

## REVIEWS

Ran Hirschl, **Comparative Matters: The Renaissance of Comparative Constitutional Law**, Oxford: Oxford University Press, 2014, 304 pp, hb, £29.99.

*Comparative Matters* marks the conclusion to Ran Hirschl's constitutional law trilogy that started with *Towards Juristocracy* (Cambridge, MA: Harvard University Press, 2007) and continued with *Constitutional Theocracy* (Cambridge, MA: Harvard University Press, 2010). Like its predecessors, *Comparative Matters* shows the same marked brush strokes of exemplary interdisciplinary inquiry that underpins Hirschl's mission to emphasise the political dimension within constitutional law, aided by his dual disciplinary background as a distinguished professor of both law and political science at the University of Toronto.

As the title suggests, Hirschl's argument advances the importance of comparison in constitutional law as much as it promotes the adoption of a wider 'toolkit of methodological considerations' (186) for such comparative matters. While he lauds the 'tremendous renaissance' (3) of comparative constitutional law over the last twenty years, he also expresses his concern that the field remains, 'as a method and a project . . . undertheorised and blurry' (3) with a 'loose and under-defined epistemic and methodological framework that seems to be held together by a rather thin intellectual thread: the interest of some sort or another in the constitutional law of polity or polities other than the observer's own' (5). Comparative constitutional studies, in his view, still lack a definitional consensus on the meaning and methods of being 'comparative'. Hirschl's self-professed goal is to 'fill that gap' (5) at the core of comparative constitutional studies.

To do so, he proceeds in two steps. First, Hirschl looks to the practitioners. The 'View from the Bench' (Chapter 1) illustrates diverging outlooks and trends across the world's highest courts when it comes to voluntary references to foreign constitutional jurisprudence. With an impressive set of examples, ranging from the usual suspects, such as the Canadian and American Supreme Courts, Germany's Federal Constitutional Court and the European Court of Justice, Hirschl advances his theory of why judges refer to others' constitutional jurisprudence with illustrations from perhaps less widely studied jurisdictions, such as Turkey, Pakistan, India, Israel and Malaysia, among others. Mindful of the fact that 'the international migration of constitutional ideas . . . results from a confluence of factors rather than any single cause' (75), Hirschl advocates his argument for the inclusion of a court's 'sociopolitical context' (76) when analysing its motivations to voluntarily cite foreign jurisprudence. Akin to his line of argument in *Towards Juristocracy*, Hirschl emphasises that references to foreign constitutional jurisprudence can thus be 'at least as much an identity-constructing political phenomenon as it is a juridical one' (76).

In Chapters 2 and 3, Hirschl uses a small sample of selected countries – a small-N case study approach, as he will explain in Chapter 6 – to present

a historical step back to pre-modern religion law and early legal scholars, such as Jean Bodin, John Seldon, Montesquieu and Simón Bolívar. He demonstrates what he considers to be the first instances of systematic engagement with other legal systems, and suggests that comparative constitutional scholars can gain a 'deeper understanding of the considerations and driving forces – principled, necessity-based, and/or ideology-driven – behind a legal system's selective engagement with foreign law' (79) from this historical excursion.

In the second part, Hirschl follows up on the book's theme, the benefit of moving 'From Comparative Constitutional Law to Comparative Constitutional Studies' (Chapter 4) through the conscious inclusion of social sciences and their methodologies, such as political science, development studies, and sociology. Having made the case for the importance of the social sciences for the systematic inquiry into causal connections and theory building in comparative constitutional studies, Chapters 5 and 6 are then concerned with the limitations of this social scientific approach (in particular, 205–207) as well as case selection (232–244) and research design (245–281).

Hirschl ends *Comparative Matters* with an epilogue and three take away points: that the history of comparative constitutional inquiry is longer than we think; that the political (as opposed to the legal or jurisprudential) dimension of comparative constitutionalism needs to be taken into account; and, finally, that the global renaissance of comparative constitutional law cannot come to fruition without the breaking down of disciplinary boundaries between law and the social sciences, a plea that will find much approval across comparative constitutional studies and other comparative legal fields alike.

What shines through Hirschl's work is his deep engagement with the controversies currently shaping his discipline. Leading the debate about the role of political versus legal and jurisprudential factors, Hirschl provides an impressively international account of constitutional experiences from around the world, including tensions between universalism and particularism (194ff), Western-centric and inclusive analyses (205–223) and the true meaning of 'comparative' in the context of constitutional studies (231).

Hirschl is as much an expert on the nexus between constitutional law and religion as he is of comparative research methods (the interested reader is encouraged to refer to *Constitutional Theocracy* to explore his full thinking on the former). Thus, the historical pre-modern religion law perspective he adopts in part one offers a fascinating journey into an unknown island of riches when it comes to comparative constitutional insights. Yet the level of detail in his historical chapters somewhat outweighs the informational content, and it seems that Hirschl introduces a second mission – to engage thoroughly with pre-modern religion law – to his stated goal of identifying an epistemological and methodological canon for comparative constitutional studies. As enjoyable and informative as the read may be, the main conclusions Hirschl draws about potential motivations for the engagement with foreign constitutional law might just as well have been illustrated with examples

from current scholarship, as he proceeds to do with great care throughout the book.

There might be one notable gap in Hirschl's otherwise comprehensive treatment of the history and development of comparative constitutional studies. One may feel somewhat doubtful whether Hirschl's argument truly touched the actual crux of the interdisciplinarity problems he identifies. While Hirschl has a remarkable gift for explaining methodological approaches in an accessible – and even entertaining – way, none of the comparative methodologies he describes in *Comparative Matters* are new or unknown. Neither does his introduction to research methods comprehensively present the full extent of fervent methodological debates that have been plaguing the social sciences over the last fifty years. What is it, then, that has kept – and, presumably, is still keeping – legal scholars and social scientists from a closer interdisciplinary engagement within comparative constitutional studies?

Hirschl alludes to the underlying problem in passing: a lack of familiarity with statistical methods among elites within the legal field (229), doctrinal approaches as dominant means of instruction across law schools (*ibid*) and within legal research itself. (It should be noted for the sake of completeness that Hirschl does point to empirical legal studies and other new movements to bridge this gap.) The remedy he suggests is a movement away from the 'juridification' of comparative constitutional studies (190). Yet, while Hirschl argues for comparative constitutional studies as a two-way enterprise across law and the social sciences, he is significantly one dimensional in his depiction of what stymies theoretical growth within the field.

If we hold legal academics responsible for falling short of rigorous social scientific research design within comparative constitutional studies, we should apply similarly high standards of interdisciplinarity to political scientists and sociologists, who often apply their rigorous research designs in blissful ignorance of the doctrinal content of the field in which they engage. This failure to acknowledge doctrinal methods of concept formation runs the risk of bad and misleading research, but also alienates legal scholars who perceive the choice to be between rigorous research in either field, without motivation or instruction how to combine the two. Thus, social scientists surely would have equally benefited from a chapter with lessons on doctrinal constitutional law scholarship to inform their future conceptualisation and operationalisation of comparative constitutional phenomena across their different methodological approaches.

As a conclusion to his comparative constitutional trilogy, *Comparative Matters* is undoubtedly masterful. Hirschl's work provides a concise yet comprehensive account of the development of comparative constitutional studies as a field across (at least) two academic disciplines. As such it is an invaluable resource for advanced undergraduate and graduate students, newcomers to the field, and anyone with an interest in comparative law in general. Now it is up to comparative constitutional scholars to overcome the barriers that have kept the field from engaging in rigorous, interdisciplinary,

and multi-method theory building. One may hope they take Hirschl's advice seriously.

Sophie Flemig\*

David Fox and Wolfgang Ernst (eds), **The History of Money in the Western Legal Tradition: Middle Ages to Bretton Woods**, Oxford: Oxford University Press, 2015, xxviii + 892 pp, hb £125.00.

Lawyers typically consume theories of money developed by theorists in other fields, particularly philosophy, sociology, and economics. When we do engage with the concept of money, it is usually obliquely, our primary interest being in the particular legal rules that govern money as a legal object. This heavy volume gives a 'connected history' of the main topics in monetary law at the most important stages of its development over 800 years, from the Middle Ages to Bretton Woods. It attempts to invigorate monetary law by collecting and presenting material forgotten by lawyers and neglected by historians, with the aim of 'open[ing] new ground that other scholars can explore in greater detail' (1). As the editors observe, 'jurists, legislators, and learned writers in the continental European and common law traditions have generally avoided trying to formulate a legal definition of money', with the consequence that the law of money has evolved 'without any sustained consideration of the legal institution which lies at its core' (7). As David Fox, François R. Velde, and Wolfgang Ernst observe, economists tend to separate the *explicans* from the *explicandum*, taking things like the natural environment and hours of sunlight as given features of the world exogenous to the concept of money (17). Often, they take law, ie, the 'rules of the game', as given, too. But institutions like money are human constructs, and the legal institutions that undergird money's existence—be they property, contract, debt, or the concept of a 'sovereign' to mint or to borrow—are not parts of the natural landscape and cannot be so treated. It has been clear since Aristotle that money is at least arguably a product of law: 'this is why it has the name "money" (*nomisma*)—because it exists not by nature but by law (*nomos*)' (*Nicomachean Ethics* (1966, W. D. Ross trans) 30). Lawyers and legal theorists thus have an essential role to play in theorising money, a role that cannot be played by any other discipline. As a legal construct with a complex ontology, money is properly a primary object of enquiry for legal theorists, and there is good reason to think that other disciplines might benefit from a distinctly legal literature as well.

The ambitious scope of this volume is rendered even more impressive by its attempt to combine scholarship from all the major jurisdictions of the 'Western legal tradition', in particular combining common law and civilian perspectives. It is organised thematically in five parts, moving from 'Coins and the Law' to the 'Triumph of Nominalism', 'Bank Money', 'Paper Money',

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and 'Fiat Money'. Each part comprises three sections, covering 'Monetary Environment', 'Common Law', and 'Civil Law'. (Part I, unfortunately, lacks a section on the common law.) Overall, the chapters tell a story of the increasing de-materialisation of money over time. Where Parts I and II reflect the intense attention paid by continental civil and canon lawyers to metal money, the others reflect the predominantly commercial and financial history of cashless payments and banking systems (10). The long list of contributors is diverse, although the volume as a whole has a German inflection. The transition between some chapters is smoother than others. This is a symptom of the fact that each chapter is written by a specialist with deep knowledge of his or her field; the result is a collection too large for any curator fully to master. These issues do not obscure the virtues of the volume as composed, however: in particular, it provides a rough chronological overview of the political and economic history of Europe told through the complex intellectual history of medieval law, canon law, theology, and the competing claims of secular and ecclesiastic authority to control the creation and use of money. This is strong meat for the reader, and for those of us unversed in the Latin world of schoolmen, legists, glossators, and publicists will find the first parts in particular hard to digest. The effort, however, is worthwhile, for it is only in light of this history that we can fully understand the more familiar story of money that commences in the early modern period.

Despite the volume's length and breadth, the editors expressly disclaim an encyclopaedic intention (9). There are acknowledged gaps. Some of these reflect the punctuated development of money; it is correct to focus attention on the places and times of most importance to its development. Others are due to the editors' inability to find contributors with expertise on certain places and times. In particular, they acknowledge insufficient treatment of the Kingdom of France and the North Italian city-states (4). Their plea for forgiveness falls on sympathetic ears, and the gaps are all partially filled. William Roberds and Velde, for example, discuss the history of ledger banks in Genoa and Venice in Chapter 17. Those organising a project of such scope might perhaps have ensured that these important gaps were filled entirely. The danger is that, because the volume appears in all other respects so comprehensive, it might give an unbalanced impression of the subject matter despite the disclaimer.

The volume's 34 chapters cannot be reviewed individually here, but it is worthwhile to sketch the outlines. In Chapter 1 the editors (with Velde) justify the book's scope and approach and provide an overview of its major themes. Christine Desan, in Chapter 2, follows with an account of money as a legal institution, presenting a historically informed, broadly chartalist view of the evolution of money in which political rulers play a central role in the creation of money through the recognition of tokens valid for the payment of future obligations (such as tax) to the ruler. Some more thematic essays in a longer introductory section may have benefitted the volume as a whole. In Chapter 4 Fabian Wittreck examines medieval philosophy on the nature of money and its permissible uses, tracing the influence of Aristotelian thought. The complexity of medieval monetary law is in large measure due to sovereign manipulation of the metallic content of coin, so this introduction to the philosophical opinions

on debasement provides some vital context to understanding the subsequent chapters. Witteck's chapter is also admirable in that it connects medieval Western European thought to its Islamic, Jewish, and Byzantine counterparts, as well as providing an insightful revision of scholastic thought on money. Also noteworthy is Thomas Rűfner's examination of the Roman legal texts in Chapter 6, which explores whether any coherent concept of money was part of the Roman legacy to the middle ages. Wolfgang Ernst's examination of the glossators and post-glossators in Chapter 7 covers a formative period in the civilian law of money, as Roman legal sources were adapted to the complex monetary practices of Rome's successor states in Western Europe. Andreas Thier's translations of medieval ecclesiastical law sources in Chapter 8 provide fascinating reading, however the English translations would have benefited from proper copy-editing and proofreading.

Part II tells the story of how a nominal value impressed on a coin by a sovereign issuer came to be determinative of its value. Fox's two chapters mentioned above stand out in this part. Historically, the *Case of Mixt Monies* (1604) 2 Howell's State Trials 114 has articulated common law and civilian monetary law. Fox explains that Sir John Davies drew selectively from the available stock of ideas. The principle of nominalism established in that case is put into its proper context by other chapters on the civil law, covering Spanish scholastics (Wim Decock, Chapter 14), German university jurists (Clausdieter Schott, Chapter 15), and early modern civilian litigation (Anja Amend-Traut, Chapter 16). Part III begins the story of new financial innovations made possible by the idea of money as an abstract measure of value which could be moved and manipulated independently of its physical substrate. Roberds and Velde explain the history of central banking in Chapter 17, putting the evolution of the Bank of England in the context of pre-Napoleonic European central banks. This is a story of 'alchemy' in the sense of converting a number of risky assets such as bullion, coin, and government debt into money-like liabilities (322). This is a particularly important aspect of the transition to modern money, as it explores the role of financial intermediaries in the money supply. The story of paper money is continued in Part IV, with Velde and Roberds carrying on the story of public banks in Chapter 22. This chapter touches on the fascinating story of John Law and his adventures in the Kingdom of France. It also explores the link between banking, money creation, and colonial trading companies, which is essential to the evolution of modern capitalism. This part finishes with other important historical developments in paper money, including early English bank notes (J. S. Rogers, Chapter 24) and the Austrian coupon cases (Rastko Vrbaski, Chapter 26).

The volume concludes with the history of fiat money in the twentieth century. Peter Kugler's explanation of the Bretton Woods system in Chapter 28 is essential reading for anyone wishing better to understand this complex settlement or the reasons why it failed. The book's primary focus is on the history of money 'within the private law world' (5), for example telling how the notion of 'legal tender money' evolved from rules on the performance of debts rather than from a top-down conception of monetary sovereignty. The public and international public law aspects of money always break through,

however, given the historical role of sovereign and quasi-sovereign institutions, and this part is no exception. L. Randall Wray gives some much needed theoretical context to the rest of the volume in Chapter 29, discussing the major thinkers in the chartalist tradition with a particular focus on ‘modern money theory’. Most of the contributors have chartalist leanings, identifying ‘money’ more closely with institutions of debt, credit, and state than with the metallic origins of money as a cost-minimising medium of exchange (631). This tendency not only puts ‘orthodox’ and ‘heterodox’ accounts of money into historical perspective, but makes the volume very interesting to public and public international lawyers. The remaining chapters present the history of early twentieth century developments such as the Great Depression (Roy Kreitner, Chapter 31) and German hyperinflation (Jan Thiessen, Chapter 33).

The volume examines a defined, if large, period of history. It finds its point of departure at a point in time when coin was taken for granted, and ends just shy of the cusp of money’s complete detachment from metal. It does not claim to do more, for it is already a feat without including the story of proto-money such as Mesopotamian ‘barley money’, shells, or modern ‘money candidates’. Cryptocurrency, for example, is only mentioned in one of the 34 chapters (see Helmut Siekman, Chapter 23, 491, 517, and 518). Some readers will search this volume for guidance on questions such as money in the Eurozone or the legal nature of Bitcoin. They are left, for the most part, to their own devices to extrapolate lessons from the history provided. One hopes for a sequel—say a ‘Bretton Woods to Bitcoin’—in due course of time.

*J. G. Allen\**

*Mireille Hildebrandt, Smart Technologies and the End(s) of Law*, Cheltenham: Edward Elgar, 2015, 296 pp, hb £72.00, pb £20.00.

*Smart Technologies and the End(s) of Law* is a provocative and unsettling book that elucidates precisely the nature of smart technologies and big data analytics. Positing these technologies as actors that are already fundamentally changing the way that society comes to understand itself and the law, nothing is taken for granted and everything is up for grabs.

In the first part of the book, we encounter the idea of data-driven agency. This is one of the best accounts to date of contemporary developments in the field of Artificial Intelligence (AI), and reflects Hildebrandt’s experience of teaching law in a computer science department. ‘Smart’ technology has very little to do with the old futurist dreams of AI or the possibility (or impossibility) of designing a sentient centralised machine. ‘Agency’ in the sense we are concerned with here is not based on a theory of mind but merely on the ability both to perceive an environment, and to take decisions that act upon

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that environment (22–23). In developed countries, we are already surrounded by endless examples of electronic agency integrated into the social fabric of life, from the thermostat that maintains the environmental ambience of an office to the automated passport gates controlling entry to the territory itself. But these are examples of deterministically designed machines: given a set of certain inputs, the machine performs a pre-defined set of actions. The ‘smart technologies’ that give the book its title are fundamentally different. They are based on learning algorithms that have the capacity to discern patterns in large data sets and to infer new, more accurate, models of decision-making. By analysing massive datasets concerning past behaviour, the usual idea is to arrive at predictions of future behaviour. Such systems can then be left to make decisions and, over time, continue to improve the criteria on which their decisions are made. They do this inductively, not deductively, and results are primarily based on correlations, not causation. Even though outcomes may be interpreted, acted upon, or rejected by human controllers, the given reasons for decisions made by such systems may be non-transparent to human users. The overall picture is of a society in which multiple smart agencies are assigned to carry out different tasks and invited to do them better, faster, and more efficiently than human decision-makers could. Applications range from the mundane to the potentially life-changing. This may sound familiar from certain populist accounts of the ‘Big Data’ revolution, and if so, the reader may suspect this is all rather far-fetched. But Hildebrandt is no big data evangelist: all databases are of course suspect, biased, and capable of misrepresentation. Indeed this is precisely why it is now imperative to develop a legal theory of machine-based agency. The projections that AI makes – the ‘present futures’ – will inform contingent predictions that machines make about the future. If acted upon without effective legal redress, these will produce ‘future presents’ that should worry us greatly: bad decisions can set very real constraints on human life (25).

These smart agencies, loosely defined, are growing in number and capacity at the same time that we humans increasingly live in what Hildebrandt terms ‘the onlife world’. As far as neologisms go, this one is quite difficult to type, but quite effective at erasing the intuitive distinction between life in the ‘real world’ and life on ‘the internet’. Data is the currency of decision-making today, and it is growing exponentially in quantity, taking effect in different spaces and environments. Human users volunteer much data consciously, much of it is unconsciously observed by software systems, and yet more is being silently inferred via pattern recognition. Drawing on insights from systems theory and media theory, Hildebrandt asserts that this is a new paradigm for human society:

Big Data Space is turning into the most extensive cognitive resource of our extended mind. It extends – and transforms – our memory, our capabilities of remote intervention, and the impact of all our machine-readable behaviours (46).

In the ‘Big Data Space’, all users are profiled and categorised. The indivisible individual becomes thoroughly divided into multiple data points, allowing autonomous data-driven agents to react in real-time to anticipate situations



as they emerge, offering insights, hints, suggestions, and interventions. Such computerised agencies are no longer confined to the desktop computer or even the smartphone: the optimistic vision of 'Ambient Intelligence' is a home, workplace and transport system that constantly anticipates humans and all our risks, desires and disputes, while remaining interactive to the extent that we still feel in control of it (60). Hildebrandt's exposition of these technological innovations is the most comprehensive and scientifically literate I have read. It is illustrated along the way with examples drawn from theory, art and literature. It portrays a vision of the present and the very near future closely informed by innovations in technology that are both recognisable and yet strange. Hildebrandt takes the claims of technologists seriously and sceptically, the better to highlight the risks and challenges in Part 2 of the book.

Having laid out the technological innovations that are remaking and re-modelling our lived environment so that it is shaped by a 'digital unconscious' sphere, we turn in Part 2 to the risks. Although Hildebrandt outlines several ways in which smart technologies could intervene in decisions that impact on human rights, privacy is the paradigm example that illustrates both the risks and the need for conceptual re-evaluation in the data-driven world. There is no need to rehearse here the different definitions of digital privacy that have been advanced by different authors in recent years. They are laid out in broad terms in Chapter 5. For the purposes of advancing her argument, Hildebrandt defines privacy as 'a social setting that permits a person to prevent, ward off or contest unreasonable constraints on the construction of her identity' (102). Privacy is thus about establishing relationships between persons, groups and things that can be in flux, changing in different contexts. Indeed, much of our personal privacy behaviours are unconscious and automatic, although the conscious mind can reflect on, and subsequently modify, our behaviour in different social settings. The critical point is that we cannot and should not assume that privacy is a fixed predictable value to be attributed to a given datum, or that privacy protection is reducible to a criterion of control over loosely defined 'personal' information. Rather privacy is a set of techniques that we enact, and these privacy practices will be impossible to perform unless there is a way to read something meaningful about the inferences that are being made about us by our interlocutors. In other words, when we are being profiled and categorised by data-driven agents, privacy depends first and foremost on transparency – the self's capacity to observe and react to feedback coming from whatever system is observing the self (103).

This conceptual footing for this definition of privacy is explicitly drawn from Parsons's concept of double contingency, as carried over by Niklas Luhmann into his theory of autopoietic social systems. One is thus entitled to go a step further and posit that any type of communication is conditioned in precisely the same manner: privacy is a way of observing one's own communication and how the other is responding to it. 'Privacy' is an aspect and an effect of communication. Hildebrandt's definition therefore doesn't say anything about privacy as a legal right, and that is precisely the point. The implication here is that before we define or re-define existing legal rights, we need to take

seriously the fact that to engage with smart technologies – many of which already exist and are already implicated in our lives – is to engage in communication, not mere information-processing. Technology is performing a communicative role as unpredictable and potentially as significant as that of a human interlocutor: that is precisely its agency. For this reason, if no other, our digital environment is one in which the subject-centred definition of privacy is no longer sufficient. Defining a fixed normative content to privacy is impossible; we first need to think about *how* it is practiced. Chapter 6 enriches this argument with an excursus into ‘the other side of privacy’. This is an account of relationship between persons and things in Japanese culture; one that is not directly comparable to privacy in the western sense. Privacy, on this view, is not so much a right that places an injunction on another not to ‘read’ me as something enacted through practices of restraint; a gift from the other who has observed me, but acts ‘as if’ they have not read me in order to enable communication to continue. Configured in such terms, it is a view of privacy unlikely to satisfy anyone concerned with over-intrusive state surveillance practices, or permanent commercial data mining via the hardware we rely on every day. But it is a provocative and fascinating suggestion of the kinds of explorations currently required (125–130).

In Part 3 we turn to the ‘end(s)’ of law, which of course have a double meaning here. On one hand, a number of fundamental rights are at stake with the rise of data-driven agents; law is the means to achieving the end of securing those rights. At the same time, Hildebrandt contends that modern law evolved in the epoch of the printing press. What, after all, ‘is’ the law, if not textual modes of reading and writing, styles of argumentation and epistemology, practices of authentication and dissemination, etc, that the printing press permits? This is hardly a new question for legal theory. The basic choice is to attempt to describe law analytically from the ‘outside’, or to try to find an internally consistent theory of law on some concept of justice. Just as the book is premised on the emergence of inductive machine-learning processes that are superseding rule-based deductive computing models, one can apply deductive models of formalist law against experience-based accounts of inductive pragmatic reason in positing how law ‘ought’ to emerge. In Chapter 8, the book ambitiously assumes this challenge, laying out a normative position on the best conception of law for our digital times (136). This task is never going to satisfy every reader, but even so some of the material in this part of the book feels less focused and less persuasive than what precedes it. The major figures of twentieth century jurisprudence, for instance, are dealt with quite briefly in Chapter 7, without adding very much to the overall claims of the book.

The conclusion is that there are three core normative and co-dependent ‘ends’ of law that must be present in order to have the ‘Rule of Law’ (capitalised throughout the book): law as the source of *justice* (both distributive and corrective), law as a guarantee of legislative and adjudicative *certainty*, and law as a *purposive* tool for realising the decisions of a democratic legislature – without foreclosing the other two values in the process (158). For Hildebrandt, for the law to achieve these ends depends upon the hermeneutic uncertainty in the interpretation of existing norms in new situations. This requires a human

interpretative moment, one that demands that like cases are treated alike, reasons are given for a decision, and the other side is heard. Hermeneutic ambiguity is 'not a drawback of natural language, but what saves us from acting like mindless agents'. Smart technologies could be tasked with making purely administrative decisions and applying pre-determined normative imperatives, but this would not constitute 'law' unless such decisions are contestable via some form of due process (143). The ways in which we allow time for deliberation, interpretation, and rationalisation of normative decisions – trials, inquests, appeals, advisory opinions, and other processes – these are the things that should continue to hold the imprimatur of legal sovereignty. Otherwise the interests of capital and the sirens of national security, to take just two obvious categories, will be empowered to put in place systems that will be opaque, sovereign, and impossible to reverse. Handing power to systems whose decisions cannot be humanly understood let alone contested would preclude true legal decision-making.

Hence the temporal 'end' of law is threatened by smart technologies. In this sense modern law is, at least in part, a product of the affordances of the printing press. Hildebrandt is not advancing techno-determinism here but refers instead to network theory to show that law is a co-production of a certain mode of existence, dependent on both humans and their textual tools. There is a paradoxical shift in perspective here between the internal normative values required of the 'Rule of Law' and the view from which law is posited as an epiphenomenal effect of the printing press. This theoretical tension is worthy of a more sustained treatment than the book provides. Are we not, on the first view, holding up a fictional view of law's self-description that was long-ago deposed by the rise of statistical government? On the other hand, if law is an effect of certain modes of communication, by what means can the arguments in this book hope to move beyond the book, so to speak? Is it really possible to achieve the goals set in the concluding chapter: to realise a 'technology-neutral' law that is not 'technologically-neutral', and one that is ultimately enacted through technological coding yet does not reduce law to vulgar instrumentalism?

These are questions that are necessarily speculative. If the prognoses offered in Parts 1 and 2 are correct, and I am convinced that they are, then we will all be forced to consider them before too long. Ultimately, the provocation is worthwhile, because it is not lawyers who will decide all this in the end. The view from the 'other side' is what really matters here: engineers, venture capitalists, politicians and bureaucrats. If AI is treated as 'an instrument for obtaining policy objectives that can replace legal precepts whenever these are less effective or efficient, the mode of existence of the law will be reduced to the instrumentalist modus. Its employment can then be traded against more innovative tools to attain public welfare, or whatever other policy goal takes precedent' (185). The use of non-transparent pre-emptive computing by partial interest groups like states or companies would assume 'law' is something that can be instantaneously calculated, and thus bypassed. In relation to my own research, I can only say that anyone who has followed the recent case law of the Investigatory Powers Tribunal, which hears complaints against

the use of surveillance powers in the UK, will recognise the force of this warning.

Bernard Keenan\*

**Carl Schmitt, *Dictatorship. From the Origin of the Modern Concept of Sovereignty to the Proletarian Class Struggle***, translated by Michael Hoelzl and Graham Ward, Cambridge: Polity Press, 2014, 314 pp, pb £17.99.

Almost a century after its original publication in 1921, Carl Schmitt's book *Dictatorship* is available in English. The translation by Michael Hoelzl and Graham Ward has made it possible for the Anglophone world to access what remains, within twentieth century legal and political literature, a 'classic' work, which continues to attract scholarly attention, and to generate significant critical contributions around it.

In the economy of Schmitt's general intellectual effort, *Dictatorship* forms a particular yardstick for the comprehension of the approach to law as a science and of the entire legal scholarship produced by the German jurist during the Weimar period from 1919 – 1933. The basic seeds of Schmitt's further theoretical path emerged in this work, such as the theme of sovereign power (with its twin concepts of 'decision' and 'exception'), the problem of secularisation, the critique of liberalism, and legal formalism (normativism). In addition to this prominent theoretical interest, the book also has historical significance. This work, in fact, had been conceived in a time of contradiction, trouble and defeat, at the beginning of perhaps the most tragic and crucial political experience of twentieth century European history that was initiated within the Weimar Republic. The months following the enactment of the new constitution in 1919 were characterised by widespread violence, uprisings and political tensions. This social unrest was confronted by the extensive use of emergency powers. In this respect, the presence of an insightful reflection on legal and political implications of the use of emergency powers in the Weimar constitutional framework makes *Dictatorship* both a product, in part, of that troubled period and a useful tool for its comprehension.

The book is a wide-ranging enquiry into the issue of dictatorship, which responds to the need to elaborate a theory of this form of government that is consistent with legal science. In the history of legal thought, the topic of dictatorship, Schmitt maintains, has never been the subject of a comprehensive survey toward a clear definition of the concept, which would unfold its cumbersome meaning to a satisfactory extent. The term dictatorship 'remained mainly a political catchword, so confusing that its enormous attraction is evident as the legal scholars' reluctance to discuss it' (xxxvii). Legal thinkers have always considered it as a political issue, irrelevant to legal science. In addition – to an extent – the dominant tradition of legal positivism tends to exclude from

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the ambit of law anything that is not reducible to some understanding of formal law. For a normativist such as Kelsen, Schmitt caustically claims, 'dictatorship cannot be a problem of legislation any more than a brain operation can be a problem of logic' (xlv).

For Schmitt, the essential core of dictatorship consists in the will to attain a certain goal in a limited amount of time through the action of an agent – the dictator – in a context in which the normal domain of the order of law is suspended. What Schmitt asserts here is that dictatorship is a technique of government whose main aim is the restoration of a suspended order. Dictatorship, therefore, seems to have an inner dialectical soul. In fact, it denies what it seeks to protect (the normal rule of law) and, in that manner, at the same time seeks to later restore or save what it denies. This entails a peculiar distinction between the normal domain of law and the methods of application of rules and norms: 'In terms of philosophy of law, this is the essence of dictatorship: the general possibility of a separation between norms of justice and the implementation of law (*Rechtsverwirklichung*)' (xlii). This last statement has to be counted among the many fascinating, cryptic, as well as controversial definitions given by Schmitt, which through a stylistic, concise and provocative form can entertain a wide range of meanings. The separation between the normal 'rule' of law and its implementation, which appears clearly in the event of a dictatorship, is a general feature of law as such. A legal order to be effective and valid needs to be erected on a 'normal' base, which has to be created concretely from outside of the law. The dictatorship, thus, gains the form of a particular juridical problem, because it represents, in this manner, an instrument for the implementation of law, as a means that allows the stabilisation of a critical situation.

Schmitt intends to justify dictatorship, and in general the state of exception, as concepts entailed in the ambit of law, and he proceeds to establish this through an analysis of the history of political and juridical institutions and theories of law and the state. *Dictatorship* then follows two main paths: on the one hand, it is a theoretical investigation of different constitutional doctrines in the framework of their historical development; and on the other hand, it is a historical reflection on the concrete exercise of state authority in the context of emergencies and conflicts. These two paths do not remain distinct and autonomous, but create a complex network of related references and intersections. This analytical strategy could be interpreted as a genealogy of the concept of dictatorship (and, by extension, of the state of exception), which links the various forms of emergency government, from a historical point of view, to the use of the institution of dictatorship in Roman law; and, then, from a wider theoretical standpoint, to the intimate distinctions between a norm of law and a norm of the implementation of law. Through a critical analysis of the unfolding of this genealogy, Schmitt is able to reach what he considers the focal point of the book: the crucial distinction between Commissary dictatorship and Sovereign dictatorship. Commissary dictatorship is a specific 'act of self-defence', it 'suspends the constitution in order to protect it . . . in its concrete form' (118), which means that the exceptional powers of the dictator are an emanation of an existing legal order. In contrast, in the case of the Sovereign

dictatorship, the entire constitutional order is abolished through the action of the dictator, which

does not suspend an existing constitution through a law based on the constitution . . . rather it seeks to create conditions in which a constitution . . . is made possible. Therefore dictatorship does not appeal to an existing constitution, but to one that is still to come (119).

Schmitt located a definition of commissary dictatorship in Bodin's major work *Les Six Livres de la République* (1631), which contains 'an extraordinary clear and detailed juridical foundation' (25) of commissary dictatorship. Bodin advanced a fundamental distinction in the understanding of the state's administration, between the 'regular officer' (*officier*) and the 'commissar' (*commissaire*). The regular officer 'is a public person who has a legally circumscribed remit', while, in contrast, 'the commissar is a public person too, but he has an extraordinary duty, defined by a specific mandate' (25). Within this key distinction, according to Bodin, 'the dictator . . . is by definition a commissar whose duty, seen from a legal point of view, is essentially nothing but a commissarial duty' (31). The peculiar essence of the commissarial exercise of power lies in the fact that its contents have to be based on the concrete situation (*Lage der Sache*). Dictatorship

cannot be a regular office, and it cannot be a *munus perpetuum* [permanent office], either. If dictatorship is granted the trait perpetual, then not only would the dictator be entitled to his office, he would also become the sovereign and would no longer be a dictator (31).

Dictatorship, as such, has to maintain its character as an event within a temporary limit, since if not it would simply be an indiscriminate and authoritarian imposition of a new legal and political order. In this way, what Schmitt calls commissary dictatorship is a modern relative of the institution of dictatorship in Roman law.

The sovereign dictatorship, unlike the commissarial dictatorship, is not an expression of a constitutional order by the voluntary act of a sovereign power, but arises in a vacuum of law, in order to create the conditions that allow the establishment of a new legal order. Historically, sovereign dictatorship has assumed two main forms. First, when following from a revolution, a constituent assembly is created that has unlimited power. Second, when a revolutionary party becomes the interpreter of the will of the people, and in the name of the latter assumes the state until the conditions in which the people can exercise their sovereignty are present. It follows that there are two basic characteristics of this kind of dictatorship: it is based on an anomic context; and the dictator acts, generally, on behalf of the will of the people, namely, the constituent power. Thus, it is clear on this account that it was not possible to conceive and observe sovereign dictatorship until certain historical and theoretical conditions had arisen. While commissarial dictatorship was historically present in Roman law, sovereign dictatorship appeared only after its constituent elements – the possibility of a vacuum of law and the people as the holder of a

constituent power – had emerged. This historical shift occurred over a sustained period between the seventeenth and the eighteenth centuries. For Schmitt the first proper example of a sovereign dictatorship was the government of the National Convention, during the period of the French Revolution, assembled on September 1792 with the task of drafting a constitution. ‘On the execution of its mandate’, Schmitt claims, ‘the Convention ceased to be a constituted organ’, therefore it ‘acted through a direct appeal to the *pouvoir constituant* of the people’ (127–128). The sovereign dictatorship is, then, a form of government typical of the modern age. The medieval conception of the state could not conceive a sovereign dictatorship because it considered the sovereign power as delegated from the higher divine office. Thus, it was not possible to think of a legal vacuum on which to erect the basic elements of a new order, since any order, and any power capable of creating it, would always be a direct delegation from a higher power.

According to Schmitt, the appeal to the constituent power (as expression of the ‘will of the people’) does not make the event of the sovereign dictatorship an arbitrary imposition of a new order, since ‘a minimum of constitution still remains as long as the *pouvoir constituant* is recognized’ (127). The constituent power is the source of political and legal legitimacy. The first constituent agent – the sovereign dictator – in this way, represents the will of the people and is legitimated in his action through a sort of commission of constituent power. Once a new order is laid, the task of the sovereign dictator ends. Therefore, this kind of dictatorial power is ‘sovereign only as a transition’ (127). In this way, as the commissary dictator is a commissar of a constituted power, the sovereign dictatorship is a commission of a constituent power.

Schmitt concludes his genealogy of dictatorship with an analysis of the gradual inclusion of the issues concerning emergency powers within the frame of the modern constitution. He achieves this through an analysis of the legal doctrine of the *state of siege* (as in the French nineteenth century legal tradition), which represents a prototype of contemporary constitutional emergency provision. In Schmitt’s view, what it is currently understood as ‘state of emergency’ in contemporary constitutional law could be seen as the ultimate evolution of the idea of dictatorship. In the course of the nineteenth century, a series of legislative acts on the state of war, of siege and in general on the state of exception were elaborated, leading to the gradual legal institutionalisation and regulation of emergency powers. ‘The formal act of the government’s declaration’, Schmitt claims, ‘supplanted the real state of emergency’ (161); the emergency, thus, became a tool in the hands of the sovereign. For Schmitt, the moment in which the state of siege entered the legal-formal order, becoming an object of law, marked its radical transformation from a pure factual situation to a ‘fiction’, because ultimately dependent on a political decision and not on a real event. In the light of Schmitt’s theory of exception, every constitutional provision, stating the formal and procedural administration of emergencies is fictional for the reason that it transposes the actual necessity to react to the exigency of an emergency, into a formal set of procedures. In this way, the exception is no longer an actual situation of peril, but is instead dependent on a judgment formed according to a certain procedure.

What constitutes the essential legacy of *Dictatorship* is the paradoxical status of Schmitt's interpretation of the practice of dictatorship and emergency powers. The two kinds of dictatorships that have emerged in the history of the doctrine and of the practice of the state of exception are not mutually exclusive. It is possible for a commissary dictatorship to become a sovereign one. In other words, there are no criteria or legal instruments able to limit the possibility, during the implementation of emergency power, of a transformation of the legal and political asset of the state. The prerogative of sovereign power, in time of emergency, is absolute. With the normalisation and regulation of the emergency provision – the fictional state of exception – modern constitutions seeks to ensure, on the one hand, a limit to the possibility of a discretionary exercise of power and, on the other, a legitimate way to act outside the normal jurisdiction of law. However, in doing so the law has internalised all the risks the exception entails. Needless to say, *Dictatorship* still remains an essential text for a critical understanding of today's global political scenario.

Gian Giacomo Fusco\*

Thomas Grey, **Formalism and Pragmatism in American Law**, Leiden/Boston: Brill, 2014, 264 pp, hb \$99.95.

'The life of the law has not been logic; it has been experience', said Oliver Wendell Holmes. This is more or less the argument that runs through the five chapters of Thomas Grey's book published by Brill in the series, *The Social Sciences of Practice: The History and Theory of Legal Practice*. It is a collection of articles that have been published previously as journal articles by the author but re-organised to form a coherent theme for a book. The publication of the book was motivated by the dilemma that China and many developing countries face – that is, the choice between modernity and retention of traditional values.

Although the Holmes quote above is a cry of frustration for the apparent inability to respond to the logic of Christopher Langdell's argument on consideration in the law of contract, it also epitomises Holmes' own ambivalence to the theory and practice of law and to jurisprudential discourse in general. In 1871, he rejected torts as a distinct legal category to be taught and studied (228), yet two years later accepted and advocated for it to be recognised as such; he dismissed Langdellian teaching of law as science, describing Langdell as a 'legal theologian' and a representative of 'powers of darkness' (48-50), yet wrote glowingly of law as science in his 1919 correspondence with Cohen on 'the scientific way of looking at the world' (109), and described Langdell as a '*tour de force*' of American legal scholarship, a 'profound intellect working out original theory through a mass of detail' (49, footnote 13). He is considered a progressive yet he wrote the 1927 Supreme Court decision in *Buck v Bell* that legalised eugenics or the forced sterilisation of 'undesirables'.

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Grey shows these tensions between the theory and practice of law through the use of well-established cases and law subjects. For example, he uses Langdell's challenge of the scientific basis of the mailbox or postal rule in contract to show the tension between practice and principles. Langdell argued that if consideration is at the heart of a contract in the common law, then surely an offeror must know that his offer has been accepted for the contract to be binding. This goes against the postal rule as established in the 1818 case of *Adams v Lindsell*. He used the same logic in the application of the postal rule to insurance contracts. Grudgingly accepting the logic of this argument, and yet failing to provide a counter, Holmes relied on 'experience', not 'logic'.

Grey's work, however, is not only about Holmes and Langdell or pragmatism and logic debate. The first two chapters of the five-chapter book are devoted to constitutional law and the law of property. Chapter 1 asks whether America has an unwritten constitution. This is very interesting to first year law students. Any serious student of constitutions will have learned that there is no country with a fully written or fully unwritten constitution. The issue then is how to work with or interpret the unwritten parts of the constitution? This is where Grey's work comes in handy. He examines the models of interpretation used in interpreting the American constitution, pitching jurists like Black, Bork, Linden and Ely (I may add Scalia, Thomas, Rehnquist, Roberts and Alito), who often stand for faith in and fidelity to the original constitutional text against the likes of Blackmun, Breyer, Stevens, Ginsburg and Kagan, who put their faith in the penumbra of the constitution and rely more on its 'unwritten' parts. The fascinating revelation is that the classic judicial review case of *Marbury v Madison*, which is considered the sub-stratum of the unwritten constitution of the US, is actually founded on the very idea of a written constitution. Against the charge of the unconstitutionality of judicial review, Grey answers that 'the people have chosen the principle that the statute or practice violated, have designated it as fundamental, and have written it down in the text of the constitution for the judges to interpret and apply' (15). The author gives clear examples of cases where the Supreme Court did not undertake constitutional analyses, but rather found justification for its decisions on 'general principles which are common to our free institutions', 'due process', and the 'right to privacy' (18). In some cases, the Court was not even sure of the constitutional footing of its decisions. In *Roe v Wade*, for instance, the court held that the

right to privacy whether it be founded in the 14<sup>th</sup> Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or . . . in the 9<sup>th</sup> Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy (19).

Grey's dexterity is seen in the seamless swing from constitutional interpretation to evolution of property rights. He argues that the concept of property has shifted from individual moral and physical ownership of things to state, groups, banks, and classes of owners – of mainly intangible 'products'. The apparent disintegration of the concept and institution of property is owed, according to Grey, to the inevitable 'internal development of capitalism itself' (36, 38). 'It is

intrinsic to the development of a free-market economy into an industrial phase . . . it is a factor contributing to the declining prestige, the decaying cultural hegemony of capitalism' (36). Here I disagree with Professor Grey. Capitalism is not declining. With the 'Washington consensus' of the 1980s and 1990s where Western countries agreed through the instrumentality of IMF and the World Bank to privatise or marketise the world, and in the light of the collapse of the Eastern bloc, capitalism has been on the ascendancy not only in the West, but also worldwide. The financial crisis and the recession of 2008/2009 might have heralded a rethink or review of the operation of aspects of capitalism and, for a moment, there were thoughts of state ownership or stronger regulation of the banks, AIG, the auto industry, etc, but life has quickly gone back to 'normal'. One can argue that the passing of the Affordable Care Act in the United States after half a century of effort and struggle to provide universal healthcare shows the resurgence of mixed or welfare economy. But even here it must be pointed out that the Affordable Care Act is insurance-based, relying on the market. Although Chief Justice Roberts' pragmatic opinion upholding the Act was based on the tax provision of the constitution, the welfare state is in retreat, ironically, hastened by the 2008–2010 crisis and recession.

Chapters 3 and 4, essentially, show the apparent contrasts between Langdell's orthodoxy and Holmes pragmatism. Grey describes classical orthodoxy, which he attributes to Langdell, as the method of teaching using cases rather than abstract principles, the creation of the modern legal academy and the standard three-year legal education. At the heart of this orthodoxy is science. Law is treated as science. Law, according to this formulation, should begin with principles but must also have real answers to questions. In this case, Ronald Dworkin's Hercules, who finds right answers to all legal questions, reflects the Langdellian orthodoxy.

The classical view of the law has come under sustained criticism by Holmes, Pound and others (86). A number of examples and scenarios have been given that cannot be equated to science. One is the principle of *res judicata*. Science is a continuous questioning of issues and review of existing ideas and subjects. Legal adjudication, however, calls for finality even if the instant result is wrong. Secondly, courts serve a practical function and that is why they are not permitted to rule on hypothetical cases (87). Science on the other hand, begins with hypotheses. Finally, the Restatements of American law that was supposed to be the grand legacy of Langdell and his orthodox disciples has rather proved to be their Achilles' heel. The Restatements generated a proliferation of contradictory ideas, principles and scholarship that it is impossible to derive or arrive at the few key principles or doctrines that Langdell had advocated (88).

In chapter 4, Grey pitches Holmes' pragmatism against Langdell's scientific orthodoxy. While Langdell was described as formalistic and logical, Holmes was seen as pragmatist drawing from social, biological and utilitarian contexts to posit a practical view of the law (102–112).

All judgments – scientific and moral as well as prudential and technical – were contingent, probabilistic, relative to a situation and to the interests of an agent or a community of agents. Thought was no longer to be conceived as something

distinct from practice, but rather it simply was practice, or activity, in its deliberative or reflective aspect (118–119).

The problem is that Holmes was complicated and defied neat categorisation. Although he decried science, he was a ‘conceptualist’ (134). According to Grey, Holmes advocated the generalisation of legal thought into ‘a thoroughly connected system’, almost exactly what Langdell stood for (136, 141). The difference, if any, between the two legal giants lay in their application of the science and concepts of law in concrete cases. Langdell saw the principles as ideal realities which a judge could follow. Holmes, on the other hand, saw the principles as instruments and justified only if they served a practical purpose (141). In many ways, Holmes was orthodox and a conservative jurist. He did not see merit in specialised areas of the law such as Marine Insurance (142), railroads and telegraphs (136) and, initially, torts. As he put it himself, he ‘love[d] the old’ and had a ‘reverence for venerable traditions’ (130). He was an elitist, conceiving ‘intellectual pursuits as naturally reserved for the few’ (184). Be that as it may, Grey’s book reminds us of the legacy of Oliver Wendell Holmes. These include the surge in experiential learning through legal clinics, legal practice and bar vocational programmes, the ‘modern analysis of tort and contract in terms of risk allocation’ (152) and the acceptance of the law of torts as a distinct subject.

The last chapter of the book returns to a bread and butter subject that, until Holmes’ gargantuan efforts, was not so commonplace: the law of torts. Grey acknowledges that less celebrated authorities such as Hilliard, Addison, Blackstone, Nicholas St John Green, Timothy Walker, and most importantly John Norton Pomeroy made significant contributions to the advancement of the law of torts. Pomeroy categorised civil law into ‘Law of Persons and Personal Rights, Property and Contracts’. Although he did not state it categorically, the law of persons and personal rights can be described as the foundation of the modern law of torts. Unfortunately, it appears that the admiration Grey has for Holmes and the determination to credit him with the invention of the modern law of torts led him to downplay the contribution of Pomeroy and others. He describes Pomeroy’s work as ‘less accessible to us today’ (226) and his treatment of tort as ‘well concealed’ (226), when in fact it was mainly because Pomeroy lacked the celebrity status of Holmes that his work was not as visible. Clearly, ‘at the time Holmes wrote the relationship between negligence and torts was . . . contested’ (232). It simply means that prior to and at the time of Holmes, there were important works on the law of torts.

All the same, what makes Holmes such an enigmatic jurist is his ability to disagree with himself. This he showed in his dismissal in 1871 of torts as a distinct legal category to be studied and his 180-degree turnaround to embrace and advocate for it in 1873. He dismissed Christopher Langdell’s work as not based on experience, but turned around to describe Langdell as a ‘*tour de force*’ in American jurisprudence.

This is also the reason why the book is fascinating. One weakness is that it is a collection of essays originally published over a decade ago. A re-reading of the essays, however, is illuminating and exciting. Professor Grey manages

to combine theory, history and law in a manner that is fluid and engaging. The rationale for the book is to indicate to Chinese readers and jurists from other developing countries that they can retain tradition and at the same time modernise. The choice between modernity and tradition is false. Grey's book shows us the way forward.

Francis N. Botchway\*

*Ruth Dukes, **The Labour Constitution. The Enduring Idea of Labour Law**, Oxford: Oxford University Press, 2014, 244 pp, hb £60.00.*

The crisis of protective labour law is now well documented. Legal supports for collective bargaining have been eroding and while this is partially offset by growth in the legal regulation of the individual employment relation, often these laws have permitted greater business flexibility at the expense of worker protection or have simply failed to address the needs of the growing number of workers who find themselves in precarious employment relations, including so-called self-employment, temporary and casual work, agency work, etc. So great has been the erosion that labour law scholars are increasingly engaged in discussions about what the purpose of labour law is—a sure sign of crisis (see G. Davidov and B. Langille (eds), *The Idea of Labour Law* (Oxford: OUP, 2011)). For these reasons, Ruth Dukes' book is both a timely and a brave contribution to the unsettling debate over the purposes and possibilities of labour law in the opening decades of the twenty-first century.

The structure of the book reflects its great ambition. It is in equal parts a study of the history of the idea of labour law in the twentieth and twenty-first centuries and a study of the modern history of labour law in Germany, England, and the European Union. Readers with an interest in any of these topics will find the book rewarding, but what makes it especially impressive is the way Dukes has pulled them together around the broader theme of 'the labour constitution'. The term itself will be unfamiliar to most readers since it is not one used in the labour law regimes of common law countries and so I begin by exploring what Dukes means by it.

To do so, we must begin with the facet of the book that is an essay in the retrieval of ideas and, in particular, the scholarship of Hugo Sinzheimer, the intellectual architect of Weimar Germany's labour law, whose work remains largely unavailable to the English-speaking world. Dukes locates Sinzheimer's writings in the debates of post-World War I Germany where revolutionary communists were struggling to smash capitalism through the creation of revolutionary councils that would govern workplaces, the economy and the state. While Sinzheimer opposed the revolutionary communists, he was a socialist who believed that political democracy without economic democracy would leave wage-earners – the majority of the population – unfree, subject to the

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control of the owners of capital. Human freedom would only be realised when workers were empowered to participate collectively in the management of the economy, a social institution whose ultimate goal was to produce for the common good. Thus, in Sinzheimer's view, the labour constitution was inseparable from the economic constitution and needed to provide workers with the right to collective participation on a parity basis in workplace *and* economic governance through a council system. These ideas fit within the theory of evolutionary socialism, articulated by Eduard Bernstein and embraced by the German Social Democratic Party, which Sinzheimer represented in the National Assembly.

Dukes counterposes to the labour constitution two other ideas of labour law: Otto Kahn-Freund's 'collective laissez-faire' and the 'law of the labour market' perhaps most closely associated with S. Deakin and F. Wilkinson's work, *The Law of Labour Market* (Oxford: OUP, 2004). Collective laissez-faire will of course be most familiar to English readers for whom it was both the common descriptor of the legal regime that emerged in the first half of the twentieth century and survived into the post-World War II era and also articulated and made visible its underlying principles. The idea of collective laissez-faire departed significantly from the labour constitution insofar as it effectively abandoned its socialist and transformative ambitions but rather emphasised the goal of taming capitalism by creating a legal space within which workers could unionise and achieve sufficient countervailing power so that through collective bargaining they would be able to capture more of the benefits of capitalist production. In the absence of a transformative project, the intimate connection between workplace, state, and economic governance was no longer necessary and so the role of the state was significantly limited, leaving unions and employers substantial autonomy to fashion their own arrangements. Normatively, collective laissez-faire was rooted in a pluralist conception of society which recognised distinct interest groups that acted autonomously and in competition with each other, with the state playing an indirect role of enacting and enforcing the background rules that made and kept the game fair, which included redressing structural power imbalances generated by capitalist economic relations.

The law of the labour market is an even more marked departure from the labour constitution. In this theoretical frame, the aspiration to tame capitalism is abandoned and replaced by the goal of making capitalist labour markets work better through the promotion of social inclusion and efficiency. The law of the labour market distilled the principles of New Labour's Third Way agenda for labour law but, as Dukes points out, the authors associated with this idea also embraced its normative foundations. Drawing on Amartya Sen's capabilities approach and Friedrich Hayek's idea of the market as a spontaneous order, Deakin and Wilkinson saw the role of law as one of assisting individuals to gain endowments which could be traded on the market and of overcoming systemic discrimination based on categorical distinctions that interfered with participation in and the rational operation of labour markets. Social rights, like access to education and healthcare, were justified to the extent they could be characterised as enhancing market functioning. The scope of such social rights however is ambiguous since claims about which ones would be viewed as

market enhancing rather than redressing the adverse consequences of the normal, rational operation of capitalist labour markets is controversial. Moreover, capitalist social relations and the structural inequalities they generate receive almost no recognition.

The historical trajectory of these three ideas of labour law might raise some question about the notion that the labour constitution is an enduring idea, depending on what one means by that claim. At one level, what we are witnessing is the erosion of the idea of the labour constitution, particularly when we think about how theorists understand the relationship between the purposes of labour law and capitalism: the labour constitution envisioned the evolutionary transformation of capitalism to socialism or something like it through co-determination; collective *laissez-faire* required the taming of capitalism through countervailing worker power and collective bargaining; and the law of the labour market embraces capitalism, seeking only to enable individuals to improve their tradeable value. If an enduring idea is one that continues to shape dominant conceptions of the law, the labour constitution has been losing ground for nearly a century, embraced only by a minority of radical labour law scholars.

There is however a second way that we can think about an enduring idea and that is in regard to its influence on the development of the law itself. This brings us to the second facet of Dukes' book, its history of selected modern labour law regimes. As Dukes notes, each of the three ideas of labour law was developed to a significant degree in support of political projects to implement or foster a labour regime and a broader conception of social justice. For Sinzheimer, the labour constitution was to provide a model for the Weimar Republic's labour law, a social democratic project, but the story is one of partial success. In particular, while the regime embraced a system of works councils at the workplace level and provided for the extension of collective agreements across industries, the promise of Article 165 of the Weimar constitution to provide workers with co-determination in the regulation of the overall economy was never implemented. The post-World War II labour regime of the Federal Republic adopted many features of the Weimar labour regime, but here too the demand for economic democracy was never satisfied and was eventually abandoned by the labour movement. Finally, Dukes argues, the regime has been eroded in recent decades not by changes to the law but by the withdrawal of state support for centralised collective industrial relations, leading her to question the strength of the labour constitution's continuing influence in Germany.

Looked at more broadly, the labour constitution has had even less influence outside of Germany. Certainly, as Dukes demonstrates, the British industrial relations model was marked by the way it provided a legally protected space for trade union activity and encouraged employers to engage in collective bargaining while respecting the substantial autonomy of the parties to fashion their own agreements. The idea that workers should have a collective voice in the direction of the firm and the economy was never on the agenda. Although collective *laissez-faire* was conceptualised after the key elements of the British regime had emerged earlier in the century, it, rather than the labour

constitution, best articulated and then shaped the principles of British industrial relations.

It is arguable that the idea of the labour constitution had somewhat greater influence on efforts to harmonise labour laws in the EU, particularly through the European Works Council (EWC) directive which established a transnational mechanism for the representation of employee interests. Measured against the idea of the labour constitution however, the EWC falls far short of achieving anything close to democratic worker participation in multinational enterprises on a parity basis. More generally, as Dukes explains, the EU constitution and institutions have developed in a way that decreases the capacity of workers to act collectively and influence their terms and conditions of employment, let alone have a voice in workplace and economic governance.

Clearly, the labour constitution has not had an enduring influence on the development of labour law regimes. Indeed, as was the case with its influence on ideas of labour law, it seems to be of diminishing significance at this historical juncture. So what then is the basis for Dukes' claim that the labour constitution is an enduring idea of labour law? The first is the labour constitution as a normative theory while the second is as a positive theory.

As a normative theory, the labour constitution is founded on the value of human emancipation from domination and exploitation by those who are in a position to control the activities and to extract economic benefits from the work of others. As Dukes notes, for Sinzheimer, democratic participation by workers in their workplaces and in the economy is a means of emancipation.

Through its participation in the regulation of the economy, labour was freed from its subordination from capital; workers were freed from employer efforts to dictate the social and economic conditions of their existence, and at the same time, become free to participate in the formation of those conditions (4).

However, Dukes herself does not emphasise the normative foundations of the labour constitution or, for that matter, construct a normative argument about the purposes of labour law or labour law scholarship. Rather, in the final chapter where normative issues might have been addressed, Dukes reframes the issue more as a question of the purpose of labour law scholarship, which is not primarily a normative question but a political one; she asks whether labour law scholars are or should be engaged in descriptive or prescriptive projects. Clearly, all the labour scholars Dukes discussed previously were engaged in both to different degrees, so that is not a particularly interesting line of inquiry. Some normative arguments slip in to this discussion, with the principal one being a critique of the normative value of promoting the rational operation of capitalist labour markets. Dukes, drawing on the work of Wolfgang Streeck and others, challenges the claim that efficiently operating markets are mutually beneficial to workers and employers and asks whether they are defensible 'with reference to non-market values such as democracy, freedom, and human dignity' (207). In this passage, and others, Dukes makes it clear that she is committed to the normative underpinning of the labour constitution and that she believes in its enduring salience for critically evaluating alternative ideas of labour law.

Dukes's claim that the labour constitution is an enduring idea, however, is most strongly made on the basis that it provides a 'framework for the scholarly analysis of labour law today' (194). What she means by a framework for analysis is that the labour constitution provides a positive theory about the conditions under which the normative goals of emancipation and democracy at work can be realised. Here the crucial point is Sinzheimer's understanding of the relationships between the workplace, the economy, and the state. Democracy and human emancipation cannot be achieved without economic democracy in a capitalist society because of the control that employers exercise over workers and the economy through their ownership of the means of production. Therefore, Sinzheimer postulated state power is required to impose economic democracy on capital through the enactment of laws giving workers parity participation in employer decision-making and in the formulation of economic policy. However, state power will only be exercised in this manner if there is a particular kind of state. Sinzheimer imagined that a social democratic state would enact such laws, but even that hope proved excessively optimistic, raising the question of whether any variant of a capitalist state, social democratic or neo-liberal, can or will enact the economic or labour constitution necessary to realise labour law's democratic and emancipatory goals.

Dukes also deploys the labour constitution framework to explain why collective laissez-faire was only able to provide some workers with a more equitable share of what was produced under historically specific and limited conditions that ultimately could not be sustained when capital no longer saw cooperation with unions as preferable to resisting them. Similarly, in her analysis of EU law, Dukes explores the limited development of labour rights. While in its early years there were some signs that social democratic governments and trade unions would achieve an upward harmonisation of collective bargaining law along the lines of the German model, recent developments suggest the trajectory is toward deregulation that accommodates the priority given to the free movement of capital and labour. As Sinzheimer's theory predicts, in the absence of a strong social democratic state, robust collective bargaining institutions will not be sustained and workplace and economic democracy will not be realised.

Perhaps the ultimate challenge to the labour constitution as a positive theory, however, does not lie in its articulation of the conditions under which the normative project of a democratic and emancipatory labour law can be realised, but in the meta-question of whether those conditions can be realised within a globalised capitalism. This is the question that lies at the heart of the crisis of social democracy. Dukes recognises the problem—'It is not suggested here, therefore, that the idea of the labour constitution provides easy answers to the challenges posed to the protection of workers' interests by the development of global capitalism' (221)—but wisely does not end the book with a speculative response of her own.

In sum, *The Labour Constitution* raises fundamental questions about the purposes and possibilities of labour law in our time. It is a brave book that retrieves and defends the goals of emancipation and democracy against contemporary theorising that accepts the market as the measure of and mechanism for achieving workplace and economic justice. It also provides a critical and compelling



account of the decline of collective bargaining and the loss of space for democratic engagement. In so doing it makes an important contribution to debates about the crisis of labour law in the twenty-first century.

*Eric Tucker\**

*Adam J. MacLeod, Property and Practical Reason*, Cambridge: Cambridge University Press, 2015, 268 pp, hb £69.99.

There aren't as many competent philosophical studies of property law as there are of the other main fields of private law. In *Property and Practical Reason*, Adam J. MacLeod studies private property through a perfectionist lens. The book grounds property in accounts of perfectionism and flourishing developed by Joseph Raz and (especially) John Finnis. The book supplies an important normative justification for property. That justification also generates along the way several fine conceptual insights about property. Since interests in flourishing simultaneously justify *and* limit property rights, a sound grasp of flourishing clarifies how and why different parts of the common law expand and limit legal property rights.

*Property and Practical Reason* begins with two conflicting intuitions. One commonplace holds that property is valuable as a sphere of undelineated and unlimited authority – in Sir William Blackstone's perhaps-overused phrase, a sphere of 'sole and despotic dominion'. The other holds that some exercises of dominion seem so irrational or inconsiderate to others' interests that they don't deserve to be respected. Both of these commonplaces make a certain amount of sense, and Chapter 1 clarifies that sense using a perfectionist theory. In traditional classifications, deontological theories make fundamental the duties associated with moral agency, while consequentialist theories make fundamental the social consequences produced by particular actions or policies. In contrast with both, perfectionist theories focus on flourishing and human goods. Such 'goods' aren't goods because they're pleasant or enjoyable, but rather because they are 'gratifying,' or 'constitutive of flourishing' as a sociable, discerning, and virtuous person would understand 'flourishing'.

*Property and Practical Reason* relies on the perfectionist 'New Natural Law' theory propounded by John Finnis. In his 1980 book *Natural Law and Natural Rights*, Finnis argues that human well-being derives from seven basic goods, or intrinsic, irreducible sources of well-being. In his account of property, MacLeod gives pride of place to one such good, practical reasonableness, 'the good of being able to deliberate about, and choose between, valuable possibilities, and to act consistent with the requirements of reason' (28). Practical reasonableness, MacLeod argues, captures the complexity of private property. On one hand, property illustrates vividly the broad autonomy that moral agents need to be self-governing (33–34). On the other hand, property ceases to be justifiable

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when the uses to which people deploy it can't be connected to life, knowledge, friendly association, or other basic human goods (22, 34–36).

The rest of the book develops this argument, illustrating it with cases and legal rules from the United States, United Kingdom, and other English-speaking common law jurisdictions. Chapters 2 through 5 develop the case *for* property, each in confrontation with a familiar challenge *against* property. Chapter 2 begins with the view that property consists of a (mere) 'bundle of rights,' such that different types of property have few or no recurring or common features. MacLeod argues that his portrait of 'mediated' but limited dominion (49) supplies the content and direction left out of bundle accounts. Chapter 3 confronts familiar arguments for redistribution and against private property—long associated with Pierre Joseph Prudhon's saying 'Property is theft'. MacLeod recounts the many ways in which ownership encourages the production of new goods, and the circulation of those goods to non-owners via commerce (87–90). Separately, he argues that strong property confers on families and close associations the power to use property for their social goals. Co-tenancies and corporate governance facilitate cooperative governance among insiders; trespassory rules stop outsiders from disrupting such communal governance (74–87).

Blackstone's 'sole and despotic' image prompts another criticism, that property seems to encourage selfishness. As explained in Chapter 4 ('Property from the internal point of view'), however, property facilitates social behavior indirectly but powerfully. People can't pursue serious life goals without: freedom from coercion; stability of expectations for long-range plans; commitment to their own projects; and freedom to pursue their own personal goods even when those goods conflict with goods being sought by others. Property helps satisfy all four conditions (106–114). Chapter 5 ('Property and charity') applies the same basic insight to the phenomenon of charity; people are empowered to pursue philanthropic goals when property rights entitle them to attach strings to their charitable gifts.

Chapters 6 through 8 switch course and show how practical reason limits property. Chapter 6 explores outer limits associated with spite fences and other doctrines relating to 'abuse of right'. Anti-spite doctrines effectuate a low-common-denominator prohibition; even if conduct is ordinarily legitimate, it ceases to be so when conducted solely to interfere with someone else's pursuit of his own flourishing. Chapter 7 ('The nature of property rights') explains how legal property rights relate to and implement the prescriptions from different underlying moral rights. Chapter 8 ('The contours of property rights') focuses on the ways in which property law expresses and compels adherence to norms that citizens would respect if they were all reasonable and virtuous. Property law expresses a few categorical prohibitions, for example against using property as a vehicle for slavery, or against theft and trespass (205, 209–210). Property expresses many more context-dependent prescriptions, for example in the relations that owners have with others via various servitudes, bailments, and licenses (214).

Chapter 9 ('Settling property rights in law') considers how practical reason reconciles owner rights, property-related social obligations, and the common good. MacLeod's observations on this topic arise out of an inquiry into how

to reconcile private rights and public policy goals in constitutional property-rights doctrines. ‘Private property law lays a foundation for public law not only by establishing baseline expectations for commercial and legislative action,’ MacLeod concludes, ‘but also by securing the conditions within which citizens exercise civic virtues, and in particular learn to deliberate together, to share reasons for action and to become habituated to pursuing a common and pluralistic good’ (233). This is a useful restatement of how sensible theories of natural law or rights conceive of the common good – without subordinating property.

Because *Property and Practical Reason* reads primarily as a philosophical justification for property, legal readers may wonder whether and to what extent MacLeod’s justification provides concrete guidance in specific property cases. The question assumes a misconception about philosophical justifications for property rights; one of MacLeod’s many contributions is to dispel that misconception. A moral theory can identify the most fundamental criteria by which a system of property law may be evaluated and found either legitimate or illegitimate. Such a theory can also justify general policies (generally protect owner autonomy), rules (no trespasses), and exceptions (except for cases of extreme necessity, or in conflicts over access to riparian water). But such a theory needn’t and usually doesn’t require results in specific cases.

MacLeod confirms as much when he explains: ‘Though moral concerns appear most clearly in hard cases, they are nevertheless at work in property’s core, silently and invisibly’ (7). In his portrait, property’s perfectionist foundations become immediately relevant most often when legal doctrines seem to contravene property’s fundamental justifications in particular conflicts. So if – as in the well-known case of *Riggs v Palmer* (22 N.E. 188 (NY 1889)) – a devisee under a will ‘slays’ the testator, to stop him from rewriting the will (16–20), the plain terms of the testator’s devise don’t control – because of reasonable limits on testamentary meaning. In most cases, however, a perfectionist justification justifies the many *interplays* in property, the various doctrines that expand and contract the scope of property depending of the strengths of the interests in dispute. Chapter 7 is especially instructive in this regard. As MacLeod shows, property often starts with simple ‘no entry’ trespassory norms, effecting a judgment that owners are ordinarily best-situated to use an owned resource beneficially. Strangers’ normative interests become decisive only when the strangers face immediate and grave threats to person or property. Reasoning becomes much subtler in disputes among concurrent proprietors – between present estate holders and remaindermen, or neighboring riparians, or neighbors with overlapping land uses (188–196).

Because *Property and Practical Reason* aims to introduce a new moral theory of rights into property scholarship, it is sure to prompt questions from scholars who sympathise with other moral theories. In the rest of this review, I should like to raise two representative questions from one such perspective, that of natural law and rights moralities similar but not identical to Finnis’s New Natural Law.

First, is property best justified in reference to practical reasonability . . . or in reference to a moral interest in the use of resources? Although *Property and Practical Reason*’s main argument embraces the former justification, the book

gestures toward the latter one. From time to time, the book claims that property is structured around '[t]he central case of use – what we generally mean when we speak of the use of things – . . . deliberate use, which is done purposefully in order to realize some good end' (2). This claim is better grounded in Western law, and seems more convincing, than the claim that property is best justified in relation to practical reason.

To be sure, ownership does supply raw materials needed to exercise practical reason, and people do exercise such reason when they manage their assets and deliberate on how to respect others' assets. But the relation between property and practical reason is complicated. Some people can prosper in a moral sense even if they have few material possessions. Other people become miserable in a moral sense when they win the lottery.

And even to the extent that property does contribute to practical reasonability, it does so only as one of many contributors. To borrow an Aristotelian analogy that MacLeod likes, if practical reasonability is analogous to architecture (37), then property seems analogous to one single mechanical art, such as carpentry. In both cases, the subsidiary field contributes to the architectonic field; it can't possibly encompass the architectonic field, which the architect practices by applying the subsidiary field in concert with other subsidiary fields to accomplish a goal more comprehensive than their subsidiary goals. To practice practical reason fully, a person needs not only property but also bodily autonomy, privacy, a secure reputation, a reliable system of contracts, and sound rules ordering family relations and close associations. And that list covers only necessary legal infrastructure; further social, cultural, and political infrastructure is needed as well.

As a result, the link between property and practical reason is more attenuated than *Property and Practical Reason* sometimes suggests. As carpentry is individuated from masonry and other mechanical arts by its focusing on wood, property is individuated from other fields of law by focusing on external objects. In both cases, the subject matter generates a systematic normative goal: for carpentry, the right assembly of wood into durable and useful articles, and for property, the protection and encouragement of different people's equal normative interests in acquiring and using things for their own basic goods.

Such an account makes property seem less dignified than MacLeod's account does. After all, interests in 'acquisition' and 'use' don't link property directly to basic human goods. Nevertheless, even if they don't constitute intrinsic human goods, such interests remain extremely effective instruments helping people to pursue basic goods. And this justification links property to practical reason – indirectly, but realistically. It's practically reasonable to organise a field of law around equal rights to acquire and use resources, because these rights facilitate the pursuit of basic goods – including practical reason itself.

Separately, is the New Natural Law the most satisfying perfectionist framework? Although *Natural Law and Natural Rights* is a masterpiece, the book's argument is not beyond criticism. In *Natural Law and Natural Rights* Finnis argues that there aren't 'differences of rank of intrinsic value between the basic values' or goods, and claims that different people's pursuits and desires are incommensurable (Oxford: OUP, 2<sup>nd</sup> ed, 2011, 94). Some scholars (especially

Russell Hittinger, and Ernest Fortin) have suggested that these qualities may make the New Natural Law too rigid and indeterminate, especially when political actors make irreconcilable claims for the same goods.

These criticisms may strain a New Natural Law framework, especially in recurring property conflicts with strong political or class overtones: arguments between land owners and grazers or recreational hikers over the scope of non-owner rights of access to owned land; conflicts between lower- and upper-class residents over zoning restrictions; and efforts by developers and professionals to condemn working-class neighborhoods and convert them to 'high end' uses. In my opinion, the most intractable of such conflicts are disputes over whether a resource should be classified as private or public property – beachfronts, land that might be held as a public park or reserve, or national oil and gas reserves. In controversies like these, some citizens may demand private property, on the ground that property facilitates the creation of goods (like residences, or factories, or energy supplies) that supply means for acquiring basic goods. Others prefer that these resources be held in common—because public property conserves resources for the future, or because it facilitates the basic good of aesthetic satisfaction. Such use-conflicts are already quite intractable in practice. The New Natural Law makes them seem even more so, by describing the goods in conflict as incommensurable and unrankable.

Although I cannot develop an alternative account fully here, let me at least sketch one. Such an account focuses on a normative interest in 'use' – and especially the way a social and legal right of 'use' needs to be structured knowing that different people will exercise the same conventional right for different life goals. No one person is entitled to pursue a legitimate plan for flourishing in disregard of others' equal opportunities to do the same. So in considering whether land should be held privately, a legal system must consider the effects of doing so on people who strongly want to keep the land available for aesthetic uses; in considering whether land should be held by the government, a system must consider the effects of preservation on people who want affordable housing.

In principle, there is a sense in which the needs and desires of these competing constituencies are incommensurable with one another. Yet any robust social morality needs some mechanism to specify when recreation-lovers are demanding land for parks to the point that they're denying prospective homeowners access to affordable housing, and vice versa. Even if such criteria do not make different use-claims commensurable with one another, they still rank such use-claims – perhaps in relation to second-order considerations, about how compatible any legitimate use of property is with a range of other legitimate uses. Under such rankings, when choosing between public and private property, private property may be preferred on the ground that it facilitates active uses, such as residential uses, which contribute to a wider range of forms of human flourishing than passive, conservation-related uses do. People come to appreciate environmental goods only after they've satisfied more basic needs relating to survival and simple prosperity. Even if readers reject this specific criterion, my broader point still holds: a system of property needs *some* ranking

criterion to structure legal reasoning about public and private property, and an incommensurable basic goods framework seems unlikely to supply satisfying criteria.

But these questions should be understood as friendly disagreements stimulated by a well-argued and instructive book. *Property and Practical Reason* should be read by any scholar interested in property, philosophy, and legal reasoning in English-speaking jurisdictions.

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