

BOOK ANNOTATIONS

BAILEY, CLINTON, *BEDOUIN LAW FROM SINAI AND THE NEGEV, JUSTICE WITHOUT GOVERNMENT* (New Haven, Connecticut: Yale University Press, 2009).

GHODSE, HAMID, ED., *INTERNATIONAL DRUG CONTROL INTO THE 21ST CENTURY* (Aldershot, United Kingdom: Ashgate, 2008).

GOLLIN, MICHAEL A., *DRIVING INNOVATION: INTELLECTUAL PROPERTY STRATEGIES FOR A DYNAMIC WORLD* (New York, New York: Cambridge University Press, 2008).

JOJARTH, CHRISTINE, *CRIME, WAR, AND GLOBAL TRAFFICKING: DESIGNING INTERNATIONAL COOPERATION* (New York, New York: Cambridge University Press, 2009).

KENDE, MARK S., *CONSTITUTIONAL RIGHTS IN TWO WORLDS: SOUTH AFRICA AND THE UNITED STATES* (New York, New York: Cambridge University Press, 2009).

MCCLAINE, LINDA C. & JOANNA L. GROSSMAN, EDS., *GENDER EQUALITY: DIMENSIONS OF WOMEN'S EQUAL CITIZENSHIP* (New York, New York: Cambridge University Press, 2009).

SHACHAR, AYELET, *THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY* (Cambridge, Massachusetts: Harvard University Press, 2009).

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Bedouin Law from Sinai and the Negev, Justice Without Government.
By Clinton Bailey. New Haven, Connecticut: Yale University Press, 2009. Pp. xvi, 400. \$70.00 (hardcover).

REVIEWED BY JENNA BROWNING

Many of the practices that pervade contemporary Arab societies were inherited from the cultural practices of Bedouin tribes, the great desert nomads of the Arabian Peninsula. Though American readers are at once fascinated by and mistrustful of the cultures of the Middle East, surprisingly few available texts describe the Bedouin peoples and their traditions. Clinton Bailey's *Bedouin Law from Sinai and the Negev, Justice Without Government* is the first comprehensive study of Bedouin law published in English and, as such, the leading authority on Bedouin law for English readers. Bailey provides a profoundly well-written and scrupulous account of Bedouin law, replete with rich narratives and case studies that make the legal principles they illustrate both clear and accessible. *Bedouin Law from Sinai and the Negev, Justice Without Government* is the product of forty years of devoted research spent in the heart of the Negev Desert. Periodically living among assorted Bedouin encampments and maintaining close contact with nearly all of the Bedouin tribal confederations in Sinai and the Negev, Bailey painstakingly earned the trust of Bedouin leaders, thereby gaining access to insular reserves of Bedouin knowledge that are preserved only by oral tradition. It is from this uniquely situated position that Bailey presents his formulation of the Bedouin legal canon as a comprehensive system of formal law.

However, it is important to note that Bailey's unique position affords him a privileged and scholarly perspective of Bedouin legal sources that is unavailable to actual Bedouin legal officials. His work is the product of many years' worth of interviews and corroboration against similar scholarly works. In fact, Bailey's meticulous compilation and exhaustive description creates the illusion that the Bedouin legal system is comprised of legal specialists operating on a body of knowledge as complete as the author's. Unfortunately, this does not closely approximate the true law-finding mechanism as it plays out in Bedouin society. Given that there is no formal system of legal education and that law is immortalized in proverb form

with little or no emphasis on procedural elements, Bedouin legal decisions adhere only to those governing principles that happen to be stored in the minds of the decision-makers in a particular case. Inconsistency necessarily abounds.

In his Introduction, Bailey does fleetingly acknowledge that, within a given legal context, conflicting opinions regarding the correct legal outcome are bound to emerge because Bedouin law is exclusively oral law, with no written codex to serve as a point of reference or confirmation. Even as Bailey cites the existence of an appeals process as a possible procedural cure, he concedes that an individual's knowledge is limited to what he has observed in his immediate environment. Yet, Bailey abandons his discussion of this structural uncertainty after the Introduction, and the six subsequent chapters treat each legal principle and outcome as a general rule rather than a context-specific application. As such, the intricate, ordered logic that seems to emerge out of a sea of customary norms is largely a function of Bailey's own systematization. While all of the cited cases and corresponding legal principles do exist within the Bedouin legal tradition, no one legal decision-maker at any given time is in possession of them all. Therefore, they are not applied with as much predictability or certainty as the book implies, given that their application is contingent upon the pertinent legal expert's distinct knowledge base.

An additional consequence of Bailey's representation of the Bedouin legal system as a standardized body of laws is the attendant insinuation that, if a proverbial rule is applied in a particular case, the application does not constitute an exception, and the rule is thus not just a *de facto* formality. For example, Bailey describes instances of the retaliatory murder of rapists by members of the female victim's tribe. Although the oral law formally permits revenge by way of murder against a male rapist belonging to another tribe, the reality is that in most cases, money is demanded or the female rape victim is sacrificed in an 'honor killing,' under the theory that she induced the male's advances. For example, in an article titled, *The Politics of Honor: Patriarchy, the State, and the Murder of Women in the Name of Family Honor*, Manar Hasan claims that even in the face of well-known laws calling for the murder of male perpetrators, female victims are much more frequently sacrificed, since the loss of a female has a "cheaper social price tag"

for the family or tribe.¹ In traditional Bedouin culture, the number and strength of the men belonging to a tribe directly correlates with that tribe's ability to survive desert conditions.

As Bedouin peoples abandon their traditional nomadic lifestyles and become acculturated to the various Middle Eastern societies where they make permanent settlement, the notion that women are the legal property of the paternal family, subject to honor killings, endures. In fact, many Bedouin laws that entrench the subordinate position of women were adopted by Arab cultures at various points throughout history. Bailey suggests that knowledge of Bedouin law might also enlighten us to aspects of Islamic law, which originated among a predominantly Bedouin culture, even though Bedouin law does not derive from Islam. Bailey's thesis largely rests on the assumption that Bedouin law is a unique and exemplary product of extremely limited and treacherous desert conditions. Yet, somewhat ironically, the book provides an intentionally present-tense account of Bedouin law in order to highlight its continued applicability as Bedouins move from nomadic life into modernity. Unfortunately, its continued applicability in modern times gives rise to several human rights issues that Bailey's account fails to address.

As a result of many decades spent studying Bedouin culture in the Negev, Bailey understandably developed strong attachments to both the Bedouin peoples and their traditions, and has been advocating on behalf of Bedouin civil rights in Israel since 1978. An unfortunate consequence, however, is that Bailey's descriptions of Bedouin law reveal a fair amount of bias. Bailey betrays his loyalties both in the form of substantive endorsements explicitly proffered in the Afterword, and by virtue of implicit approval evidenced by his acceptance at face value of particularly problematic elements of Bedouin law, such as honor killings of women. Furthermore, Bailey fails to discuss or consider the criticisms and modern implications of such laws. In the last sentence of the Afterward, Bailey writes:

Whether one condones or condemns the internal logic of Bedouin law, this law must be seen—in the perspective of millennia—as a major human achievement . . . The fact that

1. Manar Hasan, *The Politics of Honor: Patriarchy, the State and the Murder of Women in the Name of Family Honor*, 21 J. OF ISRAELI HIST. 1, 2 (2002).

Bedouin in modern times still resort, with trust and hope for justice, to the legal system that their earliest ancestors bequeathed them speaks volumes for the soundness of its ways.

These statements fuse two fundamentally different ideas. The first is a backward-looking evaluation of Bedouin law, taking into account the Bedouin peoples' abilities to survive harsh desert conditions and maintain some degree of order in the absence of a centralized law enforcement mechanism. Reasonable minds may well disagree as to the value, in terms of human achievement, of a society that deprives half of its members of human rights, but nonetheless successfully staves off anarchy and starvation in the desert. The second claim, however, assumes that the continued application of Bedouin law in modern society, absent extreme desert conditions, is a result of its competence to deal with modern problems even as women are systematically deprived of fundamental rights. Further, such a claim is vulnerable to a criticism that applies to similar studies of Bedouin culture, which tend to argue that honor killings are merely part of an essentialist and impenetrable Arabic mentality.² However, there is evidence that honor killings are actually sustained by *de facto* and occasionally *de jure* endorsements of the practice by contemporary Arab societies and states, including Israel, either because of their affirmative policies or because of their silence on the issue.³ Bailey fails to discuss the important interaction of Bedouin law with modern social institutions, choosing instead to describe Bedouin law as a natural conclusion flowing from a set of fixed, historically defined circumstances.

Bailey recounts that the honor system historically ensured that men who took advantage of physically weaker women, often shepherding alone in the desert, would be held accountable under the theory that a woman held within her body the worth of all of her male relatives. That is, Bedouins conceived of the female body as a literal repository for her male kin's honor, and thus any injury or attack to her physical being was, by proxy, an attack on her male kin's honor. Blood revenge by the male kin was therefore warranted against a female's offender since it was their own honor they were avenging, rather than a mere attack on a separate female person. Adherence to

2. *See id.* at 32.

3. *See id.* at 26.

this same ideology also permits honor killings of women. Honor killings occurred in situations wherein a woman's own actions, or the actions taken against her by a third party, were perceived as an affront to the honor of her male kin, but where it would be too "expensive" to retaliate against a male offender. In other words, such retaliation might unleash a cycle of violence that would result in the death of many men. In these circumstances, the woman was killed by her own family members. Honor killings of this type represent a stark departure from the neat theoretical construct of blood revenge that Bailey describes and a tacit acknowledgement of the reality that the sanctioning of private violence as a method for deterring wrongdoing often results in excessive bloodshed. The killing of the woman was justified under the theory that the family honor had to be "cleansed."

It is clear that Bailey's justification of the honor system as a method to "protect women," at least from men to whom she was not related, is anachronistic at best. Not only do honor politics thrive in contemporary society, and as such currently rob Arab women of human rights and subject them to the real possibility of murder, they also function to harm Arab society as a whole. Within the honor system, determinations of honor are subject to volatile public opinion, and both women and men are constantly vulnerable to loss, albeit to starkly different degrees. Furthermore, women are provided with no means of gaining status, only of losing it. As Hasan notes, "the passive woman, thought to be inferior in status, holds within her body the public worth of all her male relatives, worth which she can directly damage and diminish, but which she cannot augment."⁴ As a result, society views women as passive beings who can create nothing of worth through their actions, and who are thus liabilities at the mercy of public opinion. Clearly, the integration into modern society of Bedouin laws that function to subordinate women is problematic and should not be endorsed.

Clinton Bailey's analysis is best viewed as a cultural-historical study of Bedouin law, rather than an accurate description of current Bedouin legal mechanisms as they are integrated into modern Arab societies, or as a qualitative assessment of Bedouin law. Because Bailey's work is the first comprehensive

4. *See id.* at 7.

study made available to English readers, there exists a positive responsibility to discuss the implications of applying Bedouin law in a modern context, if he is to claim that his work is representative of the current state of the law. Though well-written and comprehensive, *Bedouin Law from Sinai and the Negev, Justice Without Government* fails to address important issues of human rights and procedural uncertainty that should be central to the discussion of Bedouin law and its pervasive influence in the Middle East.

International Drug Control Into the 21st Century. Edited by Hamid Ghodse. Aldershot, U.K.: Ashgate, 2008. Pp. 242. \$99.95 (hardcover).

REVIEWED BY CHRIS MORLEY

Internationally, as in the United States, drug misuse and abuse continue to be an urgent and pressing problem for governments, law enforcement agencies, and health care professionals, among others. At a global, multilateral level, this problem is addressed by national governments through the International Narcotics Control Board (INCB), the United Nations international drug control conventions, and various bilateral and multilateral treaties between states with a vested interest in curbing drug misuse and abuse. It is on the international conventions that Hamid Ghodse, an expert in addictionology and former President of the INCB, focuses in *International Drug Control into the 21st Century*. The INCB has its underpinnings in the Opium Conventions of the early twentieth century but was formally established by the 1961 Single Convention on Narcotic Drugs as an independent organization under the mandate of implementing UN drug conventions. Ghodse has been a member of the Board since 1992 and served nine times as the board's president. In *International Drug Control*, Ghodse compiles the introductory chapters of successive Annual Reports of the INCB, the topics of which, as the preface explains, are chosen annually to reflect issues currently relevant to the board. Because of this, the chapters—edited for clarity and continuity—are intended to create a historical perspective on international drug control concerns and developments from 1992 to 2006. Taken from INCB reports written by and for governmental actors, *International*

Drug Control hardly presents a groundbreaking or revolutionary solution to the ongoing problem of drug abuse, but Ghodse does succeed in making the opinions and reasoning of the INCB available to a “general readership,” as he intended, and in presenting a relatively balanced approach to narcotics control.

After a brief introduction describing the challenges facing national and international drug control efforts in an era of increasing globalization and technological innovation, Ghodse describes the structure and history of the international drug control system. Although this is likely redundant for anyone with a background in international drug control, Ghodse helpfully describes the numerous treaties shaping international drug control efforts and the organizations involved. Consistent with his intent that the book be accessible to a general readership, the chapter provides useful background information that aids understanding of later chapters. Ghodse then lays out the fifteen substantive chapters chronologically, illustrating the changing or growing concerns of the INCB from 1992—legalization and decriminalization of illicit drugs—to 2006—the growth of unregulated markets for internationally controlled drugs. The format is particularly useful in highlighting the numerous, and often persistent, concerns of national governments and the United Nations over the past seventeen years—the impact of the internet and media on young people, the need to control how drug use is portrayed in the media, the importance of multilateral cooperation on drug control, and the necessity of a balanced approach including treatment and prevention programs to prevent individual use are all discussed repeatedly in the various chapters. Although the chapters are clearly edited from the lengthier and rather more prescriptive annual reports, the book still suffers from a degree of repetition and lack of cohesion. The decision to order the reports chronologically, rather than thematically, does provide an interesting insight to the (only slightly) changing opinions of the INCB over a fifteen-year period, but also results in similar ideas being discussed in discrete and disconnected chapters. For instance, the need for community-based measures designed to reduce or deter drug use and the impact drug use has on communities is first introduced in Chapter Four, *Drugs and Importance of Demand Reduction*, picked up again in Chapter Eight, *Preventing Drug Abuse in an Environment*

of *Illicit Drug Promotion*, and yet later in Chapter Fourteen, *Drugs, Crime, and Violence: The Microlevel Impact*. Because the development of the INCB's focus over the years could be readily seen by accessing the annual reports themselves, the decision to not edit for clarity and cohesion is perplexing.

Despite this separation, individual chapters illustrate the areas of concern which, although often repetitive, do provide a reasonably comprehensive and somewhat detailed picture of the nature of international drug control efforts. Chapter Four analyzes demand reduction efforts administered by national governments domestically and advocates for increasing treatment, rehabilitation, education efforts, and drug courts. Chapter Six stresses the need for stricter financial regulation and international cooperation on monitoring cash flows to combat increased money laundering by growing criminal networks. In Chapter Eight, Ghodse returns to one of the central topics of the book: preventing youth drug use through stricter regulation of "pro-drug" messages in popular media. Although recognizing the limitations of such efforts in countries with strong guarantees of free speech, like the United States, Ghodse repeatedly decries the negative impact of television shows, movies, and music that portray drug use in a positive light and urges national governments to restrict or criminalize, consistent with their obligations under the international conventions, such "pro-drug" messages. The repeated assertions of the value of stricter governmental controls on media are discomfiting to readers who value freedoms of speech and expression, and also distract from the more important causes of drug abuse, such as poverty, domestic violence, and poor social integration. Nevertheless, the range of topics covered in just these three chapters indicates the broad concerns of national governments and the INCB, and could serve as a starting point for research into any of the topics individually covered.

In the latter half of *International Drug Control*, the focus turns away from the immediate impact of drug abuse and methods of combating it and towards the externalities of widespread illicit drug consumption. Following in the mandate of the INCB, Chapters Ten and Eleven discuss the difficulties of eradicating drug abuse while simultaneously increasing the availability of much-needed opiate-based pain medications in countries where these typically have not been available. Draw-

ing attention to the great disparity in licit analgesic consumption between developed and developing nations is the true achievement of the book. The discourse on illicit drug consumption often focuses on eradication or reduction of undesirable drug use, to the exclusion of a discussion on the pressing need for opiate-based pain medications in poorer nations. In Chapters Thirteen and Fourteen, Ghodse follows with a discussion of the stifling influence of illicit drug use and traffic on developing nations and the harm done to communities and child development by the presence of drug abuse and low-level drug dealing. This chapter draws attention to the cyclical nature of drug abuse, in which the strong presence of illicit narcotics in a community deters economic development and increases the likelihood of drug abuse in succeeding generations. These four chapters are the most interesting of the lot and powerfully illustrate considerations usually passed over in discussions of drug control. Within these four chapters, as elsewhere in the book, reasonable time is given to discussion of public health approaches to crime and drug abuse reduction. In fact, in Chapter Fourteen, *Drugs, Crime, and Violence: The Microlevel Impact*, Ghodse advocates strongly for a multidisciplinary approach to communities suffering from widespread drug abuse, including the involvement of local government, outreach services targeting drug users and vulnerable groups, and community-based restorative justice. Such programs have a proven history of reducing recidivism and drug abuse in numerous U.S. cities, the U.K., and Australia. These chapters provide some much needed balance to those sections of *International Drug Control* which focus on traditional, crime-centric drug control efforts.

Ghodse's largest hurdle, which he ultimately fails to overcome, is the burden of the institutional traditions in which he operates. The INCB focuses on international, largely criminal, measures to control drug production, while repeated studies have shown that domestic, individual-level treatment and prevention programs are far and away the most effective method of controlling drug use. While the INCB encourages more progressive policies such as treatment and demand-reduction strategies, it seems that the board may be burdened by the domestic concerns of State members, such as the United States, whose main focus often is criminal enforcement, interdiction, and eradication. The format of the book—a compilation of

annual reports—by design produces nothing new, and despite Ghodse's efforts to advocate for a comprehensive approach to drug control, the book's message is dominated by the same failed policies repeatedly implemented by national governments wishing to look "tough on crime." The final chapter discusses alternative development as a possible solution to illicit crop cultivation in developing nations. Ghodse points, as does the United States, to Bolivia and Peru as examples of successful crop eradication and replacement, despite the fact that the coca crop in those countries has been entirely replaced by coca cultivation in Colombia and cocaine availability and use in the United States (the final destination for almost all Colombian coca) have seen no significant decrease in the past many years.

Written by and for national governments, it is unsurprising that *International Drug Control* largely argues for the same policies implemented since the reports began being published in 1992. This staidness does leave the reader questioning for whom the book is intended: Those with a policy interest in international drug control already may be familiar with the policies and practices espoused here. Those with only a casual interest in narcotics control or illicit drugs should look for the far more accessible and entertaining *Cocaine: An Unauthorized Biography*, by Dominic Streatfeild (Picador, 2003) (a humorous but incredibly detailed and well researched history of the drug and attempts to eradicate its use) or Michael Massing's, *The Fix* (University of California Press, 2000) (describing the development of the United States' drug policy from Nixon's initial experimentation with community-based treatment to the modern "War on Drugs"). The thorough citation of reports, treaties, and other books does make *International Drug Control* an excellent starting point for research in the policy field, although the ready availability of the unedited INCB's annual reports does draw doubt on the added value of this text. Ghodse has succeeded in the most basic of his tasks: making the annual reports available to a general readership. But because of Ghodse's questionable editing decisions in the presentation of the reports, readers will likely choose to skip *International Drug Control* in favor of the annual reports themselves.

Driving Innovation: Intellectual Property Strategies for a Dynamic World. By Michael A. Gollin. New York, New York: Cambridge University Press, 2008. Pp. 415. \$90 (hardcover).

REVIEWED BY GENG LI

Intellectual property is critical to all participants in innovative industries, from global software companies to small start-ups. With the growth of a global market, especially in developing countries, understanding and advocating for an IP rights system that effectively drives innovation and balances the public demand becomes the shared goal of many corporations, NGOs, and governments on both local and global levels. With *Driving Innovation: Intellectual Property Strategies for a Dynamic World*, the title is a little misleading: Admittedly, the discussion of the global level is very important and interesting; nevertheless, it might be given too little weight. Instead, the book focuses less on the global implications of IP law and more on IP law writ large, with an overview of some key concepts and the domestic legal scheme, making it accessible to either general counsels and policymakers dealing with intellectual property in their day-to-day jobs or ordinary people without much IP law background. Still, the book provides an interesting and important section on IP law on a global scale, and it is worth examining the book's contributions to the field of global IP. The author recognizes the challenges of the global market, in which countries have attained varying stages of growth and have developed different national intellectual property systems. Particularly important is the variance between the strong IP schemes of developed countries and the weaker, developing systems of the BRIC countries (Brazil, Russia, India, and China). In confronting these issues, the book deals with IP strategies on a global stage and provides a very current treatment of the impact of globalization.

Driving Innovation is divided into four parts. Parts I-III, taken together, provide useful concepts and strategies for understanding the IP law system. In Part I, the concept of "innovation cycle" is introduced, which is at the root of IP law. The cycle contains three stages: creative work by individuals, adoption by society, and accessibility of knowledge, and an effective IP system should stimulate each stage by paying fair rewards for innovation. In the first stage, it encourages an individual

or a small group to be more creative; in the second stage, it facilitates the diffusion of the products created in the first stage; and in the last stage, the community that adopts the creative products interacts with the creative individuals. Part II first explains the distinct features of trade secret, patent, trademark and copyright—the four main types of intellectual property rights. These rights serve as a bundle to protect and stimulate the innovation cycle. The book describes how these rights are transferred and the possible infringements due to inappropriate IP transactions. Nowadays, most innovations are driven by communities rather than individuals, so the author used the last chapter of Part II to describe the role of communities in innovation. Specifically, there are three types of communities: private ones like corporations that are profit-driven, public ones like universities or other research institutions, and mixed ones that include both private and public activities. In each community, a chief innovation officer plays a critical role in IP rights management and decision-making, which requires a great deal of leadership and business skills.

Part III is the most important part in the book because it deals directly with the practical strategies for IP rights management, making the book distinct from a purely theoretical treatise. Therefore, the scope of discussion goes beyond a mere coverage of the law or rather vague policy considerations, but rests on very concrete steps to achieve practical goals. This generally involves three separate steps: planning, assessment, and implementation. The first step is to recognize the importance of IP rights in the organization, and then take steps to use strategic management with the organization's mission in mind. For developing a strategic plan, the book offers some important policy and practice tools and a few "template" strategic plans. Faced with such a "menu" of strategy options, a organization can customize its plan to its own specific goals and concerns, thus absorbing shared wisdom to generate a plan fitting its own needs. Of course, in making the plan, the critical task for the organization is to evaluate the internal resources and the external environment, especially the financial value of its intellectual property assets. The author uses several examples from different industry sectors and countries to illustrate where both non-financial and financial information can be found and how it should be used. Armed with a well-drafted plan based on accurate assessment, the organization

then takes the final step of implementing the plan. At this stage, the organization must assess the innovations of others to avoid unnecessary infringement, and the author depicts how to carry out such an inquiry, even when little information is available. The implementation stage consists of two aspects: acquisition and enforcement of an organization's IP rights, and external deal-making. Over two chapters, the author presents a series of approaches to protect, enforce, and transfer IP rights.

As noted above, Part IV is the most current discussion touching on the trend of globalization. Chapter 16 surveys different growth stages, industry sectors, and technologies, providing various approaches for IP managers in different organizations. Specifically, a start-up needs to apply different strategy tools and practices than a large multinational company. However, the author does not delve into the unique international IP needs of large, multinational corporations here. Also, there are a few specific industries and sectors, like life sciences, electronics, consumer products and services, the entertainment industry, and nonprofit research institutions, that require organization-specific strategies. For example, the life sciences industry applies for many patents on basic research and specific products; in contrast, the entertainment industry seldom uses patents, focusing on copyright content.

Chapter 17 compares different national intellectual property systems, and tries to group countries into distinguishable categories based on their IP law systems. One group consists of the developed countries, such as the United States, Japan, and many European countries, which have the strongest and oldest IP systems. The other group is the so-called BRIC countries, which are experiencing rapid economic growth but still offer relatively weak IP protection. Therefore, when an organization from United States, which might be used to strong IP protection, expands to a nation like China or India, it might need to intensify its efforts to obtain patents and trademark licensing, or it rely on alternative dispute resolution rather than formal litigation.

On the global level, IP managers worldwide face shared challenges, and some of them are very industry-specific and may involve deeper socioeconomic issues. One prominent case is the competition between branded and generic pharmaceutical companies, as patients in poor countries with low

purchasing power and the worst public health problems need the drug most, but the patent-holding companies usually would not make enough profit and protect their IP rights adequately from such sales. This illustrates the inherent issues of a useful IP system, namely developing a balanced level of access and exclusion, private rights and public domain, and the individual and society. However, as a patent attorney, the author might have the natural bias to argue for broader protection and might not be able to consider the situation of some interest groups, especially those in developing countries that lack sufficient representation and advocacy. In addition, the author also engages in in-depth discussions on other problems, such as marketing of national-security technology, environmentally beneficial innovation, and regulation of biotechnology development. However, one of the most important issues nowadays— climate change—is left unaddressed.

Overall, the book should be helpful for current IP right managers and practicing IP lawyers, regardless of what specific community or technology sector they serve. Although the overview of the law is not as reliable as a treatise might be, the author's goal is provide more of a practical guide to global IP law rather than a rigorous academic inquiry, and at this he succeeds. At several points, the book gave helpful basic guidelines for generating an IP strategic plan from scratch. However, it will require further experience to fully and accurately carry out an assessment and make specific plans for an organization's mission, but still the tools concept of the "innovation cycle" will be helpful. By recognizing this concept, the goal of developing and applying IP law and practices becomes clear: to stimulate innovation by facilitating each stage in the cycle.

But this discussion is plainly domestic, based on a developed and familiar IP system. When issues go beyond the domestic boundaries, the nuanced balance between public domain and private protection that U.S. law seeks might not be available or welcomed. Facing great variation in economic and social status and need, it would be hard for anyone, especially a practicing lawyer who might be biased to believe in the U.S. IP system, to fully acknowledge or articulate a theoretically satisfactory framework. There is a possibility that, for a developing country, the most important consideration is not to push forward innovation but to maintain the health and safety of its citizens and the stability of the society. In that

case, the factors will be given different weight, and the author's emphasis on the innovation cycle might fail over other external considerations. The situation is further complicated by the fact that globalization has resulted in easy movement of technology and information. Therefore, if there are various levels of IP protection worldwide, the countries that enforce stricter protection might face the flow of patented products or copyrighted materials, at very low cost, from the countries that have little or no protection. Moreover, the author's perspective lies more on the strategic side, and therefore he recommends for "customized" IP management in different countries and industries, but on the legislation level, more options usually mean more administrative cost, and the author fails to suggest an optimal point based on cost-benefit analysis. However, the practical approach the author articulates remains informative and comprehensive; after all, this perspective might be a good starting point to an ultimate, well-balanced, and compromised solution.

Crime, War, and Global Trafficking: Designing International Cooperation. By Christine Jojarth. New York, New York: Cambridge University Press, 2009. Pp. 342. \$30.00 (hardcover).

REVIEWED BY WAMIQ CHOWDHURY

In our seemingly ever-shrinking world, the ability of individuals to harm other states through cross-border actions which might be considered illicit has led to the creation of new international institutions aimed at filling the legal vacuums within which such individuals operate. The challenge, of course, is that creating institutions in a vacuum is extraordinarily difficult. Simply characterizing the best solutions to the problems these institutions address requires groundbreaking analysis, let alone designing the institutions with the capacity to implement those solutions.

Crime, War, and Global Trafficking: Designing International Cooperation is Stanford researcher Christine Jojarth's attempt to begin to understand how we should think about efforts to address four kinds of international trafficking from an institutional design standpoint. Trafficking occurs at the murky intersection of crime and war, between domestic law and tradi-

tional international legal regimes. As the world continues to globalize, the destructive effects of trafficking become more far-reaching and make necessary an international collaborative response that must navigate this intersection. What makes efforts to address trafficking particularly interesting is that the institutions created to deal with the various kinds of trafficking differ in several fundamental ways. Aside from the positive question of how this came to be, there is the crucial normative question of how these institutions should be, and whether or not they currently look anything like they should.

In creating her analytical framework, Jojarth relies heavily on the school of thought developed by Abbott *et al.* as to the central functional features of international institutions. Its main proposition is that whether an institution can be characterized as having a high or low degree of legalization depends on three main factors: obligation, precision, and delegation. High or low marks in each are considered to represent high or low levels of legalization, respectively – or, in other words, hard or soft law.

There are advantages, however, to each end of the spectrum of legalization. In short, an institution that seeks high credibility will want to lock itself in through high levels of obligation, precision, and delegation, while an institution that foresees a need for flexibility in its functions will prefer a design that scores lower on each of those scales. Jojarth theorizes that characteristics of the problem in question will determine where the needs of the optimal institution for that problem lie on the legalization spectrum. The first step, then, is to identify the relevant characteristics of the problems in question.

Jojarth grounds her analysis of problem “constellations” in the assumption that an institution’s design is the result of conscious decision-making by policymakers. The weakness of this approach, of course, is that it ignores the effects of exogenous forces on the process of designing a new international institution, but it is a reasonable way to begin such an analysis. After exploring the standard international relations theories—power-based, domestic politics-based, and functionalist—and their approaches to institutional design, Jojarth develops the functionalist approach by introducing transaction cost economics to her inquiry. This part of the book is one of its most important contributions to the literature, as the author takes transaction cost concepts and applies them to the topic of in-

stitutional design so as to identify the relevant characteristics of a problem for determining optimal institutional design. Jojarth employs three transaction cost variables in particular in her analysis: asset specificity, behavioral uncertainty, and environmental uncertainty.

Jojarth proposes that the problem constellation variables affect the legalization variables in logical ways. For example, high asset specificity for a particular problem should lead to the creation of an institution with high legalization, since it will be important in such a situation that states do not shirk their obligations. On the other hand, high environmental uncertainty should favor institutions with low levels of legalization, so as to allow the institution to adapt to the changing environment. In operationalizing her analytical framework, however, Jojarth makes one conceptual error. Essentially, she uses an approximation of the costs and benefits to a state of continued participation in an institution versus the costs and benefits of shirking as a proxy for asset specificity. However, this is *not* the same thing as the value states place on getting returns from their investments specific to a particular institution. Asset specificity in the context of international institutions would more appropriately refer to efforts expended toward creating one institution that cannot be utilized in the creation of another. In the end, however, the costs and benefits of shirking may be a more important factor to consider for the purposes of institutional design than true asset specificity anyway, making the author's mistake a disorienting one as one progresses through her application of this analytical framework to the four areas of trafficking she examines, but not one that does great damage to her conclusions.

The first type of trafficking Jojarth tackles is narcotics trafficking. Narcotics represents one international problem for which the disparate effects on different countries is obvious: drug-producing states suffer from internal conflict, while neighboring states may suffer from violence due to trafficking, and drug-importing states suffer the harmful effects of the drugs themselves on their people. And of course, for states like the U.S., terrorism financed with drug money makes the security consequences of the illicit trade in narcotics comparable to war. The author first assesses the asset specificity—again, actually the costs and benefits of shirking—of state investments in an international institution dedicated to limiting

the narcotics trade. She argues that cost-benefit asymmetries among different kinds of states should favor the creation of an institution with a high level of legalization, to lock in the commitments of those states that would find it beneficial to shirk. She then examines the behavioral uncertainty inherent to the problem of drug trafficking, and finds that it is high, due to the low governance capacity of many crucial states, the difficulty in monitoring compliance with anti-drug trafficking obligations, and the opacity of the drug trafficking industry. This, she argues, should also encourage creation of an institution with a high degree of legalization. Finally, she determines that environmental uncertainty is low, because drug trafficking is not a novel policy issue, and the drug industry is not being particularly innovative in its methods of trafficking. Therefore, there would be no advantage to making the institution more flexible, and she concludes that the optimal design for an anti-drug trafficking institution features a high degree of legalization.

Jojarth then analyzes the existing anti-drug trafficking legal regime, embodied primarily in the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the Vienna Convention), to see whether it matches the prediction of her problem constellation analysis. She determines that the Vienna Convention is legally binding and contains strong compliance mechanisms, and that it thus establishes a high degree of obligation. With respect to precision, she finds that the Convention's provisions are highly detailed and coherent, suggesting a high degree of precision. And finally, she examines the UN bodies that the Convention delegates tasks to, finding the effectiveness of such delegations to be moderate. Thus, she concludes that the Vienna Convention is an institution with an overall high degree of legalization, which does indeed match her prediction.

The remaining case studies proceed in a similar fashion. Money laundering poses something of a conundrum for Jojarth's analysis, as the problem constellation's high cost-benefit asymmetry suggests high legalization, while its environmental uncertainty calls for high flexibility and thus low legalization. The author concludes that in such a scenario, an institution with moderately hard legalization is most appropriate. Jojarth decides that the primary international anti-money laundering regime, composed of the Financial Action Task Force

and its Forty Recommendations, represents a moderate level of legalization, in line with her expectations. It is difficult, however, to conclude that this means that the regime is appropriate based on the problem constellation: as the author herself points out, that the problem constellation points in two different directions does not necessarily mean that the optimal institutional design lies somewhere in the middle. One consideration may dominate over the other, and Jojarth's analysis provides no way to determine whether this is the case.

The case of trafficking in conflict diamonds and the Kimberly Process Certification Scheme (KPCS) poses no such problems. Jojarth finds conflict diamonds' key problem attributes to be moderate across the board, and thus predicts that an institution with a moderate degree of legalization would be ideal. The Kimberly Process' moderate obligation, high precision, and low delegation make it overall a moderately legalized institution, matching that prediction.

Finally, Jojarth turns to the case of trafficking of small arms and light weapons (SALW), which in practice departs the most from her model. She determines that this problem constellation should encourage the creation of a legal regime with a moderate level of legalization. The primary international SALW institution, however, the UN Program of Action on Small Arms and Light Weapons (PoA), does not meet this prediction. It falls on the low end of the scale with respect to almost all of the components of obligation, precision, and delegation, making it a very soft legal institution. Jojarth admits that this result casts doubt on the explanatory power of her transaction cost model of institutional design.

This should not come as a major surprise. Jojarth's analytical framework is an important step in understanding how international legal institutions should be designed, but it is a somewhat limited one. Forecasting whether an institution should have a high, moderate, or low degree of legalization leaves one with a rather rough understanding of what the institution might look like. Just how an institution's framers should and do go about imbuing their institution with the appropriate characteristics is a far more complicated question. And the transaction cost approach leaves out so many other circumstantial factors that might affect the creation of an international institution, including state power and the extent to which states seek to create institutions for reasons other than

finding effective solutions to these international problems. Jojarth mentions some of these issues in her conclusion, but real answers to these questions are beyond the book's scope, which is unfortunate because an analysis that does not take these factors into account seems somewhat divorced from reality.

Despite its shortcomings, the book represents a vital advance in the understanding of international institutional design and should serve as the building block for future scholarship in this area. Jojarth's development of the transaction cost model of institutional design is an important contribution to the literature, and this framework can be developed upon to more accurately address the realities of institutional design. Future developments aside, the book itself should serve as an important guide for policymakers seeking institutional solutions to the novel and complicated international problems presented by our world today.

Constitutional Rights in Two Worlds: South Africa and the United States. Mark S. Kende. New York, New York: Cambridge University Press, 2009. Pp. ix, 336. \$90.00 (hardcover).

REVIEWED BY NYASHA PASIPANODYA

At first blush, constitutional rights in South Africa and the United States appear to be worlds apart. The South African constitution, which emerged within the last two decades during a global human rights era, represents a fervent attempt by its framers to break away from an odious apartheid legacy, and is now widely considered to have produced one of the world's most innovative and progressive jurisprudence in the area of constitutional rights. In contrast, the United States constitution, with its roots sunk deep in eighteenth century, slave-owning America, espoused the principles of equality and freedom hundreds of years ago, but has taken just as many hundreds of years to evolve its rights' jurisprudence beyond mere rhetoric. Against this backdrop, Kende boldly embarks on a journey to reconcile these two worlds through a comprehensive, comparative analysis of the key judgments made by the South African Constitutional Court and the U.S. Supreme Court on various substantive rights issues. Given the two countries' disparate historical, political, and socio-economic contexts, from the

outset one might inquire as to the purpose and utility of such juxtaposition. As explained in the preface to the book, Kende endeavors to shed light on the various methods of analysis and interpretation used by South Africa's Constitutional Court, highlighting the role the court has played in transforming South African society and comparing it to the U.S. Supreme Court. Ultimately, Kende suggests that the latter could employ some of the former's methods of interpretation.

In the introduction, Kende puts forth several reasons why this constitutional comparison makes sense. For one, the comparative approach is consistent with the increasingly transnational nature of constitutional discourse. Second, there exists some historical basis for comparison, as both nations were born of revolutions that rejected tyranny and share a history of institutionalized racism that has significantly shaped each country's identity. While some similarities are shared, Kende rightly highlights important foundational differences between the two constitutional contexts as well. Significantly, South Africa's constitution follows a very progressive agenda, and its Bill of Rights not only includes "first-generation" rights, which prohibit the government from interfering with an individual's rights, but also "second-generation" rights that require expenditure of government resources, such as the right to health care and education, and "third-generation" solidarity rights, such as the right to a clean environment and cultural membership. Neither of the latter two groups of rights are included in the text of the U.S. constitution. This distinction has undoubtedly contributed to the fact that the two high courts have reached divergent opinions on almost all rights issues.

The book tackles a different constitutional rights issue in each chapter, explaining, comparing, and contrasting the various rationales used by the South African and United States high courts to arrive at their decisions. With regard to the scope of the constitutional law issues covered in the book, Kende properly limits his analysis and excludes structural issues such as separation of powers, questions of criminal procedure, and South African customary law issues. This limitation on scope is positive in that it provides the book with both focus and a more thorough analysis of fewer issues.

The first substantive right the book analyzes is the death penalty. Kende traces how the high courts have arrived at divergent conclusions about the constitutionality of the death

penalty, with the Constitutional Court on one end of the spectrum, abolishing the punishment, and the Supreme Court on the other end, upholding its constitutionality. As Kende points out, the Constitutional Court has informed its analysis by looking to foreign law, while the Supreme Court has been much more closed to the notion of integrating foreign law into its constitutional analysis. Kende argues that the Supreme Court will likely follow the lead of its international counterpart by eventually abolishing the death penalty, and suggests that Supreme Court decisions may be increasingly influenced by international and foreign jurisprudence in the future.

The following chapter highlights the Constitutional Court's advancement of substantive gender equality, focusing on a decision that upheld the criminalization of prostitution, which Kende argues was decided incorrectly. In particular, Kende contends that the Constitutional Court diverged from its usual transformational path, and thus failed to embrace an opportunity to transform society in this area of law. Despite this divergence, however, Kende argues that South African jurisprudence is far more sympathetic to "sophisticated gender discrimination arguments" than the U.S. Supreme Court, noting in particular the Constitutional Court's argument that a law that criminalizes prostitution is discriminatory against women if it does not make male clients liable as well. In this chapter, as in others, Kende's analysis appears to assume that the transformative method of constitutional interpretation used by the Constitutional Court is normatively desirable and superior to a more conservative judicial approach. The question therefore arises whether this is a valid assumption, especially given the anti-majoritarian nature of both high courts. The author could have done more to expound on this underlying assumption.

In the next chapter, Kende explains how the Constitutional Court has aggressively fought to protect gay rights, as illustrated by the Court's decision to invalidate same-sex marriage restrictions. Kende engages in an interesting analysis of the Constitutional Court's gay rights jurisprudence and includes some criticisms that have been made, such as arguments that the Court has been too progressive for the public. Unfortunately, however, the comparative analysis aspect of this chapter is lost due to the fact that Kende focuses most of his

time on South African jurisprudence, as the U.S. Supreme Court has yet to decide on the issue of gay marriage.

When discussing freedom of expression in the following chapter, Kende argues that the Supreme Court is not only incorrect in its formalistic approach to this jurisprudence, but that it should also consider adopting the approach used by the Constitutional Court, which weighs the burden on the individual against the government's justification when deciding speech issues. Again, Kende is noticeably biased in favor of the approaches and rationales used by the Constitutional Court in addressing rights issues. Although this may be justified because South African courts are generally more open to how other courts have approached such issues, while the Supreme Court has not, and perhaps should be, the author could have done more to address this bias. Similarly, in his next chapter on freedom of religion, Kende posits that the Constitutional Court's adoption of a formalistic approach that led to many decisions against religious minorities was an unfortunate divergence from its typically progressive nature. Kende limits his analysis of American jurisprudence to speculation about how the Supreme Court would have resolved the issues presented in the various South African cases.

Finally, in the last chapter of the book, Kende analyzes socioeconomic rights—an area of the law where the South African constitution has been celebrated internationally in its recognition of constitutional rights to housing, health care, and social security. Kende closely analyzes the cases that have arisen and argues that while the Supreme Court is unlikely to recognize such rights any time soon, it could learn much from the South African cases.

Kende concludes that the U.S. Supreme Court could employ the South African Court's "transformative pragmatic" method of interpretation in its future decisions. The problem with this conclusion, however, is that it can be argued that the U.S. Supreme Court already has access to a variety of methods of constitutional interpretation, including the ethical and prudential methods of interpretation. As argued by American constitutional law scholar Phillip Bobbitt, the former method interprets the Constitution while considering the updated and current ethos of the polity, and the latter considers the potential consequences of that interpretation. Accordingly, one could argue that these methods of interpretation could easily

be used by the U.S. Supreme Court to institute a “transformative” progressive agenda, and are only a means used towards a particular end. In South Africa, that end is social change. In the United States, however, the Supreme Court may not have the similar will or necessary public approval to engage in such progressivism.

Despite its criticisms, *Constitutional Rights in Two Worlds: South Africa and the United States* is a unique and valuable contribution to comparative constitutional law. The most outstanding quality of Kende’s book is its careful and thorough exposition of the Constitutional Court’s decisions, and the inspiring account of the ways in which South Africa’s judicial branch has played a significant role in transforming South African society. One is left hoping that courts around the world, including the U.S. Supreme Court, will take a closer look at the ways in which South Africa’s constitutional rights jurisprudence is evolving and shaping constitutional discourse.

Gender Equality: Dimensions of Women’s Equal Citizenship. Edited by Linda C. McClain and Joanna L. Grossman. New York, New York: Cambridge University Press, 2009. Pp. 450. \$90.00 (hardcover).

REVIEWED BY LAURA TURANO

It is undeniable that in the last fifty years incredible strides have been made toward gender equality. The near-success of Hillary Rodham Clinton in obtaining the Democratic primary nomination for the presidency and the selection of Governor Sarah Palin as the vice-presidential candidate on the Republican ticket prompted commentary as to whether the United States had finally achieved gender equality. *Gender Equality: Dimensions of Women’s Equal Citizenship* is a valuable collection of works aimed at addressing this inquiry and critically examining the residual gap between formal commitments to gender equality and achieved substantive equality.

The volume identifies four specific aspects of gender inequality—workplace equality and gender discrimination, work-family or work-life conflict, political representation, and reproductive rights—as persistent obstacles to women’s full civil participation, evidence of gender’s continued relevance, and indications of the value of the book itself. In arguing that gender

equality remains a contemporary challenge, the editors reference recent judicial, legislative, and executive actions.

The volume adopts a “citizenship framework” to guide the gender equality analysis, referring countless times to T.H. Marshall’s conception of a three-part framework of full citizenship: civil rights, which are necessary for individual freedom; political rights, which are essential to participate in the exercise of political power; and social rights, which are required to share in economic welfare and security. The editors rightfully acknowledge the shortfalls of the citizenship framework, outlining the main feminist critiques: that citizenship itself is a gendered concept traditionally contoured differently and unequally between the sexes; that the traditional citizenship concept places less value on work done disproportionately by women; that citizenship privileges the public sphere, which is traditionally male, to the exclusion of the private sphere, that is predominantly female; and that formal equality expressed in gender-neutral language does not signal the irrelevance of gender to citizenship. The editors defend the framework by making a number of points. First, they note that there is a historical tradition traced back to the advocates at Seneca Falls of asserting citizenship-based rights in the struggle for gender equality. Second, they point out that citizenship, in terms of a political and constitutional commitment to gender equality, need not refer only to those with formal legal citizenship status. Rather, the authors argue that equal citizenship can be employed in a more aspirational sense of full belonging, participation, and membership in society. The volume focuses on formal citizenship in chapters discussing immigration and naturalization law, but more often employs the looser, aspirational concept of citizenship.

Overall, the utility of the citizenship framework is doubtful. A formalistic conception of citizenship, as the authors concede, is troublingly confined to those with formal citizenship status, excluding alien women that may be the most vulnerable to gender and other forms of discrimination. It is also inconsistent with U.S. constitutional jurisprudence, which has extended women’s rights under the Fourteenth Amendment’s Due Process Clause and Equal Protection Clause rather than as a privilege and immunity of citizenship. A less formalistic conception of citizenship does not resolve the drawbacks of the framework. Instead, caveats weaken the utility and neces-

sity of the citizenship framework and highlight the need for alternative, more precise vocabulary. The choice to utilize the citizenship term in a more “aspirational” sense strips the term of legal meaning and consequence and risks confusing fundamental tenants of human rights with benefits of citizenship. A designation that is not a legal term of art would not be haunted by the same drawbacks and would more clearly express the author’s intent.

Employing the citizenship framework, the volume is divided into five main parts. “Constitutional Citizenship and Gender” encompasses Marshall’s conception of both political and civil rights and looks at the role that constitutions play in fostering women’s equal citizenship and forbidding discrimination based on sex. “Political Citizenship and Gender” captures Marshall’s conception of political rights and looks at efforts to foster women’s active participation in government, both as protestors and politicians. “Social Citizenship and Gender” looks at the rights Marshall designated as material preconditions necessary for effective participation in society. Essays look at barriers to women’s economic equality, workplace accommodations for pregnant women, and gender preconceptions that shape the federal income tax code, and offer suggestions for how gender can be used as a back door to a broader inquiry into society’s efforts to address human vulnerability and privilege. The fourth section, “Sexual and Reproductive Citizenship,” is not based on Marshall’s typology. Finally, “Global Citizenship” seeks to explore the international dimensions of equal citizenship, exploring the vulnerability of women living in border towns at the “margins of national citizenship,” the importance of exploring traditionally domestic issues, like domestic violence, as a human rights issue, and the problems faced by women in Islamic countries where religious interpretations of the constitution often result in differential treatment between men and women.

Overall, the authors provide insightful analysis that expands the traditional parameter of gender concerns. Nancy Hirschmann’s essay connecting stem cell research, disability, and women’s reproductive citizenship is emblematic of the volume’s efforts to explore gender equality dynamics in a context that may not ostensibly appear to have gender relevance. At times, however, the volume can be faulted for its overreliance on gender inequality to explain the motivation of gov-

ernment actors. This is particularly evident in the volume's repeated characterization of *United States v. Morrison*, a case in which the Supreme Court held that the Violence Against Women Act ("VAWA") exceeded Congress' Commerce Clause powers, as a gender-motivated decision. Roger M. Smith's article contrasts the Court's decision in *Morrison* with its earlier decision to uphold the 1964 Civil Rights Act. Smith concludes that the Court should not have had difficulty in finding that VAWA was justified by Congress' authority and accuses the Court of ignoring gender and failing to protect women. Similarly, Elizabeth M. Schneider's article characterized the *Morrison* court as ignoring the public nature of domestic violence and the link between violence and equality, autonomy, and women's full participation and citizenship. Both Smith and Schneider fail to acknowledge the major shift in constitutional jurisprudence under the Commerce Clause that occurred in the 1995 *Lopez* decision with the inception of a more constrained interpretation of Congress' powers. While the possibility of gender influencing the court's analysis cannot be denied, an analysis of post-1995 Commerce Clause case without a discussion of *Lopez* is deficient, and any comparison to a pre-1995 case is misleading.

Although the volume purports to consider gender equality across national boundaries, like many international texts, it is predominantly centered on a U.S. perspective. Only three of the twenty articles explore women's citizenship in other countries. "Must Feminists Identify as Secular Citizens? Lessons from Ontario," discusses whether there were post-secular citizenship implications for feminists who participated in recent campaigns to recognize Sharia family arbitration. The article offers interesting insight, not only into the Canadian controversy on religious arbitration, but also into the examination of inter-sectionalist feminists and post-secular citizens' role in society. "Women's Unequal Citizenship at the Border: Lessons from Three Nonfiction Films About the Women of Juárez" offers a glimpse at three films' different renditions of a town on the Mexico-United States border that has been wracked with violence against women. The article offers a troubling view of the effect of globalization on vulnerable citizens. Finally, "On the Path to Equal Citizenship and Gender Equality: Political, Gender, and Legal Empowerment of Muslim Women," examines the contradiction between formal declarations of gender

equality in the constitution of Muslim countries and pervasive inequality in practice. Despite these valuable pieces, overall the collection mainly offers deep insight into the quality of women's citizenship in the United States, even though a truly cross-country comparative investigation of the gap between formal and substantive gender equality would better align with the volume's stated objective.

The text's five-part analysis of women's citizenship demonstrates the existence of pervasive gender inequality and the long road that remains to achieving equal citizenship. Although the editors attempt in the introduction to tie the articles together in a coherent illustration of the elusiveness of equal citizenship, a conclusion to help draw the main points together at the end of the volume is notably absent. Still, *Gender Equality: Dimensions of Women's Equal Citizenship* leaves the reader thoroughly convinced of the persistence of a gender equality gap and increasingly aware of how gender permeates many political issues.

The Birthright Lottery: Citizenship and Global Inequality. Ayelet Shachar. Cambridge, Massachusetts: Harvard University Press, 2009. Pp. 273. \$39.95 (hardcover).

REVIEWED BY GENE SMILANSKY

The challenge of blunting global economic inequality has attracted no shortage of ambitious scholarship. Much of this work, like the research of Dani Rodrik and Joseph Stiglitz, frames the growing gap between rich and poor as a failure of global economic policy. In contrast, Ayelet Shachar's *The Birthright Lottery* questions the very legitimacy of the political communities that endow their members with economic opportunity. Shachar argues that the unconstrained transfer of citizenship from one generation to the next arbitrarily perpetuates (and in some cases aggravates) transnational disparities in wealth. Merely by being born, children inherit vastly different life chances depending on the circumstances of their birth. The key to alleviating these disparities, then, is to introduce a sound normative basis for the intergenerational transfer of citizenship—the mechanism by which most of the world's population gains entry into bounded political communities.

Shachar's argument starts from the key premise that citizenship is best understood as a bundle of complex property rights. Much like conventional property law, which governs interests in land or enterprise, citizenship law is merely "a system of rules governing access to, and control over, scarce resources." What is commonly understood as an abstract right to political membership in fact materializes into concrete benefits and opportunities. For instance, citizens are (at least theoretically) guaranteed a stake in governing their country of nationality. Certain public goods, infrastructure, and employment are available exclusively to citizens. And unlike non-citizens, whose legal right to reside in a state is often precarious and can vanish upon a minor infraction of its laws, citizens enjoy a security of status that in most cases cannot be unilaterally revoked by the state.

These tangible benefits of political membership are unevenly distributed across the globe. The more affluent a state, the greater the entitlements and opportunities available to its members. *The Birthright Lottery* contends that the global allocation of citizenship benefits is not only unequal, but also arbitrary. Whether a state assigns citizenship by *jus soli* (birth on the state's territory) or by *jus sanguinis* (blood descent from the state's citizens), an individual's citizenship status depends on the circumstances of her birth, over which she ostensibly has no control. On this theory, the acquisition of citizenship by birthright is no more morally justifiable, as the book's title suggests, than the outcome of a lottery. Importantly, the accidental beneficiaries of this birthright windfall are protected against hapless outsiders by increasingly regulated borders and admission policies.

Shachar offers two central prescriptions to legitimize the current mechanisms of citizenship allocation and dedicates half of *The Birthright Lottery* to each one. The first half argues that the arbitrary distribution of citizenship benefits creates an inherent obligation in the "haves" to the "have-nots." This provocative assertion finds support in Shachar's analogy between citizenship and inheritance law. She likens the unconstrained transfer of citizenship from one generation to the next to the feudal-era fee tail estate, designed to perpetuate the wealth of dynastic families by guaranteeing birthright succession. Early opponents of the fee tail included Jefferson and Madison, for whom "the entailment of land appeared to be

[one of] the most glaring vestiges of a corrupt past.” Over the last two hundred years, this untaxed mode of inheritance has been roundly rejected in property law literature and abandoned by the common law. Why, then, Shachar asks, does an undeniably similar intergenerational transfer mechanism endure, largely unquestioned, in the context of citizenship law?

Unlike advocates of open borders, Shachar rejects the wholesale elimination of bounded political communities. She identifies several important enabling functions of citizenship—security, continuity, and identity—that may justify some degree of bounded membership. After examining and ultimately rejecting several other middle-path policy solutions between the two extremes of eliminating and refortifying political boundaries, *The Birthright Lottery* arrives at the first of its two major policy prescriptions: the establishment of a citizenship tax that redistributes wealth from members of rich states to members of poor ones. For Shachar, the “birthright privilege levy,” like an inheritance tax, satisfies beneficiaries’ responsibility to excluded populations and thereby legitimizes the economic inequality that results from intergenerational citizenship transfers.

Shachar acknowledges that the adoption of a global citizenship tax is likely to be politically contentious. As a work of advocacy, however, *The Birthright Lottery* suggests a broader goal: to undermine the presumed naturalness of unconstrained birthright entitlements. If property law has come to recognize the social obligations of heirs—as a matter of legal duty, not just of moral charity—then surely the rules of political membership, so widely associated with democratic legitimacy and civic participation, should *a fortiori* allocate benefits on a similar normative basis. Birthright ascription, claims Shachar, “flies in the face of our standard liberal and democratic accounts of citizenship as reflecting the choice and consent of the governed.” For many readers, it is deeply unsettling to think of citizenship law as a legal anachronism, more arcane and less normatively justifiable than property law. Shachar seeks to tap that moral discomfort and channel it into support for a boldly progressive policy proposal.

The notion of a birthright privilege levy raises several interesting questions not directly addressed in *The Birthright Lottery*. For instance, Shachar counts the opportunity for democratic governance among the tangible benefits of citizenship.

A progressive global tax based on such a valuation of citizenship may result in the subsidy by democracies of autocratic regimes—membership in which, under Shachar's definition, is worth less than participatory citizenship. Such an outcome is problematic on an instrumental level if the spread of democracy is to be seen as a normative good.

A more serious shortcoming of the first half of this work is its cursory discussion of the basis of citizens' legal duty to outsiders. The inheritance analogy, upon which this new obligation largely rests, becomes problematic when applied across national borders. In the inheritance context, haves and have-nots are subjects of the same legal regime of property rights. Because that regime recognizes unequal property interests among its subjects based on the circumstances of their birth, those who benefit disproportionately must legitimize their windfall acquisition by paying a tax. In the citizenship context, however, there is no analogous single legal regime that allocates citizenship benefits on a global scale. A Swedish national, for example, acquires a certain citizenship interest under Swedish law. But it is not entirely accurate to say that Swedish law ascribes a lesser citizenship interest to a Cambodian national, because the value of that interest is defined by Cambodian law. It is true, as Shachar points out, that both insiders and outsiders are subject to the same legal regime to the extent that every state coercively excludes outsiders from the benefits of citizenship. But unlike a domestic inheritance regime, a country's border policy does not in itself *create* the inequality. (This is not to say that no legal basis exists for redistribution across national boundaries. Such an obligation could be articulated in the context of economic and social rights, for example. Shachar's property analogy, however, does not seem to bear the full weight of the new obligation that she advocates.)

Having critiqued birthright citizenship in light of its distributional effects, Shachar goes on to challenge the normative basis of ascription on its own terms. The second half of *The Birthright Lottery* advocates a shift toward a citizenship transfer mechanism based on "the social fact of membership rather than blind reliance upon the accident of birth." This genuine connection principle, which Shachar terms *jus nexi*, is not an original concept. In the *Nottebohm* case, the ICJ refused, for diplomatic protection purposes, to recognize a businessman's

status as a citizen of Liechtenstein on the grounds that his habitual residence and social ties were centered elsewhere. Other courts have similarly applied the effective nationality principle to exclude individuals from various benefits of citizenship. Shachar, on the other hand, envisions *jus nexi* as also extending citizenship benefits to “resident stakeholders” who do not meet birthplace- or bloodline-based criteria of citizenship but have established a “center of life” in their host country.

Shachar’s *jus nexi* prescription seems more politically viable than the birthright privilege levy proposed in the book’s first half. For instance, it entails many fewer beneficiaries. Under *jus nexi*, states would extend the benefits of citizenship to the limited subset of their populations who lack official status, rather than sharing the country’s wealth with the entire global population. Moreover, *jus nexi* is consistent with the widespread belief, acknowledged by Shachar, that individuals feel a stronger sense of social responsibility at the local and national levels than at the global level. Indeed, while no U.S. immigration reform has ever made genuine connection a central criterion for citizenship status, periodic “amnesties” have extended benefits to those who had already established that genuine connection through years of residence. Under current law, undocumented immigrants may also be eligible for legal residence permits if they can demonstrate ten years of continuous presence in the U.S. and family ties (or other circumstances) that would result in exceptional hardship if they were deported.

While her analysis is heavily theoretical, Shachar demonstrates an advocate’s instinct for maximizing the ideological base of support for the book’s two central policy prescriptions—the birthright privilege levy and *jus nexi*. For instance, Shachar attacks birthright entitlements not only as a matter of distributive justice, but also on the ground that they distort meritocracies—a position with potential libertarian appeal. But it is reductive to distill *The Birthright Lottery* to a two-point policy proposal. The work’s main impact comes from its well-defended proposition that current mechanisms of citizenship acquisition lack any sound normative bases. Given the immense distributional implications of citizenship law, that proposition cannot be easily ignored.

International Courts and Environmental Protection. By Tim Stephens. Cambridge, United Kingdom: Cambridge University Press, 2009. Pp. xxxiii, 365. \$100.00 (hardcover).

REVIEWED BY MARGARET GRAHAM

Environmental issues captured a large share of the international legal community's attention at the end of 2009, as the lead-up to, negotiating of, and fall-out from the Copenhagen Accord occupied hundreds of lawyers and policymakers. The past few decades have seen an incredible growth of international environmental law: a recent United Nations Environment Programme review found over 750 multilateral environmental agreements and 1,000 bilateral treaties. One can expect the field to continue to grow, as natural resources become scarcer and the effects of climate change become more evident. As the field becomes more complex, an evaluation of past developments and future challenges is useful. In *International Courts and Environmental Protection*, Tim Stephens does just that, offering a "comprehensive examination of international environmental litigation." Stephens' book is a useful addition to the burgeoning field of international environmental law, with helpful analyses of past cases and an overview of the array of relevant tribunals, courts, and treaty-based institutions. The impressive bibliography, tables, and extensive footnotes are a useful resource for anyone interested in the field.

In Part I, Stephens examines two different trends: increasing litigation of environmental issues, and the development of a complex bureaucracy of treaty-based institutions. The strengths of the two different approaches will be familiar to anyone who has studied domestic law: litigation is less flexible, essentially confrontational and adversarial, involves a limited number of parties, and can only deal with a narrow range of issues. But litigation also employs an independent and impartial judge, is an inherently rational procedure, and can produce decisions that influence the development of environmental norms. One notable oversight is that Stephens never discusses a major criticism of adjudication: how long it can take. Given the increasing urgency of environmental problems, a forthright acknowledgement of this weakness would have been useful. Treaty-based institutions such as non-compliance procedures (NCPs) are more flexible, can encourage greater co-

operation and coordination among states, can be activated more easily than litigation, and can provide positive encouragement to states rather than punitive sanctions. However, NCPs can focus too much on resolving the dispute rather than ensuring compliance with the underlying environmental regime, and can dilute regimes.

Stephens finds that the increasing emphasis on the “managerial approach” that these NCPs reflect is not inevitable or due entirely to the weaknesses of adjudication, but is instead how states have chosen to structure environmental regimes. He argues for a greater role for adjudication in international environmental governance. While doing so, he offers a helpful overview of the “expanding jurisdictional patchwork,” surveying the international adjudicative bodies in existence today and their engagement with environmental cases, including the International Court of Justice, International Tribunal for the Law of the Sea, the World Trade Organization dispute settlement system, NAFTA tribunals, the European Court of Justice, and the International Criminal Court. He also compares major NCPs: the Montreal Protocol, the Kyoto Protocol, and the Aarhus Convention.

Even after exploring the patchwork character of the adjudication of international environmental disputes, Stephens comes down firmly against current proposals for a dedicated International Court for the Environment (ICE). He points out that environmental disputes are often closely intertwined with other issues, which suggests that a tribunal specializing only in environmental law will attract little business. This seems a reasonable claim, especially given that the Environmental Chamber of the ICJ was created in 1993 but has not yet had a single case submitted to it. Stephens points out the lack of strong support among states for the ICE project and suggests that efforts would be better spent reforming existing bodies that already have state support.

Part II examines the case law in the three main issue areas that have been litigated thus far: transboundary environmental harm, international water law, and the protection and preservation of the marine environment. This is perhaps the most valuable section of the book, as Stephens provides useful summaries and analyses of such key cases as *Trail Smelter*, *Gabcikovo-Nagymaros Project*, and *Southern Bluefin Tuna*. Stephens lists three positive impacts that these bodies of case law have had

on the development of international environmental law: articulating rules and principles; illustrating potential environmental problems and identifying the range of legal issues implicated; and highlighting gaps in international environmental law.

The chapter on litigation relating to the marine environment is the most interesting of the three, probably partly due to the fact that he specializes in law of the sea and partly due to the potential for litigation in this area. Stephens predicts that litigation in the first two categories will remain limited in scope, but forecasts considerable judicial activity in the field of marine environmental protection, thanks largely to the dispute settlement system in the Law of the Sea Convention.

Part III addresses contemporary challenges in international environmental litigation. While the descriptive parts of this section are strong, the normative sections are relatively weak. In Chapter 9, Stephens describes the various participation rights given to non-parties and non-states in environmental regimes. He argues that a high level of public participation in international environmental litigation is desirable. While he acknowledges that there are serious barriers to full standing rights, he argues for the expansion of the right of non-state actors to participate in litigation as *amici curiae*. Stephens' argument is weakened by the fact that he deals with possible problems with this approach in just one short paragraph at the end of the chapter. Issues of institutional "capture" that this reform would raise deserve a more thorough examination. The writing also becomes unnecessarily politicized in this section. He states that allowing participation by environmental NGOs may counterbalance the influence of corporate interests, for which states may be "effectively acting as proxies." Nowhere does he acknowledge that environmental groups may exert undue influence on institutions or states, and that this may be as undesirable as overrepresentation by their corporate counterparts.

Stephens next addresses the problem of jurisdictional coordination in environmental law, examining problems of forum shopping, simultaneous litigation in multiple fora, and successive proceedings. He gives useful examples of these problems, such as the *MOX Plant* dispute and the *Swordfish Stocks* case. In *MOX Plant*, Ireland's challenge to a proposed fuel plant in England was litigated in four different tribunals

(ITLOS, an annex VII tribunal, an OSPAR arbitral tribunal, and the ECJ) under four different regimes (LOS Convention, Euratom Treaty, OSPAR Convention, and EC Treaty). In *Swordfish Stocks*, involving a port ban by Chile on Spanish fishing vessels targeting swordfish near the Chilean exclusive economic zone, proceedings were brought in both the WTO and ITLOS. Although the dispute was resolved through negotiations before any hearings took place, the potential for competing conclusions by the two different tribunals is troubling. Stephens is quick to acknowledge that a wholesale rationalization of the jurisdiction of these competing bodies is a remote prospect. He fails, however, to operationalize his recommendations beyond a vague suggestion of greater formal and informal measures of coordination.

In Chapter 10, Stephens raises the alarm on the potential fragmentation of environmental law this jurisdictional patchwork could cause. Especially problematic is the increasing litigation of disputes with environmental dimensions in issue-specific bodies, such as the WTO and human rights tribunals, who have other agendas and missions. Environmental law is especially vulnerable to destabilization and distortion because it is substantially made up of soft-law principles which often are not given binding legal status. Stephens does not offer any concrete suggestions for how to deal with this potential for distortion of environmental law: the value of this chapter seems to be mostly to draw attention to the potential for conflict. The urgency of this issue is diminished when Stephens concludes, after examining important cases such as *Tuna-Dolphin* and *Shrimp-Turtle*, that there is no evidence to suggest that issue-specific bodies have adopted interpretations of international environmental law that conflict with prevailing understandings. While Stephens notes that the lack of normative conflict in human rights litigation is due to the nature of the cases brought thus far, it appears that the lack of conflict in WTO's judicial bodies has been due to their willingness to be faithful to international environmental law.

Unfortunately, Stephens does not undertake any of his own empirical research, and what he is able to find is sometimes incomplete and outdated. For example, despite the recent explosion of multilateral and bilateral environmental agreements, the only numbers on dispute settlement provisions are from a 2000 study that examined only 150 agree-

ments. While Stephens has numbers on how many cases involving environmental questions have been litigated in the ICJ (ten as of December 2007), and ITLOS (eight), he does not have similar numbers on the dispute settlement system of the WTO or human rights tribunals.

Overall, this is a solid summary of the state of international environmental governance. While it does not offer concrete solutions for future challenges, it highlights potential problem areas in a way that scholars and practitioners may find helpful. Its rigorous academic tone is not calculated to stir passions in the hearts of environmental litigators or inspire young law students to take up the banner, but for scholars and practitioners alike this is a valuable jumping-off point for a more thorough examination of many of the pressing issues in international environmental law. Its conclusions about the future development of international environmental law may also be of interest to global administrative law scholars.