

BOOK ANNOTATIONS

ALSTON, PHILIP & EUAN MACDONALD, EDS., HUMAN RIGHTS, INTERVENTION, AND THE USE OF FORCE (New York, New York: New York University Press, 2008).

ARCHIBUGI, DANIELE, THE GLOBAL COMMONWEALTH OF CITIZENS: TOWARD COSMOPOLITAN DEMOCRACY (Princeton, New Jersey: Princeton University Press, 2009).

CHOUHRY, SUJIT, ED., THE MIGRATION OF CONSTITUTIONAL IDEAS (Cambridge, United Kingdom: Cambridge University Press, 2007).

IRVING, HELEN, GENDER AND THE CONSTITUTION – EQUITY AND AGENCY IN COMPARATIVE CONSTITUTIONAL DESIGN (Cambridge, United Kingdom: Cambridge University Press, 2008).

KENNEY, DAVID NGARURI & PHILIP P. SCHRAG, ASYLUM DENIED: A REFUGEE'S STRUGGLE FOR SAFETY IN AMERICA (Los Angeles, California: University of California Press, 2008).

KIERNAN, BEN, BLOOD AND SOIL: A WORLD HISTORY OF GENOCIDE AND EXTERMINATION FROM SPARTA TO DARFUR (New Haven, Connecticut: Yale University Press, 2007).

LEVITT, JEREMY, ED., AFRICA: MAPPING NEW BOUNDARIES IN INTERNATIONAL LAW (Portland, Oregon: Hart Publishing, 2008).

POSNER, ERIC, THE PERILS OF GLOBAL LEGALISM (Chicago, Illinois: University of Chicago Press, 2009).

SUBEDI, SURYA P., INTERNATIONAL INVESTMENT LAW: RECONCILING POLICY AND PRINCIPLE (Portland, Oregon: Hart Publishing, 2008).

Human Rights, Intervention, and the Use of Force. Edited by Philip Alston and Euan Macdonald. New York, New York: New York University Press, 2008. Pp. 286. \$50.00 (paperback).

REVIEWED BY SOPHY QIAN WANG

A familiar narrative in international law and politics tells of shifts between three paradigms in history. First was the age of state sovereignty, then came the era of human rights, and most recently we entered into the age of national security. The origins of the concept of sovereignty take us far back into our history; sovereignty functioned as a basis for the basic international legal order established by the Treaty of Westphalia of 1648. Three hundred years later, human rights claimed its victory when the General Assembly of the United Nations adopted and proclaimed the Universal Declaration of Human Rights. Since the terrorist attacks on the World Trade Center and the Pentagon in September 2001, we have begun to see national security become the dominant theme for both international legitimacy and legality.

Human Rights, Intervention and the Use of Force complicates the story. In contrast to the familiar story, the main theme in *Human Rights, Intervention and the Use of Force* is that all three forces are very much alive, and the relationship between the imperatives of sovereignty, human rights, and national security are “considerably more subtle than those of simple opposition.” In their introduction, Euan MacDonald and Philip Alston emphasize that sovereignty, human rights, and national security can become the “poles of some of the most intractable dilemmas, or trilemmas of international law.” According to them, this is most obvious when those themes interact with the prohibition on the use of force.

The book, which consists of seven substantive chapters, explores the interactions between the three concepts in the context of military intervention by states on territory other than their own. In “Human Rights and State Sovereignty,” Helene Ruiz Fabri takes an essentially abstract and conceptual approach and provides important legal background regarding the interplay of human rights and sovereignty. Her article illustrates in precise detail how complex and ambivalent the interaction between human rights and sovereignty is. For example, Ruiz Fabri points out that an attack on state sovereignty

from globalization and nationalism may undermine the goal of protecting human rights if no alternative means are available. The human rights regime is concerned with state violations of human rights, but states are also the most effective protectors of human rights in most cases. She argues that traditional boundaries between human rights and state sovereignty should be redrawn. On the one hand, human rights seek a genuinely international public space, which the retreat of sovereignty does not generate. On the other hand, different human rights need to coordinate with each other in the global space. Her conclusion is “a hypothesis of shared responsibility,” which calls for cooperation between states and an international civil society where human rights and sovereignty are mutually dependent. Ruiz Fabri prepares readers to understand the relationships between sovereignty, human rights, and the use of force on a theoretical level.

The third chapter presents the most dramatic clash between human rights and state sovereignty, namely the prohibition on the use of force. Olivier Corten examines whether there is an emerging right of humanitarian intervention under contemporary international legal practice. This early part of the essay focuses on both the practices and public announcements of major international players regarding the interventions of the early 1990s. The latter part of the chapter covers developments in the field from 1999 to the present. In both periods, Corten found little evidence supporting the proposed right to unilateral humanitarian intervention. He concludes by identifying the political and legal obstacles to the emergence of a right of humanitarian intervention.

In “The Implication of Kosovo for International Human Rights Law,” Richard Bilder reflects upon the 1999 intervention in Kosovo and its aftermath. He draws a similar conclusion as Corten, namely that little evidence exists to support the existence of a right to humanitarian intervention. Compared to Corten, Bilder approaches that right from a broad context, considering its relation to the UN, the doctrine of humanitarian intervention, the laws of war, international criminal law, international political stability, media, NGOs, sovereignty, ethnic conflict, and the future of international law. For instance, Bilder argues that the international media solicited, drove, and shaped the public response to the humanitarian intervention in Kosovo. Readers should applaud Bilder for placing the

Kosovo intervention in such a dynamic and international conceptual environment. However, they might question the legal relevance of some of the topics Bilder introduces into the discussion.

Anthea Roberts discusses whether the use of force can be illegal but justified in "Legality versus Legitimacy." The majority of western scholars considered the Kosovo intervention illegal but justified. Roberts argues that although the illegal-but-justified approach intuitively reconciles legality and morality, it is not sustainable in international law. It switches the focus away from questions of legality to questions of legitimacy. This is problematic because legitimacy lacks a clear definition and is therefore subject to manipulation and cannot provide independent justification for actions. Roberts establishes her position by critically analyzing the arguments of two main proponents of the illegal-but-justified approach. Reading through her arguments is an enthralling intellectual exercise. However, readers might wonder what moral and legal obligations the international community would have if another event like Kosovo should happen in the future.

Nathaniel Berman addresses intervention in a "Divided World." Berman reviews the axes of legitimacy in the past and the present. He distinguishes two different kinds of legal legitimacy: status and coherence. Status legitimacy focuses on the identity of the system as a whole; coherence legitimacy concerns problems internal to the system. Berman argues that the legitimacy of international law comes not from the unity of the international community but from international law's capacity to accommodate different ideas in different circumstances for different audiences. The chapter ends with four hypotheses regarding the effects of legitimization, namely the delegitimizing effects hypothesis, the legitimizing effects hypothesis, the cautionary effects hypothesis, and the strategic effects hypothesis. Berman proposes that any of the hypotheses might be proper given a particular international regime and its relationship to local conflicts. He emphasizes the resiliency of international law and encourages readers to engage in dialogue with international law. Nevertheless, readers could question: what makes international law *law*? Is it merely because a majority of people in the world happen to believe that it is?

Nehal Bhuta contributes a chapter called "States of Exception: Regulating Targeted Killing in a 'Global Civil War.'"

He starts by inquiring what the global war on terror implies for international law. The essay compares how two regimes, international humanitarian law and international human rights, regulate the use of lethal force against suspected transnational terrorists. Bhuta observes that neither of the regimes deal with terrorism adequately and both have their own underlying norms and value hierarchies. Bhuta proposes a functionalist approach to overcome abuses of power by referring to values central to human rights dialogue, such as transparency, due process, and real and effective limitations on any categorical right to kill. Bhuta's approach is innovative, but readers might wonder how he can justify transplanting the aforementioned values to the functionalist approach.

In the last chapter "The Schizophrenias of R2P," José Alvarez considers the "responsibility to protect" (R2P) in the debate over humanitarian intervention. His analysis focuses on how sovereignty has been redefined, how the idea of "protection" has been expanded, how security has been broadened, and how legal responsibility has been invoked. He proposes to replace R2P with the concept of humanitarian intervention. This is because the law of humanitarian intervention poses little threat to traditional sovereignty and protects the intervenor against charges of unlawful actions.

Human Rights, Intervention and the Use of Force provides an in-depth and probing analysis for readers interested in these fundamental themes of international law. The authors' observations and reflections are worthy of serious attention and invite interested readers to engage in a fruitful intellectual dialogue with them. This excellent book deepens discussion on three basic themes of international law. It should whet readers' appetites for further academic inquiry into contemporary issues that raise questions about human rights and sovereignty.

The Global Commonwealth of Citizens: Toward Cosmopolitan Democracy. By Daniele Archibugi. Princeton, New Jersey: Princeton University Press, 2009. Pp. xiii, 287. \$29.95 (paperback).

REVIEWED BY JULIE OTA

The end of the Cold War and the triumph of Western liberal states inspired hope that principles of democracy would

guide international relations. It seemed possible to reform international organizations and to plan the expansion of democracy to new places and areas of international governance such as the environment and international organizations. As a result, theorists such as Daniele Archibugi developed the cosmopolitan democracy project in the early 1990s, providing intellectual arguments in favor of expanding democracy both within states and at the global level. Since the end of the Cold War, democratization has made great headway within states, but efforts to democratize the global system have been less successful.

Today's global governance structure fails in many respects. Violations of human rights, extreme poverty, environmental degradation, and other problems plague the world and are difficult to confine to the borders of one state. This undermines the ability of a single state government to ensure security and promote prosperity. The inability of individual states or current international organizations to address these issues adequately leads to a huge gap between statements of principle and reality at the global level. In *The Global Commonwealth of Citizens*, Archibugi suggests that principles of cosmopolitan democracy can respond to these issues and serve as a foundation for a system of global governance. But while the principles of cosmopolitan democracy are appealing, Archibugi fails to rebut critics who say that cosmopolitan democracy is infeasible.

Many of the values of cosmopolitan democracy are attractive, at least in theory. Cosmopolitan democracy respects and incorporates different habits and customs across national borders, inviting all individuals to participate in decisionmaking and governance processes that concern them. Cosmopolitanism seeks to be impartial and address differences without imposing any one group's value system on other groups. It recognizes that democracy may function differently inside nations, among states, and at the global level. Rather than apply the same democratic procedures and norms to every situation, it recognizes that democracy should be tailored according to specific issues and places. In addition, it postulates that democracy is an evolutionary process that allows various communities to follow different paths. The evolutionary nature of cosmopolitan democracy means that the cosmopolitan democracy project does not have a finite endpoint; rather, it is a con-

stantly changing ideal that global decisionmakers can work toward embracing. Although these broad ideas seem admirable, cosmopolitan democracy remains a theory without a practical means of implementation or concrete ideas of governance structures.

Archibugi incorporates these values into his cosmopolitan democracy model. The cosmopolitan model assumes that there should be limits on the centralization of power, especially at the global level. It seeks instead to develop democracy at different levels of governance that operate in an independent and parallel fashion. Cosmopolitan democracy envisions new institutions that represent the will of citizens of the world. These institutions help integrate states on cross-boundary issues and also subject them to global standards, limiting their sovereignty. For example, principles of cosmopolitan democracy may be used as a basis for intervention to prevent humanitarian tragedies from happening at a state level, but global standards must be used to prevent states from using a humanitarian crisis as a pretext to engage in violence and impose their will on less powerful nations. To balance these competing interests, Archibugi believes it is necessary to set up institutions that are morally, politically, and militarily prepared to intervene wherever necessary, rather than responding only to emergencies.

Although the model and principles of cosmopolitan democracy present worthwhile goals, current democracies do not always follow them. It is difficult to see how we could create a cosmopolitan democracy that embodies these values. Democracy has not lived up to its ideals. Archibugi's examination shows that democratic states do not necessarily behave differently than non-democratic states, that they are just as quarrelsome and bullying as other kinds of states. Specifically, Archibugi criticizes the West for preaching democratic principles while applying these principles unevenly in foreign affairs, and for being unwilling to share the management of global affairs with others. He accuses the West of "democratic schizophrenia," where western states engage in one type of behavior internally but act in the opposite manner on the outside.

Archibugi is critical of democracies, especially western democracies, for engaging in actions aimed more at dominating than promoting democratization through inclusion and dialogue. He blames the decreasing belief in democracy on the

West for preaching the need to democratize while ignoring international legal principles and failing to live up to its promises. For example, Archibugi questions whether it is justifiable to export democracy by force and criticizes democratic nations for their participation in the wars in Afghanistan and Iraq. He rejects this approach and stresses the need to export democracy by nonviolent democratic means instead.

Despite his criticism of the West and democracies today, Archibugi retains a strong belief in the principles of democracy and urges democracies to improve and pursue globalized democracy. He believes that the foreign policy of democratic regimes should be assessed by how it compares with their internal policy rather than with the foreign policies of autocratic nations. He seeks to hold democracies to a higher standard. He does not want to allow democracies to hide behind the rhetoric of the greatness of democracy while they continue to engage in less than democratic behavior. Although his criticism of some democracies is harsh, he lessens the blow by stressing that democracy is an evolutionary process that is constantly improving and that modern democracies will therefore evolve into something better.

Throughout the book, Archibugi shows an unwavering optimism and belief in the principles of democracy. Although his enthusiasm is infectious, the critique of cosmopolitan democracy remains strong and compelling. Critics say that the idea of extending democracy beyond the state is naïve, unfeasible, and undesirable. Opponents of the idea of cosmopolitan democracy criticize it for being too inconclusive and oblivious to the way world politics really works. While they acknowledge that the desire to apply cosmopolitan and democratic values to international relations has merit in principle, they point out that other factors such as the political clout of nations, geopolitical interests, and the self-interests of governments will ultimately impede any nascent efforts toward cosmopolitan democracy.

Other realists worry that cosmopolitan democracy may perpetuate U.S. political hegemony by allowing democracy to provide an improper pretext for justifying war. Multiculturalist skeptics point out that a more integrated global democracy could end up clashing with local forms of democracy. Some critics claim that a democratic community needs a common language of communication that is open to all, or it will turn

into an oligarchy ruled by nations that speak the governing language.

Archibugi attempts to address these criticisms. While he acknowledges the difficulty of transforming such an ambitious and far-reaching project into reality, he argues that the challenges are surmountable and worth the effort. He argues that power has been successfully contained in the internal sphere and can also be harnessed in the external sphere. In addition, he considers cosmopolitan democracy to be a solid and far-sighted antihegemonic project that will not lend itself to becoming an improper means of justifying wars. In addition, he argues that cosmopolitan democracy is possible in a multilingual society and is a suitable means of coping with the problem of mutual understanding. He points out that there are many examples of dealing with this issue at many different levels—for example, managing persons of different linguistic and ethnic backgrounds in schools, small countries, and international organizations.

To rebut critics who say cosmopolitan democracy is unfeasible, Archibugi applies cosmopolitan concepts to several specific issues and considers steps that could make cosmopolitan democracy a reality. Responding to criticism stemming from the wars in Afghanistan and Iraq, Archibugi argues that it is possible and preferable to export democracy by nonviolent democratic means rather than by force. In order to legitimately export democracy using principles of cosmopolitan democracy, Archibugi says the exporting state should consider the importing state's preferences, give people the freedom to choose which form of governance to apply, and have an independent assessment of whether the importing state actually needs a change of regime. Archibugi's advice may be correct but it is still too vague to provide meaningful guidance and change. His solutions to the other issues he addresses are similarly vague, and fail to provide adequate answers to critics who say cosmopolitan democracy is impracticable.

Archibugi grapples with difficult issues, and his theory for addressing global issues may not be any worse or more difficult to implement than any other major theory of global governance reform. Archibugi's book reveals several areas where states and global government are failing and could improve by incorporating democratic principles. He makes a compelling argument for overcoming skepticism about cosmopolitan de-

mocracy. Archibugi offers a well-thought-out explanation of democratic principles and how we can use them to create a more responsive global governance system. Despite making a convincing argument for the need and the value of spreading democratic values to global governance, however, he fails to offer persuasive evidence that cosmopolitan democracy is truly possible. His enthusiasm for the benefits of cosmopolitan democracy is infectious, though, and that alone may be enough to convince readers that striving toward cosmopolitan democracy is worth trying.

The Migration of Constitutional Ideas. Edited by Sujit Choudhry. Cambridge, United Kingdom: Cambridge University Press, 2007. Pp. v, 448. \$110.00 (hardcover).

REVIEWED BY BRIAN D. BUEHLER

The Migration of Constitutional Ideas seeks to expand on the long-held view that jurisdictions simply “borrow” constitutional concepts from each other. Sujit Choudhry cobbles together a collection of essays that instead suggest that legal scholars think of constitutional ideas as migrating, just as peoples might migrate from one region to another. According to Choudhry, long-standing concepts from one jurisdiction appear in another through a number of processes that are not always intentional or transparent, and these processes are best captured by the notion of migration. Drawn from the authors’ presentations at a conference at the University of Toronto, the essays explore the migration metaphor as it relates to comparative constitutional methodologies, as it manifests in systems as diverse as the NAFTA trade agreement and the European Union, and in light of timely issues such as gay marriage and national security law. No one crusades for the migration label quite as forcefully as Choudhry, and for many authors, this labeling exercise often seems an afterthought. The reader is frequently challenged to glean an overall purpose from the collection. But the authors study constitutional ideas’ “movements across systems, overt [and] covert, episodic [and] incremental, planned [and] evolved, initiated by giver [and] receiver, accepted [and] rejected, adopted [and] adapted.” In creating this panorama, the essays ultimately justify Choudhry’s attachment to the concept of migration.

Choudhry introduces the volume with a bold assertion: embracing the notion of constitutional migration might help resolve the hotly contested debate over the U.S. Supreme Court's use of comparative materials in *Roper v. Simmons*. Choudhry argues that migration captures important types of comparative engagements that escape the "borrowing" or "transplant" metaphors. This includes using comparative materials "as an interpretive foil, to expose the factual and normative assumptions underlying the court's *own* constitutional order"—what Choudhry terms "dialogical interpretation." The Supreme Court never pretends to borrow from the jurisprudence of other countries in *Roper*. But the *Roper* Court's global survey of views on the juvenile death penalty makes sense, argues Choudhry, if seen as a dialogical exercise.

Roper illustrates just one of the many justifications for embracing the migration metaphor, Choudhry says. A term like "borrowing" carries the implicit promise of returning the idea, focuses on the idea rather than the movement itself, and contemplates ideas lifted wholesale from one jurisdiction's legal structure and inserted into another's. Migration, on the other hand, does not imply that the idea will be returned, incorporates analysis of the process by which ideas move, and allows for the adaptation and modification of constitutional ideas. The characteristics associated with migration much more accurately reflect the sum of the processes by which we see constitutional ideas transferred from one jurisdiction to another.

Choudhry attempts to illustrate this point through four loosely connected sections. Part I of the volume lays out methodological frameworks in which to evaluate the migration of constitutional ideas. Ran Hirschl seeks in the first essay to improve the methodology of comparative constitutional study by identifying five principles typically employed by social scientists in designing their research and explaining the logic behind these principles. Hirschl suggests that constitutional scholars should choose situationally from amongst these methods in selecting cases for their research, as each method tends to highlight a different aspect of the field surveyed. This will improve the quality and credibility of scholarship in a field that has traditionally avoided such considerations, Hirschl says.

In response to Hirschl, Mark Tushnet comes to the defense of the traditional comparative constitutional approach. Specifically, Tushnet highlights three well-established compar-

ative methodologies: universalism, functionalism, and contextualism. Tushnet points out that each of these methodologies is also likely to draw out different conclusions and create different complications in the comparative process.

Carol Weinrib wraps up Part I of the book with an essay contrasting American courts' "exceptionalism"—or refusal to engage in constitutional comparison—with a "rights-based" constitutional model. Weinrib argues that the rights-based model is not, as is often thought, foreign to U.S. courts: rights-based jurisprudence dates to Harlan's dissent in *Lochner*, and features prominently in the decisions of the Warren court.

Choudhry sees Part I as establishing some principles of comparative constitutionalism to use in evaluating substantive arguments later in the book. The authors easily meet this modest goal, although they rarely touch on Choudhry's migration hypothesis. Moreover, although Weinrib contributes a significant example of migration of constitutional ideas, her piece fits uncomfortably in a section focusing on the methodology of scholarship.

Part II of the book begins to explore the migration model by asking whether we are undergoing a global "convergence toward a liberal democratic model." Jeffrey Goldsworthy assumes that this convergence on a single constitutional model is taking place through judges' decisions and levels two criticisms at this phenomenon. First, Goldsworthy expresses misgivings about convergence generally, celebrating the few examples he can point to of current constitutional innovations. Second, Goldsworthy argues that modifying a constitution forces judges to lie, and that lying will almost always be detrimental on balance.

Next, Michel Rosenfeld and András Sajó assess the relationship between jurisdictions' use of liberal constitutional norms and the spread and consolidation of liberal constitutionalism. Rosenfeld and Sajó use freedom of speech as a barometer, since all liberal theories regard this as a core value. Surveying the United States, Germany, and Hungary, the authors find mixed results: liberal constitutionalism in these societies has sometimes been accompanied by liberal regulation of speech, sometimes by an illiberal approach. Interestingly for Choudhry's purposes, the authors frequently slip into the old language of transplantation and borrowing even though the

dynamics they analyze might fit most neatly into the migration concept.

Jean-Francois Gaudreault-Desbiens sticks to Choudhry's game plan a bit better. Gaudreault-Desbiens makes the case that the civil and common law traditions are beginning to overlap jurisdictions. He presents as evidence the *Quebec Secession Reference*, in which the Supreme Court of Canada ignored the constitution's amendment provisions and created a secession procedure out of whole cloth. Ignoring the plain constitutional text does not make sense, the author argues, when viewed from the ordinary Canadian common law perspective. But the Court's ruling *does* make sense as an example of the civil law concept of unstated general principles, which can sometimes take precedence over the plain text.

Brenda Cossman concludes Part II by pointing out that migration is not limited to ideas—people and media representations also migrate, with important legal implications. Cossman cites Canada's legalization of gay marriage as an example. U.S. courts are unlikely to cite Canadian law favorably on this issue, says Cossman, since comparative engagement is often linked—with negative connotations—to judicial activism. But many gay couples are actually going to Canada to get married and returning to the U.S. This migration of people and media depictions thereof serve to normalize gay marriage in U.S. culture.

Part II convincingly advances Choudhry's thesis. The authors' respective themes are tangential to the volume's underlying purpose, which gives the impression that they are unconnected. But each essay presents concrete evidence of constitutional ideas moving between jurisdictions by means that cannot be labeled "borrowing" or "transplants." That the authors' examples are so distinct from one another reinforces the need for an umbrella concept such as migration.

Part III analyzes not how constitutional ideas migrate horizontally, from country to country, but how they move vertically between national constitutions and international and transnational systems. Oddly, however, the section leads off with a piece that seems better suited to Part II. Mayo Moran discusses how judges adjudicating non-constitutional claims, such as those in private commercial law, look to constitutional values as "influential authority." Sources of influential author-

ity are not binding, but still carry weight sufficient to convince courts that the sources must be considered in rendering a decision. Moran notes that many jurisdictions view important decisions from other countries as influential authority on certain points.

Mattias Kumm follows by addressing a long-standing deficiency in constitutional scholarship: defining the principles that produce effective interfaces between national constitutions and international law. Kumm lays out four such norms: a presumption that international law is legal; a requirement that any international law must resolve a problem that occurs in less centralized decision-making; requiring adequate accountability and participation in international rulemaking; and a requirement of reasonable outcomes.

David Schneiderman then argues that constitutionalism has migrated into the transnational sphere with the advent of multilateral trade agreements in the mold of NAFTA. Schneiderman notes conventional arguments that portray these treaties as mere international commercial agreements, but counters each of these arguments in turn. NAFTA's prohibition on regulatory takings, for instance, requires judgments about state administration that influence the development of domestic law far into the future. Such far-reaching policies are the stuff of constitutions, not contracts.

Neil Walker rounds out this section nicely by analyzing the migration of constitutional ideas into European Union law. Walker focuses on criticism that the EU lacks a democratic pedigree because, for example, member citizens do not elect the EU college. Walker counters that the EU bolsters its pedigree through indirect means, such as incorporating national constitutional ideas into its own system. But Walker acknowledges that the EU nevertheless faces problems concerning a collective legal *culture*.

Part III does not assist Choudhry very much in his quest for acceptance of the migration concept. The four essays therein all imply that necessity gave birth to each system's constitutional innovation. But the authors fail to discuss the processes by which constitutional concepts moved from one system to the next, whether borrowed, transplanted or otherwise.

Part IV focuses on constitutional migration as it manifests in emerging national security issues. Kim Lane Scheppele argues that the September 11 attacks issued in a troubling new method of constitutional change: the imposition of constitutional norms on nations through international mechanisms. Initiatives such as the Security Council's Counter Terrorism Committee successfully pushed governments to pass extreme counter-terrorism legislation in the biggest wave of legal ideas to strike the globe since the human rights movement. This top-down pressure cannot, Scheppele points out, be explained by traditional concepts such as borrowing.

Kent Roach shifts the focus to migration of ideas between nations, and arrives at quite different conclusions than Scheppele. Roach points out that the United Kingdom's Terrorism Act influenced similar legislation in other Commonwealth countries, but that the impact was limited by the countries' respective preferences.

Oren Gross concludes the book by arguing that the invocation of emergency powers tends to migrate across geographic boundaries. For instance, Gross notes that measures employed by the early twentieth-century English army in Northern Ireland found their way into the English legal system. Gross cautions present-day governments on the futility of attempting to distinguish between the rules applicable abroad and those applicable at home.

Part IV renews the authors' support for the migration concept. Pressure from the UN and the partial success of English influence over the Commonwealth, in particular, exemplify the migration of constitutional ideas. As with most of this volume, the authors focus on quite different issues—but in the end, their contributions, like the others gathered here, provide implicit support that the contemporary movement of constitutional ideas is best viewed as a migration.

Gender and the Constitution – Equity and Agency in Comparative Constitutional Design. By Helen Irving. Cambridge, United Kingdom: Cambridge University Press, 2008. Pp. v, 264. \$29.99 (paperback).

REVIEWED BY KRISTINA AGASSI

Many national constitutions provide equal rights to all citizens, yet for historical and structural reasons these rights do not always apply equally in practice. Helen Irving provides a detailed framework for a gender-focused constitutional analysis. She makes an active choice to go beyond typical “rights”-focused scrutiny, which examines the types of rights and benefits offered to all people, male and female. An exclusively “rights”-focused analysis ignores the myriad problems that prevent true equality between the sexes. Irving insists that facially neutral constitutional language often remains gendered in practice.

Instead, Irving recommends a purposive approach to the reading of constitutions. This approach places the broad historical goals of constitutions within the context of current national realities. She calls for constitutional readings that take into account the everyday female experience but still maintain the spirit of the constitutional text. In other words, Irving imagines that political actors and judges should carry out the broad ideals of the constitutional text while they ensure that practical application of the doctrine does not yield a socially unjustifiable result. She supports a type of “substantive equality, which allows for unequal treatment by the law. . . in order to give effect to the constitutional purpose of gender equality.”

Irving’s gendered analysis of existing constitutions examines constitutional language and judicial interpretation, the power dynamics between and within the branches of the government, rules governing citizenship, the processes of representation within the government, and the level of acceptance and incorporation of international law within the national constitution. This book and the framework it presents represent the culmination of a series of works that deal with constitutional analysis and gender equality. Professor Irving holds degrees in political science, anthropology, history, and law, and her writing reflects her diverse educational history. She shows equal facility exploring the legal aspects of the constitu-

tional debate and the political and historical implications of her particular brand of constitutional analysis.

Gender-focused constitutional interpretation is a relatively new enterprise, as Irving makes clear. However, long before scholars engaged the disparate impact of constitutions on men and women, women often played significant, if sometimes hidden, roles in the shaping of national constitutions. Not always in the public eye, they sometimes wielded influence through their husbands and sons. Irving includes a famous letter from Abigail Adams to her husband John in which Adams cautioned her husband to consider women when writing the Constitution of the United States. She wrote: "Remember the Ladies, and be more generous and favorable to them than your ancestors." Female efforts to contribute to the shaping of national laws have not always been welcome, but women did have some level of influence and participation in public political life. During the last century, female participation increasingly took center stage. The female suffrage movement culminated with women obtaining full citizenship and a right to participate in government. Many national constitutions originated during this seminal period and gave equal rights to both men and women. However, due to lingering historical forces, these rights do not always apply equally to both genders. Women around the world are still underrepresented in their governments, and in many countries women continue to have only indirect influence on national policy. Gender-focused analysis of the world's constitutions gives legal scholars the tools to understand why women continue to face barriers to full participation in their governments and how different models of constitutional interpretation might facilitate the removal of those barriers.

Irving's study provides a three-tiered analysis of constitutions and the rights and interests they create for the people they govern. First, Irving presents a textual analysis of constitutional documents. Second, Irving describes the structural frameworks that support and enforce constitutions. Third, Irving examines the practical, *de facto* implications of constitutions.

Irving acknowledges that there is no single, proper way to interpret a constitution. Indeed, judicial review relies on a number of varying methods. Choosing a methodology always involves a normative choice. Irving rejects a radical feminist

perspective, which attempts to create a universal women's perspective and deny the great variety of burdens women can experience. Such a radical perspective relies on the narrative that women across all borders are in equally oppressive circumstances to support the notion that constitutions must incorporate major textual change to give equal rights to men and women. Irving finds this notion inapposite and unhelpful. First, she stresses that women in developing nations face significantly different issues than those living in Western, developed nations. Second, Irving believes that women everywhere should not strive for blind equality, but for a system that is capable of establishing equality in practice. Without this type of pragmatic equality, women will continue to be excluded from the constitutional debate. In the search for pragmatic equality, Irving turns to the question of federalism and gender equality.

The Forum of Federations, a non-profit international partnership organization, estimates that forty percent of the world's population lives in federations. The theory of federal distribution of power plays a critical role in Irving's analysis of the world's constitutions. Irving spends a large part of the book analyzing the gender implications of federal forms of government. She concludes that the historical distribution of power within the federal government has resulted in traditionally masculine issues receiving the protection of the federal government and traditionally feminine issues being relegated to local control. As a result, traditionally feminine issues such as health, welfare, and education usually come under local governmental authority.

The split between the federal and the local spheres may not seem to present an inherent problem to gender equality. But practically speaking, federal governments often have more access to funding and are uniquely capable of promulgating major national changes. In general, women are dependent on their local communities—more so than men—and are unable to shop around between local jurisdictions when they are denied legal protections. Irving suggests that we ask, "*Who has the money?*", when we consider such constitutional power arrangements. Some proponents of the federal model point out that women are more active in the local sphere and therefore have better opportunities in that arena to influence their governments. Yet there is something inherently unequal and sexist

about such a split, Irving argues. This type of thinking relies on the idea that “national equals masculine, and local equals feminine.”

Paralleling the local-national split is the split between the domestic and public spheres. Irving is not against the concept of a private sphere insulated from governmental action. Privacy and personal choice are highly valuable for democratic societies. Nonetheless, she objects to making a full separation between the domestic and the public spheres. This type of arrangement usually places women’s interests and experiences in the domestic sphere and tends to reduce legal protections for women. According to Irving, the domestic-public dichotomy perpetuates the common belief that women’s experiences and concerns properly belong to the “private realm” and not in the national policy arena. The local-national and domestic-public dichotomies frequently leave women in a position where they have little power to effect major nationwide change or adequately represent their own interests.

In order to achieve full membership in the constitutional community, women need an unencumbered right to vote; they also need the right to participate in lawmaking and adjudication. Full participation in government requires a political culture of openness and equality and a supportive political structure. Because the processes of lawmaking and adjudication take place on both formal and informal levels, women cannot achieve full representation if they rely on their enumerated constitutional rights alone. In almost all democratic countries, women continue to be underrepresented in the legislature. Rights that seem to provide the basis for equal participation are ineffective in places where local political culture hinders women from implementing those rights on equal terms with men.

Irving identifies two methods for challenging political cultures that undermine equality: party selection of candidates and the use of quotas. She acknowledges that the second solution is controversial, but it has proven to be effective. Countries that embrace quotas and structure them in a way that ensures the election of female politicians fare much better in terms of gender equality. The quotas themselves vary in type; they can be constitutional or statutory, voluntary or mandatory, and they can set a minimum or maximum number of reserved seats. Yet even quotas can fail if they allow for the

stacking of female politicians in a way that allows the electoral process to weed them out. Quotas may strike some as anti-democratic, but they are in fact common features of federal systems. Quotas routinely distribute seats in federal governments without regard for population distribution. For example, the United States allocates two senators to each state without considering the population of the state—one of the more famous examples of a geographic quota scheme. Federalism features clear departures from simple majoritarian democracy, and one can find strong arguments why federalism should make room for gender quotas. But gender quotas do not even need the federalism justification, which would give disproportionate representation to a bloc of voters in order to promote effective federal governance. Women differ from other population blocs, like those organized along geographic lines. Women constitute a majority of the population, and quotas institutionalizing representation for them would bend the democratic process less than the geographic quotas that the constitution provides for Senate membership. Quotas for women would simply institutionalize the principles of gender equality already embedded in the constitution. Quotas would constitute one effective way to give voice to a silent majority that has suffered consistent underrepresentation since the founding of the union because of social and political discrimination.

If Irving's study attempts to achieve one goal, it is to show that constitutional interpretation is not possible in a vacuum. Irving provides useful analytical tools for examining structural and practical gender inequality. At times, she relies on generalities at the cost of providing specific examples, and readers may legitimately question how her analysis plays out in practice. Irving states that the book's purpose is to bring a feminist perspective to the process of constitutional analysis. The book succeeds at this and provides one particular starting point for the discussion. The book will not be the last statement on gender and constitutional analysis, but it does not claim to be. Future work might apply Irving's theoretical work in specific contexts. Such studies could show how Irving's generalized theories about gender inequality and constitutionalism match up against state-specific political and legal realities.

It is likely that many will disagree with Irving's conclusions and approaches, but her book provides a necessary, and per-

haps long overdue, service by launching a civic discourse about gender and the constitution. Women have a particularly high stake in these debates considering the long history of sexism and female disenfranchisement around the world.

Asylum Denied: A Refugee's Struggle for Safety in America. David Ngaruri Kenney and Philip P. Schrag. Los Angeles, California: University of California Press, 2008. Pp. 352. \$24.95 (hardcover).

REVIEWED BY MEREDYTHE RYAN

Students of immigration law, and others who glance at the myriad statutes and regulations that comprise the U.S. immigration scheme, know that navigating the complex legal field of immigration is frustrating, daunting, and at times seemingly impossible. No real-life story could convey this better than that of David Wachira Ngaruri Kenney. Kenney, a native of Kenya who survived torture and imprisonment for his leadership role in a farmer's boycott in the early 1990s, encountered nearly every possible obstacle created by the U.S. immigration system in his quest for permanent legal status in America. Ultimately, Kenney, the narrator and hero of *Asylum Denied*, triumphs and makes his home in the United States. This occurs despite, rather than because of, the rules and actors of the U.S. asylum scheme.

This book is for wide-eyed novices to the subject, not for lawyers, advocates, or even immigrants who already know the frustrations of immigration. The legal intricacies are largely simplified so that lay readers can understand them—although this is not to say that such simplification does not aid in providing even hardened attorneys with a humanized perspective on the bigger picture of immigration law. *Asylum Denied* effectively explains the processes and procedures of immigration in the United States while providing a thoughtful analysis of the successes and failures of the U.S. system. Kenney narrates most of the book, starting with a basic family history and tracking his life and saga chronologically. Philip Schrag, a Georgetown University Law Center clinical professor who served as Kenney's counsel throughout his appeals process, bookends the narrative with analysis of some of the legal policy issues

that come up in Kenney's story. He presents a call-to-arms of sorts for change in the modern U.S. immigration system.

Schrag elucidates the recent history of immigration and asylum law in the United States and introduces readers to David Ngaruri Kenney. To Schrag, the legal system is tortured and challenging and the immigrant is noble and deserving. This duality sets the tone for the rest of the book. Schrag provides sufficient facts to establish his expertise: footnotes are extensive, with the authority supporting the text but not overwhelming the narrative. Then he quickly steps out of the way to allow Kenney to tell his story.

Kenney's writing is not as polished, or necessarily as informed, as Schrag's, given that English is not his native language and that he only recently graduated from law school. Despite this, his prose is clear and informative. His account begins with a simple family history and the story of his childhood, laying the foundation for his role in the Kenyan farmer's boycott on which his asylum claim is based. The story includes pictures to give readers a sense of the faces and places Kenney encountered.

Kenney describes his successes in overcoming family feuds and starting his own tea farm. Later, he turns to the boycott and the repercussions he faced for his leadership in the tea farmer's protest. The narrative's tone and language is unwavering in its simplicity, whether Kenney is describing his tea crop, the protest march he organized, or his torture at the hands of the Kenyan police forces. Although his clarity serves to articulate the facts accurately and avoid over-emotionalizing what ultimately becomes a legal claim, his passionless style at times detracts from the reader's interest in his situation. These dry histories reappear in the book's discussion of the immigration proceedings. Telling the stories more vividly the first time around would have given the narrative momentum going into the legal section of the book.

Kenney ultimately seeks an education in America, both as a refuge from the threatening political environment in Kenya and as an opportunity to increase his prospects for a successful future. He describes the seemingly random manner in which he ends up working in Virginia despite lacking permanent legal immigration status. These episodes involve Peace Corps volunteers, bribed Kenyan officials, Catholic colleges in the

Midwest, and a variety of unexplained marriage proposals. These chapters provide narrative background information but do not contribute to the immigration tale that Kenney and Schrag are attempting to weave. (They do, however, illustrate the surprising and somewhat offensive standards for recruiting tall basketball players from Africa.) Although these events undoubtedly served to establish Kenney as the well-regarded asylum applicant he became, his at-times halting writing prevents this intermediate information from becoming much more than additional facts and stories, inadequately tied into Kenney's immigration saga.

Throughout the book, Kenney attempts to bring additional, and more complex, issues into his discussion, such as his several attempts to discuss his encounters with racism in Kenya and in the United States. These diversions distract from the intricate and complex main issue, immigration, and raise concerns that the author is trying to accomplish too much in one book. Such interludes seem "plopped" in the middle of his immigration story, leaving the reader wondering why Kenney embarked on the tangent.

Nevertheless, Kenney admirably and effectively drives home his overarching immigration narrative. The initial chapters cover Kenney's life up to the time his student visa runs out. Next comes the saga of Kenney's attempts to navigate the asylum system in the United States. Here, the book turns its focus to the legal obstacle course that asylum applicants must maneuver to earn permanent legal residence in the United States.

Skillfully laid out, each chapter presents a step in the process of fighting for asylum. Kenney, a student of the process, describes each step in the procedure as his various advisors must have laid it out to him—clearly, without mincing words, and specifically delineating options. Although his descriptions of the immigration system and review options might not present the most sophisticated depiction and analysis of the legal efforts involved, Kenney's words convey not only the nuts-and-bolts of what the immigration world actually looks like, but a sympathetic face and a story to each procedure. Kenney animates how the steps of the immigration process affect a protagonist that readers have come to know and probably admire. Through this lens, readers learn how complicated the immigration system is and the myriad obstacles that often stand in

applicants' paths. Kenney and Schrag discuss appellate review, questions of law versus questions of fact, precedential authority, and other legal issues. A law degree is not necessary to follow Kenney's story, and it may in fact frustrate readers disturbed by oversimplification, but any reader can come away with greater clarity about how the courts function, how judicial review is conducted, and the relationships between administrative agencies, the law, and the courts.

Readers might wonder about the immigration bureaucrats that Kenney encounters along the way. Some are corrupt; some are helpful; others are positively offensive. However, aside from a very brief reference in Schrag's closing chapter, the book fails to treat these inconsistencies and perhaps improprieties in bureaucratic behavior with more than the blink of an eye.

Ultimately, however, Kenney and Schrag's book paints a painstaking and personal depiction of the U.S. asylum and immigration processes. It illustrates how deeply these bureaucratic, administrative, and legal proceedings touch lives. Schrag's conclusion, which contains a variety of policy recommendations, is perhaps the most effective portion of the book. Having established the inefficiencies and problems that afflict the immigration system, the book takes the important next step of providing insightful solutions.

Schrag bullets each of his eight recommendations, making his specific policy propositions clear to the reader. Each recommendation ties closely to Kenney's story, in particular addressing the specific failures that plagued Kenney's case. He first asks that the government reduce the role of luck in immigration proceedings, positing that too much of any outcome is a consequence of chance, such as which asylum officer or immigration judge was assigned to hear a case, and in which jurisdiction. While Schrag provides data demonstrating the randomness of many decisions, he fleshes out his recommendation, suggesting more than just an end to random selection (which seems impossible given the volume of applications as Schrag points out, and would likely be an ineffective solution, as it does not get to the root of why disparity between judges might be so great). Schrag perhaps needs to take this recommendation a step further, and provide the government with a concrete plan of action, requiring judges and other officials to unify their approaches. This critique of policy might be better

addressed by a recommendation Schrag makes later in his chapter, that training be increased for judges hearing immigration cases (at all levels).

Schrag gets more specific when it comes to his recommendation to provide lawyers to asylum applicants. He calls for each asylum applicant to be provided with government-funded legal assistance, analogizing to the criminal system. He briefly discusses a few policy options for assigning and compensating immigration attorneys, but fails to point out the administrative problems that might arise from only guaranteeing asylum applicants free attorneys. When would applicants be screened and assigned attorneys? Would this disproportionately alter the volume and merits of asylum claims? Other broader systematic recommendations include restoration of the appeals process and providing review for the decisions of consular officials (addressing one of the main frustrations evident throughout Kenney's tale).

Some recommendations are smaller-scale and more specific, although they demonstrate how some minor changes could be made that would greatly improve the fate of many refugees. Schrag recommends making minor changes to the diversity lottery process, and informing courts of their capability to suspend expiration of voluntary departure—both of which are discrete reforms which could have huge impact without requiring much political maneuvering. Schrag seems to be acknowledging that the issue of comprehensive immigration reform is fraught with political and ideological tensions. While he certainly is not afraid to shy away from sweeping change which could transform the system into a far more effective one, he also recognizes political realities and seeks nonetheless to effect change, even if the change is not as complete as he might hope.

Asylum Denied illuminates the system's "warts," as Schrag terms some of the issues, but finishes with hope that the United States can continue to open its borders to those such as David Ngaruri Kenney who deserve its safety.

Blood and Soil: A World History of Genocide and Extermination from Sparta to Darfur. By Ben Kiernan. New Haven, Connecticut: Yale University Press, 2007. Pp. 724. \$26.00 (paperback).

REVIEWED BY LAURA CAREY

Ben Kiernan's *Blood and Soil* is a 700-plus page catalogue of the world's largest and most gruesome genocides. From Sparta to modern day, Kiernan presents each genocide's background and culmination in an academic style. His goal in presenting all the horrific events in one place is to demonstrate their commonalities in the hopes that it might aid the world in identifying future conflicts before they develop into genocide. Kiernan does succeed in identifying the uniformity that exists throughout the various histories, but it remains unclear to the reader how this information will prevent future tragedies, especially given humanity's proclivity for remaining inactive in the face of humanitarian catastrophe. Overall, the book is a useful compilation that makes clear, if nothing else, man's capability for violence.

Kiernan arranges the book in chronological order, beginning with genocide in Sparta and progressing to the modern day. He divides the historical progression into three parts: early imperial expansion, settler colonialism, and the twentieth-century. Part one includes medieval genocides as well as Spanish conquistadors' mass killings in Latin America and early Asian genocides. Part two details the English genocide in Ireland and colonial brutality in North America, Australia, and Africa. Part three examines the Turkish genocide of Armenians, the Holocaust, imperial Japanese genocide, and the major communist genocides in the USSR and China. Finally, Kiernan wraps up the book with a final chapter on Cambodia and Rwanda and an epilogue of short summaries of the most recent genocidal events, including Al Qaeda's genocide in Iraq. The progression of history tracks colonial powers expanding their regimes abroad to a post-colonial world where nationalist dictators carry out gruesome agendas with the goal of reclaiming territory.

Despite this historical progression, much remains constant. In his introduction, Kiernan lays out four characteristics he views as common to the world's largest genocides. The

characteristics are a preoccupation with race or racism, cults of antiquity, agriculture, and territorial expansion. Kiernan explains each of these characteristics in the introduction to the book and successfully highlights examples of each throughout his examination of the various genocides.

Although racism is perhaps the most obvious characteristic of many genocides, Kiernan demonstrates at a more granular level that many aspects of racism have to be created or imagined to foster the type of hatred capable of inciting a genocide. The perpetrators often emphasize physical differences to create racial boundaries. Race played a significant role in colonial genocides, including the Spanish and United States' genocides of indigenous Americans, as well as more modern tragedies in Cambodia and Rwanda.

Kiernan describes the imagined concept of returning to a purer, more authentic version of a region, a cult of antiquity. The perpetrators of genocides often foster such feelings of ethnic-regional antecedence in order to justify mass killings in the name of cleansing the population of foreign elements. This "purity" element of genocides is often applied in tandem with the first characteristic of racism and the subject of agriculture by using rhetoric of returning to some type of agrarian past. A potent example is Al Qaeda's genocide in Iraq, which vilified Western urbanism in favor of a purified version of early Islam.

Kiernan also highlights how preoccupation with agriculture plays a large role in genocides. Like the cults of antiquity, this characteristic is exemplified by a desire to return to a romanticized agrarian past and to eliminate threats posed by urban society and perceived elites. Although this often does not reflect reality, many colonialists used indigenous communities' lack of agricultural background as a justification for genocide under the theory that they themselves could make for better use of the land. Hitler, for example, often emphasized the Germany's connection to farming and contrasted it with the Jewish tendency to live in more urban settings.

Finally, Kiernan highlights territorial expansion as a common aspect of worldwide genocides. Given resource limitations, a power enacting genocide has often enabled its territorial expansion by eliminating rival inhabitants and resistance. For example, *Blood and Soil* details how in Australia, genocide

of aborigines was essential to allowing white settlers to establish homesteads. Pol Pot similarly committed genocide against the Vietnamese in the hopes of expanding Cambodian territory.

Apart from the four common characteristics, Kiernan highlights the interconnectedness of the various genocides and their sharing of techniques and rhetoric. Australian settlers were influenced by North American colonists and Spanish conquistadors. Pol Pot in Cambodia was influenced by both the genocide of communists in Indonesia and the Jewish Holocaust. Many of the genocides detailed in the book referenced Roman times for inspiration in their rhetoric.

Overall, the tone of the book is fairly removed, which is slightly disconcerting to the reader as the topic is so gruesome. Kiernan details accounts of one slaughter after the next without appearing to be emotionally involved. Perhaps that is the only way to create a comprehensive volume of worldwide genocide.

The book suffers from an overuse of quotations. Kiernan, presumably for authenticity's sake, quotes from primary sources often. When detailing United States' settler genocide of Native Americans, Kiernan quotes letters from settlers, politicians, and other observers. While these passages allow the reader to get a reliable account of the events and characters involved in each genocide, they often disrupt the flow of language and make it more difficult for the reader to follow along. Kiernan could have used fewer quotations without sacrificing the supporting impact of his sources.

Despite the occasional lapse in clarity, *Blood and Soil* represents a comprehensive and unique look at the history of genocide. Kiernan is not the first scholar to note the tensions with respect to race or land as a motivation behind genocides; these aspects have been widely documented in analysis of individual genocides such as the Jewish Holocaust and Rwanda. However, his approach is novel in identifying these aspects as a commonality among genocides worldwide and throughout time.

Although the book has great importance for scholars of history as well as other disciplines, *Blood and Soil* has very little to do with the law except for a brief explanation in the introduction of the United Nations Convention on the Prevention

and Punishment of Genocide. Kiernan states that the Convention's definition of genocide ("acts committed with the intent to destroy, in whole or in part, a national, racial, ethnical or religious group as such") is what he adopted as the definition for the book. On occasion, he also mentions the Convention in relation to specific genocides, but he does not ever analyze the legal implications of the definition or its application to certain events.

Kiernan could have made *Blood and Soil* legally relevant by incorporating his own theory on the commonalities of genocide into a suggestion for revisions to current law. If he really felt strongly that racism, cults of antiquity, agriculture, and territorial expansion are common to genocides worldwide, and that these "red flag" issues aid in the identification of genocides in the making, his argument would have been strengthened by a suggestion to add or incorporate the commonalities into the legal definition of genocide. As the Convention's definition stands, it only mentions the racial commonality of genocides.

Kiernan claims that one goal of *Blood and Soil* is to prevent future genocides by identifying what he considers to be warning signs in unstable situations. However he fails to offer any prescriptive formulas for reacting to these factors when identified. One failure of the text is the absence of legal prescriptions, and he also does not mention who he believes ought to use his identified commonalities as forewarning or how those groups or individuals might intervene.

In sum, Kiernan's chosen characteristics represent an interesting perspective on the uniformity of violence over time, and he is also able to detail the particular circumstances that led to each genocide. Because *Blood and Soil* presents genocides from all time periods and all parts of the world, the reader is confronted with the reality that violence knows no boundaries. Whether or not *Blood and Soil* will be a useful guide to those in a position to mobilize and prevent future genocides remains to be seen. However, if the Sudanese genocide, and the Western world's failure to act, is any indication, the future victims of genocides may be no better off as a consequence of such new scholarship.

Africa: Mapping New Boundaries in International Law. Edited by Jeremy Levitt. Portland, Oregon: Hart Publishing, 2008. Pp. 295. \$70.00 (Hardcover).

REVIEWED BY ELISABETH S. BRADLEY

Africa: Mapping New Boundaries in International Law (“Africa”) is the sixteenth volume in Hart’s Studies in International Law series. Editor Jeremy Levitt encourages scholars to consider international law from an African perspective and highlight African contributions to international law. To present his perspective of Africa as “a legal marketplace, not a lawless basket case,” Levitt includes nine articles, which are subdivided into two areas of international law. Part I addresses African contributions to Human Rights, Intervention, and Armed Conflict. Part II addresses African contributions to Governance, Sovereignty, and Development. Levitt is largely successful in presenting an African perspective on international law; however, some of the articles included in this volume slip into presenting Africa as an object of rather than a maker of international law, which is just the perspective that Levitt is trying to offset.

Following Levitt’s introduction, Part I begins with an article by Adrien Katherine Wing in which Wing discusses the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (the Protocol) as a “new and unique” contribution to international law. Wing notes that the Protocol, in addition to being the first regional treaty devoted to women’s rights, is the first treaty to provide a right to abortion and explicitly prohibit female genital mutilation. Although Wing cites the Protocol as an important contribution, a large portion of the article dwells on the difficulties facing African women and the reasons why the Protocol is unlikely to have a significant impact on their lives. Although Wing appears hopeful that the Protocol’s effectiveness can be improved, the tone of her article leans a bit toward the “basket case” perspective that Levitt seeks to avoid.

Pacifique Manirakiza considers the influence of customary African approaches on international criminal law. Manirakiza adeptly avoids introducing his chapter with dramatic examples of African humanitarian crises and violations of international law. Instead, keeping with Levitt’s intention

to avoid the stereotypical image of Africa as a “basket case,” Manirakiza introduces crime as a problem for which all communities search for answers. Manirakiza provides two examples of traditional justice mechanisms used by African countries to deal with international crime, the South African Truth and Reconciliation Commission (TRC) and the *gacaca* courts in Rwanda. Highlighting the TRC’s impact on international criminal law, Manirakiza notes that the United Nations encourages other countries to follow the TRC process as a more effective alternative or gap filler to classic international judicial institutions, providing more complete redress for victims of international crimes. Although Manirakiza acknowledges that these traditional justice mechanisms are not a replacement for international courts and that they have some areas that need improvement, he successfully highlights their important role in dealing with international crimes as a valuable contribution to international law.

Francis M. Deng discusses the development of international norms regarding internally displaced persons (IDPs). Focusing on Africa primarily as an object, this article essentially misses Levitt’s objective. Despite being well-written and interesting, most of the article portrays Africa primarily as an example of the region suffering most severely from internal displacement. Deng’s discussion of an African contribution does not appear until his conclusion, where he notes that in his attempt to address the problems related to internally displaced peoples, he should have looked for more contribution from African countries. At this point, Deng could have chosen to highlight African contributions—but instead, he again focuses on the fact that African countries suffer most severely with problems related to internally displaced people. Deng does note that as the countries most in need of answers for the problem of internally displaced people, African countries might subsequently provide insight into the solutions. Unfortunately, overall Deng’s article slips into the common pattern of presenting the African region foremost as an object of international law.

Levitt’s own contribution in part I addresses pro-democratic intervention in Africa. Levitt begins the first paragraph of his chapter by highlighting human suffering and breakdowns in the rule of law and democracy on the African continent, but he quickly shifts the readers’ focus onto the superior

ability of the African region to address the crises through comprehensive collective security regimes. Levitt points to examples of successful interventions in humanitarian and democratic crises by the Economic Community of West African States, the Mission for the Implementation of the Bangui Agreement, the Southern African Development Community, and the African Union. Levitt asserts that the regimes' willingness to exercise force to protect democracy and the rule of law, even where humanitarian crises have not yet reached a point requiring intervention, has contributed to an emerging norm of pro-democratic intervention in international law.

Dino Kritsiotis concludes part I with a chapter that considers African contributions to international law on humanitarian warfare. Kritsiotis argues that African countries' application of international law has expanded humanitarian warfare law in both scope and applicability. In particular, Kritsiotis argues that Algeria's broad application of the law expanded the stricter protections and responsibilities of international warfare to what were previously considered to be internal conflicts and therefore subject only to more lenient restrictions. Additionally, Kritsiotis credits African states with expanding the precondition of armed conflict to include tension and strife, thus permitting a broader applicability of the humanitarian law of warfare. Although Kritsiotis notes that the influence has not always been positive, his article effectively highlights African states' application of humanitarian warfare law as an important influence on international law that should not be ignored.

Part II begins with an article by J. Peter Pham on African constitutionalism as a response to realities facing post-colonial African countries. At independence many African countries were left with borders that did not make sense and governments comprised solely of those who were elites under the colonial governments. Pham provides examples of African constitutionalism that were designed to address these post-independence conditions. These examples include Ethiopia's constitutional permission for nations to form their own states and the provision for nations' right of secession and Somaliland's constitutional provision of a role for elders, as traditional authorities, to review legislation. Pham is hopeful that creative constitutionalism will prove to be a solution for some of the governance problems African countries have faced since

independence but concludes that it is too early to tell whether efforts have been successful. The contribution to international law that Pham contemplates is speculative and somewhat under-explained, yet his perspective on bottom-up solutions is clearly aligned with Levitt's objective for the volume.

Emeka Duruigbo argues that African states are taking the lead in a revival of shared sovereignty as a tool for humanitarian intervention and development. As examples, she discusses in depth the Special Court of Sierra Leone and the Chad-Cameroon Oil pipeline project. Duruigbo uses these two examples to argue that through shared sovereignty, African states are contributing to international criminal law norms and development norms.

Joel H. Samuels discusses African states' contribution to boundary dispute resolution. Samuels notes that African states have led the way in turning to the International Court of Justice (ICJ) to resolve their border disputes, both setting an example of non-violent boundary dispute resolution and helping to develop substantive boundary dispute law through the resolution of their cases. Samuels attributes African states' reliance on the ICJ in part to the Organization of African Unity's commitment to respecting the sovereignty and boundaries of states, changing them only through judicial process. Although the African states' contribution to substantive boundary dispute law could highlight African states as primarily objects of international law, Samuels presents the African states as leaders rather than objects, thus adding weight to Levitt's central argument.

The last article in the volume, Maxwell O. Chibundu's article on the New Partnership for African Development's (NEPAD) contributions to development theory, is a bit out of tune with the rest of the volume. Chibundu spends most of the article discussing the negative aspects of NEPAD and NEPAD's failure to take approaches different from traditional development theory. Each potentially positive aspect of NEPAD that Chibundu notes is followed with a negative aspect that dominates the discussion. At the end of his article, Chibundu does conclude that NEPAD has made a contribution to the international legal order by representing a holistic approach to development. Despite concluding with a brief listing of NEPAD's contributions, the negative tone of the rest of the article indicates that Chibundu does not have much

confidence in NEPAD's approach. As a result, Chibundu's article feels rather out of place as the concluding article in a volume dedicated to highlighting African contributions to international law.

Although some articles slip into rhetoric that Levitt aims to avoid, the volume presents an interesting collection of scholarship that illuminates some of the important contributions that the African continent has made to international law. When engaging in a discussion of African contributions to international law, one pitfall is to consider such contributions solely as byproducts of African countries' experiences as objects of international law. If an author is not careful, such a discussion continues to portray the African continent as a "basket case," only capable of contributing to international law when international law is providing solutions to the many problems the countries must address. Some of the articles included in this volume teeter on the edge of this kind of discourse, but overall Levitt effectively provides concrete examples of African contributions that do not portray Africa primarily as a subject of international law. In this way, Levitt is quite successful in presenting an image of Africa as a "marketplace" rather than a "basket case."

The Perils of Global Legalism. By Eric Posner. Chicago, Illinois: University of Chicago Press, 2009. Pp. x, 296. \$29.00 (hardcover).

REVIEWED BY MATTHEW TURK

University of Chicago Law School Professor Eric Posner's new book, *The Perils of Global Legalism* ("*Global Legalism*"), is a polemic aimed at the cosmopolitan aspirations of international lawyers and international law scholarship. However, perhaps the best way to understand the book is as an attack on a particularly vulnerable field that shares a larger problem endemic to the American legal academy. That problem Posner labels "legalism," and amounts to the attitude, or implicit faith, that all social problems are legal problems that carry with them legal solutions. International law is particularly vulnerable to the contradictions of legalism because: (1) effective (international) law without (world) government is unlikely to exist; and (2) it is unrealistic to hold that states on the one hand

create international law through their consent and at the same time are helplessly bound to follow it when it is no longer in their interest. That is to say, Posner's claim is that international law is not a Frankenstein's monster that begins as an object willed by states but later gains its own subjectivity and turns on its creators.

The contradictions of legalism that Posner identifies in international law scholarship may actually be best exemplified by the constitutional law case *Brown v. Board of Education* and its heroic reputation among lawyers. *Brown* is heralded as the paradigmatic instance of positive social change effected through judge-made law. But as an empirical matter, it is unclear whether the decision had a significant causal impact on the desegregation of public schools, which remained racially divided for ten years after it was handed down. It was only after 1964, when the political branches more aggressively intervened to enforce *Brown*, that school desegregation began to take place. International laws such as human rights treaties have much of the universalistic rhetoric and moral power of the *Brown* decision, and receive similar sympathy and adulation in the legal academy. But while even the American government was initially unwilling or unable to enforce the decision in *Brown*, there is no comparable world executive branch in existence, which makes effective enforcement of international laws like human rights treaties extremely difficult.

Posner's latest effort can also be understood as a response to the reception of his 2005 book on international law, *The Limits of International Law* ("*Limits*"), which he wrote with Jack Goldsmith. Typical of the response was a review essay by Oona Hathaway and Ariel Luvimbuk, *Rationalism and Revisionism in International Law* ("*Revisionism*"), which appeared in the Yale Law Journal. While largely agnostic on *Limits*' rational choice methodology, *Revisionism* criticized the authors at length for allegedly allowing their normative concern that international law takes policymaking power out of the political branches of domestic governments to distort their analysis and make their conclusions overly skeptical. In *Global Legalism*, Posner's reply is that the normative commitments of international law scholars, namely their unflinching faith that problems of international cooperation can be effectively solved through ever more international law-making, leads to a naïve and counterproductive optimism.

Global Legalism is divided into two parts: Part One, entitled “Global Legalism,” defines the contours of global legalism and criticizes its treatment of topics such as the disaggregated state and sub-state actors, the fragmentation of international law and the state system, and the incorporation of international law into domestic law; Part Two, entitled “Adjudication in Anarchy,” provides a detailed analysis of how international adjudication has fared in practice, including the effectiveness of international tribunals, an evaluation of human rights and international criminal law, and finally the possibility of climate change policy-making through domestic litigation in the U.S.

In Chapter One, Posner identifies global legalism as an attitude that is characterized by six beliefs: (1) international disputes should be resolved according to law and by legal institutions; (2) states should enter more treaties, and these should be multilateral and as comprehensive as possible; (3) international courts should have jurisdiction over a broad array of disputes, jurisdiction should be compulsory, and judges should be independent from governments; (4) international legal institutions that play a quasi-legislative or executive role should be encouraged; (5) domestic political institutions should be bound by international legal obligations; and (6) the growth of international law is an historical inevitability. The remainder of the book is a sustained attack on the idea that these beliefs should be accepted uncritically.

Chapter Three explores the consequences of disaggregating the unitary state, and the claim of global legalists that sub-state actors, such as government officials, interest groups, citizens, and NGOs increase compliance with international law and influence its content. Posner’s reply has two parts: (1) these actors pursue substantive (often conflicting) policy preferences and very rarely the goal of compliance with international law *per se*; and (2) disaggregated state explanations are overly vague and unfalsifiable in that they do not specify which sub-state actors influence compliance, how they do so, and when they are likely to be successful. Chapter Four addresses the fragmentation of the international system and the declining strength of the nation-state. Against the claim that this trend will strengthen international law, Posner argues that increasing the number of states actually *decreases* the pull of international law because numerous parties have more difficulty cooperating than few parties. Europe is used as an example of

how integration rather than fragmentation makes cooperation easier. The validity of this example, of course, depends on the characterization of Europe as a quasi-federation, rather than a group of highly cooperative, independent states. Chapter Five closes Part One with skepticism that incorporating treaty law directly into domestic law is wise policy, and with the observation that states rarely, if ever, do this in practice.

Chapters Six and Seven lay out the institutional rules and evaluate the success of the most prominent international tribunals. A major claim is that the proliferation of international tribunals reflects the failure of the International Court of Justice (ICJ) and the dissatisfaction of states with the idea of a “world court” of general, compulsory jurisdiction. As evidence, Posner notes the decreasing use of the ICJ, particularly by powerful states. Two outliers emerge from the general picture of under-use and under-compliance: the World Trade Organization’s (WTO) dispute settlement system and Europe’s two courts (the European Court of Justice and the European Court of Human Rights). Posner explains the success of the WTO by the fact that by its design enforcement is bilateral and incomplete, while compliance with the European courts is explained by the previously noted characterization of Europe as a quasi-federation. Chapter Eight covers human rights and international criminal law. The chapter makes two claims: (1) the development of international criminal law, in particular the International Criminal Court (ICC), is a response to the failure of states to enforce human rights treaties in any substantial way; and (2) the ICC, if used at all, is likely to only punish actors in least developed states, and as a result will be resented and seen as a form of neo-imperialism by the developing world. Chapter Nine, while feeling slightly out of place, casts doubt on whether domestic U.S. litigation will be an effective vehicle for directing climate change policy.

Global Legalism ends on a strangely ominous and cautionary note, with a three-page conclusion entitled “America versus Europe.” The conclusion suggests that historical myopia may be the main problem with global legalism. If the fundamental anarchy of the international system is taken as a premise, then the distribution of power among states will influence the content of international law. When rising powers such as China, India, Brazil, and Russia begin to remake international law in their own image, it may come to conflict with

Western academics' commitments to Enlightenment values and political liberalism. This embarrassment is structurally identical to the debate over judicial activism or restraint in constitutional law: everything depends on whether the judges are on your side.

While *Global Legalism* is a closely argued book, it will receive much criticism. A common claim will be that Professor Posner has created a straw man and that the "global legalist" he has constructed does not actually exist—but *Global Legalism* is more or less correct about the intellectual shortcomings of most American and European international law scholarship. Uncritical optimism about international law is inevitably misguided so long as there is no world government to enforce agreements, because public goods will persistently be underproduced on an international scale. This is the implacable logic of the prisoner's dilemma in a decentralized state system, which is imperfectly resolved by repeated plays, and only exacerbated as the number of state parties increases.

However, criticism may be warranted with respect to the narrow role Posner suggests legal academics play. Their work, he argues, should consist of "[explaining] how much of international relations can be successfully and appropriately legalized, and how much cannot." Throughout there is a related complaint, the gist of which is that lawyers and law professors are not social scientists. This is a true but obvious point, and the problem facing international law scholars must be to do work which is not redundant with the social sciences, but at the same time not exclusively limited to the technician's role Posner assigns. Valuable legal scholarship is often doctrinal, interpretive, and normative, and has a rhetorical power missing from technical social science research. A prime example is Professor Posner's output on international law, which has ranged from arguments about the moral status of international law to the normative value of democratic politics. The contribution of *Global Legalism* continues this eclecticism. With it, Posner has provided an intellectual history of a concept, "legalism," as well as what could be considered the sociology of a profession.

International Investment Law: Reconciling Policy and Principle. By Surya P. Subedi. Portland, Oregon: Hart Publishing, 2008. Pp. 224. \$60.00 (paperback).

REVIEWED BY BRETT MURRAY

The law of foreign investment continues to play an important role in the governance of international economic relations. Two prevalent features of globalization are cross-border investment and an increasing acceptance of standards regarding human rights, economic justice, and the environment. Disputes often arise between investors and states when these phenomena come into tension with one another. *International Investment Law: Reconciling Policy and Principle*, by professor and practitioner Surya P. Subedi, analyzes foreign investment law as it has been created and molded by traditional international law, modern instruments, and arbitral interpretations.

The seven chapters of this book are roughly divided into three sections: origin of the law, sources and interpretation, and solutions to current challenges. Chapter 1 traces the evolution of foreign investment law from its roots in the concepts of state responsibility and protection of aliens. The author discusses the schism between those who wished to place foreign investors on a level playing field with nationals of the host state, and those who demanded that treatment meet the international minimum standard. While a comprehensive treatment of the history of foreign investment law is impossible in a skeletal twelve pages, Subedi provides sufficient context for more robust discussion of central themes like the standard of treatment afforded to foreign investors, compensation for expropriations and nationalizations, and the baseline function of customary international law.

Chapter 2 examines the efforts of international organizations to draft and ratify a treaty to regulate foreign investment. Subedi displays analytical strength in identifying where various instruments depart from the status quo. In what could have been a dry and technical chapter, he weaves a compelling narrative. After confirming the right of state sovereignty over economic activities and natural resources, the UN lost momentum when it attempted to resurrect elements of the Calvo Doctrine and regulate the conduct of transnational corporations. By the mid-1980s, the tide truly turned in favor of investors when

changing macroeconomic and political conditions stoked developing countries' appetite for foreign investment. Subsequently, organizations such as the World Bank, the World Trade Organization (WTO), and the Organization for Economic Co-operation and Development (OECD) issued instruments of varying authority calling for increased investor protection, the removal of trade-related restrictions, private access to international dispute settlement mechanisms, and other terms that mostly awarded rights to investors and imposed obligations on host states.

Subedi attests that recent instruments often reflect the terms contained in investor-friendly bilateral investment treaties (BITs) and free trade agreements (FTAs). He is right that host states should be wary of accepting a global foreign investment treaty without clear assurance that it will not merely codify heightened investor protections. However, to the extent that treaties reflect a *quid pro quo* bargained for under prevailing market conditions, the level of demand for foreign capital and the amount of risk that investments present will likely be the primary determinants of the rights and obligations set forth in any binding agreement.

The author embarks upon a survey of the sources of foreign investment law beginning in Chapter 3 with customary law. The unsettled meaning of key terms like "investment," "fair and equitable," "full protection and security," and "expropriation" have garnered much attention in the literature, and here Subedi provides an adequate gloss of divergent interpretations and uses. Chapter 4 depicts BITs as *lex specialis* instruments that extend rights and noncommercial risk protection to investors above and beyond those found within the *lex generalis* framework of international law. While these agreements enable flexibility, Subedi views them as having the potential to impinge on state sovereignty by expanding the scope of expropriations, elevating a breach of contract to the level of a treaty dispute, or by permitting investors to invoke the terms of a treaty to which they are not direct parties through the Most Favored Nation principle.

Chapter 5 discusses how international courts and tribunals have defined unsettled terms and interpreted treaties in favor of investors, compelling states to pay compensation even when their regulatory measures would not customarily be considered compensable events. Subedi argues that tribunals par-

ticipating in “judicial activism” should do no more than apply traditional customary international law, which he claims has not advanced since the time of the 1962 UN Declaration on Permanent Sovereignty Over Natural Resources. While admitting that treaties and arbitral decisions are evidence of state practice, he doubts their ability to actually alter custom, citing a lack of *opinio juris*. However, in light of the widespread similarities and long-term trends in treaty provisions and “soft law” instruments, Subedi’s position that subjective beliefs about legal obligations have not significantly evolved in nearly half a decade seems untenable.

The relevance of *opinio juris* is itself contested, as the ILC Committee on Formation of Customary International Law found in 2000 that *opinio juris* is not necessary to form custom, but can prevent it from crystallizing in specific cases of *opinio non juris*, disclaimer, or ambiguity as to a party’s understanding, intent, or acceptance of the precedential effect of practice. It is unlikely that these rare exceptions apply to the typical investment agreement.

Subedi’s tendency to claim that the law is not what it is, but rather is what it was, also appears with regards to the meaning of certain key principles. For example, he attempts to give “fair and equitable treatment” an ultra-narrow reading, defining it as “the obligation not to deny justice . . . in accordance with the principle of due process embodied in the principal legal systems of the world.” Even assuming that “fair and equitable” has no independent significance outside of the international minimum standard on the treatment of aliens, it is perhaps going too far to assert that the principle stalled at *Neer*. The desire to limit “fair and equitable” is understandable given what is often at stake, but it seems that even the international minimum standard, to say nothing of treaties, currently prohibits most arbitrary or discriminatory treatment outside an adjudicatory context.

Because treaties and tribunals have an undeniably heavy influence, it would be better to make normative arguments prospectively, as Subedi does in the latter third of the book, rather than attempt to “backdate” the law. Whether or not customary law has changed, it is unnecessary to invoke the law of the past. Modern arbitral decisions arguing for what he calls the “maximum standard of treatment” have been neutralized by more balanced decisions and a “new breed” of treaties,

and thus pose no real threat of institutionalizing new custom that is excessively pro-investor.

In Chapters 6 and 7, Subedi identifies current issues in foreign investment law and offers suggestions for making dispute resolution more equitable. Primarily, he questions whether changes in the law have accounted for the international obligations and policy objectives of host states. One point of contention is whether the host should pay for indirect or regulatory expropriations. While there is no authoritative manner of distinguishing between compensable and non-compensable expropriations, Subedi believes that the law is moving towards a narrower definition of expropriation that does not include “bona-fide, non-discriminatory measures” taken to comply with other treaties. In the wake of regulatory action, international constitutional law would also compel tribunals to consider superseding *jus cogens* principles. Yet there is no consensus that the obligations and objectives in question have risen to the level of *jus cogens* such that they are believed to be “norms from which no derogation is permitted.”

Thus the problem becomes drawing a line between permissible regulation and expropriation. Subedi posits that the “legitimate and reasonable expectations” of investors should be one factor in determining whether state action is so unfair or inequitable as to constitute expropriation. This is a sensible approach, as it encourages states and companies to disclose intentions and specify expectations in contractual terms. An investor cannot reasonably expect to be immunized from all changes in the regulatory or economic environment that impact profitability, especially when nationals are similarly affected. Likewise, affirmative promises by a host state might be sufficient to create a reasonable expectation of restraint or indemnification, although Subedi remains skeptical of the appropriate scope of stabilization clauses.

Subedi reasons that the inclusion of exception clauses such as those found in trade law, and possibly liquidated damages clauses, would be preferable to relying upon tribunals to interpret ambiguous terms and reach arbitrary award sums. States could also try to prevent excessive awards by preemptively paying smaller sums to companies that are impacted by non-compensatory government action or unforeseeable situations. This “settle early, settle often” strategy may reduce the total value of awards, but it could also create a slippery slope if

investors come to expect compensation in an increasing number of situations.

Subedi argues for a public international court of foreign investment, citing the dearth of transparency, accountability, institutional competence and consistency in existing private forums. The court would be bound to apply custom, *jus cogens* principles, other international treaties covering social and environmental justice. Arbitral decisions could be made more consistent by giving them formal *stare decisis* effect and by creating an appeals process.

The author presents the option of housing such a court within the Dispute Settlement Body (DSB) of the WTO, as it has experience balancing both public interests and private rights presiding over intrastate trade disputes. While DSB jurisdiction might solve current problems with settlement procedures, it would likely create a new set of issues. Subedi argues that private tribunals were not designed to accommodate public law disputes, but he overlooks the converse—the DSB could be ill suited to entertain claims by private investors. DSB decisions usually require a state to assure non-repetition or to revoke the offending policy. Larger corporations may be willing to accept such amends, but smaller investors will need more immediate restitution. Furthermore, there is a point at which the long-term benefits of satisfaction no longer outweigh monetary compensation. If the DSB is to appeal to investors as an international investment court, it will have to adopt some of the features of private arbitration.

Reforming the dispute settlement system would certainly reduce variance in decisions, but this would do little in the way of stating what the law of foreign investment actually is or should be. Subedi argues for a global treaty to set standards and definitions, identify compensable acts, and balance investor protection against other goals of the international legal system. However, he also describes a “new breed” of agreements that indicate the willingness of some nations to curb the excesses of investor protection of their own accord. For whatever reason, he does not countenance the possibility that the need for a global treaty may never become so pressing that it is ratified before controversy in the law is settled by evolving bilateral and regional agreements. A realist theory might posit that developing countries are trapped in a Melian Dialogue, where capital-exporters procure what terms they can and de-

veloping nations accept what terms they must. Subedi makes note of countries such as Brazil and Bolivia, which have both successfully attracted capital without ratifying the ICSID Convention or many BITs. He does not explain these exceptions or explore the issue further, but perhaps the tables will turn as investors compete to participate in the BRIC and other growth economies.

International Investment Law: Reconciling Policy and Principle identifies and thoroughly describes the areas within the law requiring reconciliation. The book provides a comprehensive introduction to this subject, making it a worthwhile read for students. The analysis of treaties and jurisprudence is likely to be a useful resource for practitioners, and scholars familiar with this topic can benefit from the book's clear organization, insightful questions, and thoughtful discourse. While the theoretical underpinnings of some arguments may hinge upon a nostalgic concept of the law, Subedi should be commended for making principled arguments in favor of a balanced approach to foreign investment law.