and Irving’s chapter on New South Wales, John Bannon’s chapter on South Australia and Marian Quartly’s chapter on Victoria stand out. This reflects the political dominance of these three colonies in the Federation process. In particular, the chapter on New South Wales appropriates the national story to the greatest extent. This chapter reflects that colony’s Janus-faced control of the Federation process, which could not have concluded without its participation, and in particular the dominance of Henry Parkes, the so-called “Father of Federation”. Irving questions that title convincingly, as does Quartly in her chapter on Victoria. Parkes’s claim to the title is a myth which perhaps owes its continuing strength to his passing resemblance to Father Christmas, rather than to his considerable but not always constructive contribution to the Federation process, especially once the contributions of Barton, Clark, Deakin and Kingston are assessed. The chapter provides a compelling account of the free trade/protectionism debate, the shaky life of the Federal Council that New South Wales failed to join, the growth and dominance of the Australian Natives’ Association, popular Federation Leagues and influential Women’s Federal Leagues. In addition to its account of the formal steps towards Federation, it places the roles of defence concerns, the depression of the early 1890s and the crucial role of the Riverina district, which suffered uniquely from Victoria’s protectionist policies, in perspective. The following chapters build on this base.

Geoffrey Bolton’s and Duncan Waterson’s account of Queensland’s internal difficulties paints a picture of a colony that joined the Federation process despite, rather than because of, its political leadership. Queensland sent no delegates to the 1891 or 1897–98 conventions, eventualities that had important ramifications for Federation. The authors demonstrate that Queensland had some unique concerns relevant to the Federation process. The geographically marginal Brisbane was pitted against a series of port towns and the issue of whether Queensland should become three colonies was of importance well into the 1890s. Furthermore, Queensland agricultural interests contrasted starkly with some of those that provided some of the greatest impetus to Federation, such as the push for the exclusion of non-white immigrant labour.

Queensland’s lack of participation in the convention process contrasts with South Australia’s whole-hearted embracing of it. John Bannon’s detailed account of the South Australian experience—in particular the political contributions of its dominating convention delegates—gives many insights into important chapters of the process. His painstaking examination of newspaper editorials, correspondence and press reports of meetings gives a particularly strong impression of the popular movements afoot, such as that sponsored by the Woman’s Christian Temperance Union. He also presents convincing evidence of the concerns that drove South Australia towards Federation, in particular manufacturing, employment, tariffs, wages, finance, religious controversy and interstate domination.
The detail in the chapter on South Australia again contrasts with the history of ideas that dominates James Warden’s chapter on Tasmania. Warden faithfully relates Tasmania’s participation in the process and gives an effective account of the fear within Tasmania of being left out of Australian advancement. However, of especial interest is his account of the forces moving for Federation in an attempt to reinvent the isolated prison of Van Diemen’s Land as an exemplar of democracy. Tasmania, founded on an ideal of American constitutionalism, via the propagation of Jeffersonian principles by Andrew Inglis Clark. Clark drafted the 1891 model for what eventually became the Australian constitution, but his absence from the 1897–98 convention was undoubtedly a loss to what Warden convincingly presents as a weak Tasmanian delegation.

Marian Quartly’s chapter on Victoria asks what Victorians thought they were supporting in their long, but not always consistent support for Federation. The themes of colonial liberalism, protectionism and racism dominate. “Popular” action from 1893 is questioned as to its authenticity, especially in light of the domination of the Victorian movement by Alfred Deakin. Much of what was seen as the raison d’être for Federation by other colonies was opposed widely in Victoria, such as free-trade principles. Victoria’s important contribution to the 1891 convention is contrasted with a subsequent fallout of support based in particular on a fear of free trade. This long chapter provides a compelling counterpoint to Irving’s chapter on New South Wales, the competition between these two colonies being an ever-present factor in the process.

Finally, Brian de Garis’s account of the straggler colony, Western Australia, demonstrates how close it came to not being an Original State. Had it not been for the massive population influx due to gold strikes in the 1890s, when Federation was already an ongoing issue in the other colonies, this would probably have been the case. Western Australia only achieved self-government in 1891, and was faced with the need to reconcile the desire to consolidate its autonomy with the wish to reap the benefits of Federation that were envisaged by reason of its geographical isolation. The threat by the goldfields of separation into a separate colony to some extent forced Premier Forrest’s hand. The account of this among other factors, as well as Western Australia’s last-minute rush to join up is both well written and informative.

In summary, each of these six chapters provides accounts that differ in style as well as substance, and so provide different facets of the Federation story, drawing on a huge range of sources. There is naturally a deal of overlap, in particular in relation to the accounts of the constitutional conventions. However such overlap demonstrates that there is not just a single story to be told, even in relation to the same events. Furthermore, there are some absolute gems in the individual colonial stories, such as Bannon’s account of the heady expectation of the mayor of Port Augusta that his town would become the capital of Australia. The second part of the book, in addition to providing a range of sources and information, being a compiled work of thirty-one authors provides further perspectives on the social, cultural, economic and political factors that interacted. This is a useful tool for the academic reader as well as a detailed and highly readable general account of Australian Federation.

Chris Bleby

Never one to shirk a challenge, Michael Perry has taken on the difficult task of investigating whether, as charged by a number of prominent social and legal commentators, “the modern Supreme Court, in the name of the Fourteenth Amendment [to the US Constitution], [has] usurped prerogatives and made choices that properly belong to the electorally accountable representatives of the American people,” and if so, to what extent (p. 8). Perry makes no attempt to address every facet of Fourteenth Amendment doctrine, but instead focuses his discussion on some of the most controversial topics: racial segregation, affirmative action, discrimination on the basis of sex and sexuality, abortion and physician-assisted suicide.

Upon being presented with Perry’s enunciated goals, the reader’s first thought is that it is impossible to produce a single, cohesive theory incorporating such a range of issues unless one engages in gross generalizations or disregards important factual or legal distinctions. Perry, however, falls prey to neither of these shortcomings. Instead, he develops a theory of the Fourteenth Amendment that, while not without its flaws, effectively rebuts claims that the US Supreme Court has forsaken its constitutional role and taken up judicial politics as a usual practice.

Perry begins by identifying two types of US constitutional norms: those that were actually established by “We the people” when the textual provisions in question were enacted and those that may not have ever been established by “We the people” but which have, nevertheless, become “constitutional bedrock” through continued usage. Perry claims that critics of recent US Supreme Court practice cannot dispute the “constitutional bedrock” aspect of his theory, since Robert Bork, one of the leading critics of the Court, has himself written that there are some principles that, while not having been originally enacted by the framers of any particular piece of constitutional text, have nonetheless “become so embedded in the life of the nation, so accepted by the society, so fundamental to the private and public expectations of individuals and institutions, that the result should not be changed now” (p. 21, quoting Robert Bork). One example of a constitutional premise that is now embedded in the constitutional bedrock is the idea that the privileges and immunities guaranteed against the national government through the Bill of Rights are applicable against the various state governments by virtue of the Fourteenth Amendment. Perry claims that although there has been some controversy as to whether the text of the Fourteenth Amendment actually established such a practice, it is now too late to change tacks: for better or for worse, the principle is now part of US constitutional law.

Perry next analyses what norms were established by the Fourteenth Amendment at the time of its passage, paying particular attention to what values are being protected, who is being protected and from or against what those persons are being protected. This exercise permits Perry to construct an admittedly “complex” antidiscrimination norm that describes the fundamental purposes of the second sentence of the Fourteenth Amendment (p. 76). This norm forms the basis of his more specific
investigations into whether the judicial actions in each of the areas under discussion constitute a usurpation of legislative or executive prerogatives.

The remainder of the book contains Perry's detailed analysis of each of the judicial controversies mentioned above. He begins with racial segregation and affirmative action, two issues that are closely related to the original race-related purposes of the Fourteenth Amendment, and concludes that the Supreme Court decisions in this area were not improper. He then moves farther afield with considerations of sex and sexual orientation followed by abortion and physician-assisted suicide. Perry's analytical premise is that the Supreme Court should protect the persons or practices in question if to not do so would offend the fundamental antidiscrimination norm posited early on. If discrimination against the set of persons in question is contrary to the principles found within the Fourteenth Amendment, then it is not a judicial usurpation of the other branches' powers to overrule their actions, no matter how longstanding or popular the discriminatory practices may be. He cites the famous education desegregation case, Brown v. Board of Education, to demonstrate how the Court must sometimes transcend popular prejudice and longstanding legal practice to apply the correct constitutional principle.

Perry admits that his theory obtains results that are patently contrary to the considerations of the framers of the Fourteenth Amendment. For example, the historical evidence suggests that (at least most of) the authors of that amendment did not intend its principles to apply to women. However, Perry defends his claim that decisions forbidding discrimination on the basis of gender were nevertheless proper by arguing, first, that the framers might not have understood the full implications of the text they were drafting and second, that even if the Fourteenth Amendment did not establish the broad antidiscrimination norm that he believes it did, then such a norm became part of the modern constitutional bedrock in the period immediately following the second World War, when the full implications of treating certain groups as "not truly or fully human" became clear (p. 127).

In the end, Perry's evaluation of recent Supreme Court actions is overwhelmingly positive. In addition to concluding that the Supreme Court did not usurp the political branches in cases concerning racial segregation and affirmative action, he believes that the Court acted properly in cases involving discrimination on the basis of sex and sexual orientation and physician assisted suicide. In fact, Perry would go even farther in cases concerning sexual orientation, claiming that it would be improper for the Court to fail to protect homosexuals from discrimination in any future cases. The only issue that he believes was incorrectly decided is abortion.

Perry's book, while excellent in many ways, is not perfect. One problem is that, by focusing on the Fourteenth Amendment in isolation, Perry is able to analyse very complex questions as if only a single principle were at issue. In fact, many of the situations he discusses raise several competing principles of law: freedom of belief or association, for example, or the right to privacy and to contract. While it is beyond his mandate to discuss all of these issues as well as the one he has set himself, it would have been helpful for him to identify how his reading of the Fourteenth Amendment would respond (if at all) to competition with other constitutional values. Still, this book is a valuable contribution to constitutional analysis and
theory, and should provide critics of recent Supreme Court decisions with
much to consider.

S.I. Strong