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Terrorism, the Laws of War, and the Constitution: Debating the Enemy Combatant Cases. Edited by Peter Berkowitz. Stanford, California: Hoover Institution Press, 2005. Pp. 196. $15.00.

BY ZOE SALZMAN

The events of September 11 and the ensuing "war on terror" have raised new challenges both for American constitu-

tional law and for the laws of war. While at some level, editor Peter Berkowitz notes in his introduction, war always presents a challenge for the rule of law, this war is particularly challenging, involving non-state actors that are capable of severely threatening powerful states. Each of the six essays within this volume attempts to explain the legal response to this new threat through a close examination of the United States Supreme Court's recent opinions in the Enemy Combatant Cases—*Padilla*, *Hamdi*, and *Rasul*.

Seth Waxman's essay, "The Combatant Detention Trilogy Through the Lenses of History," examines the cases using two different paradigms—the cycle thesis and the institutional capacity thesis. Under the cycle view, Waxman astutely analyzes the Court's attitude during other periods of crisis in American history, noting that there is a pattern (or "cycle"): The Court is initially permissive of encroachments on civil liberties and then later, when the crisis situation has been diffused, apologetically takes a stronger and more rights-protective stance. Waxman argues that the Enemy Combatant Cases mark a break from this cycle, with the Court refusing to acquiesce completely to the executive's position. Waxman suggests that there are many possible explanations for this break, including the influence of social learning from past crisis situations, the "Israeli explanation" where a constant "state of never-ending threat" encourages courts to play a stronger role, and the possibility that we have already moved past the phase of extreme crisis. Waxman also believes that the Court's holdings in the Enemy Combatant Cases can be explained by the Court's growing confidence in its own institutional capacity and its resulting increased willingness to challenge the other branches of government. While the impact of these cases has yet to be fully determined, Waxman argues that the Court has sent a clear message that it intends to play an important role in responding to the challenges of the war on terror.

Judge Patricia Wald's essay, "The Supreme Court Goes to War," focuses on the many questions left unanswered by the Court in the Enemy Combatant Cases. Will detainees be limited to challenging their enemy combatant status, or can they also allege violations of the Geneva Conventions and customary international law to assert their right to POW status? Will the Court's due process criteria from *Hamdi* be applied to noncitizen detainees? Can a detainee allege a violation of interna-

tional law for abusive treatment received at Guantanamo? Judge Wald raises these and many other questions left open by the Court, concluding that Congress must take responsibility and address these issues openly and directly by formulating new rules for a new war. Judge Wald is concerned that if Congress does not intervene, the Court, lacking any legislative guidance, will be carried off into a "boundless sea" of troubled law.

John Yoo's essay, "Enemy Combatants and the Problem of Judicial Competence," argues that the judiciary has inappropriately intervened in military war-time decisionmaking far beyond its institutional capacity. Yoo begins by illustrating what he perceives as an overlooked victory for the executive in the Enemy Combatant Cases, where the Supreme Court accepted many key premises of the executive's position. For example, the Court accepted that the conflict with Al Qaeda was appropriately characterized as a war, allowing enemy combatants to be detained for the duration of that war without criminal charges. In other words, the Court accepted both that the United States was in a state of war and that the power to detain fell within the executive's authority to wage the war. Nevertheless, Yoo argues, the Court ultimately overstepped the boundaries of judicial competence by taking on a policymaking role the judiciary is ill-qualified to fulfill.

Benjamin Wittes's essay, "Judicial Baby-Splitting and the Failure of the Political Branches," agrees with Yoo that the Supreme Court has accepted the essential propositions that the United States is at war with Al Qaeda, that the laws of war apply to this conflict, and that enemy combatants—both citizen and non-citizen—can be held indefinitely without charges. Wittes suggests that while the administration suffered a stinging *rhetorical* rebuke in the Enemy Combatant Cases, the Court actually did very little to constrain the president's power to detain enemy combatants. Like Wald and Yoo, Wittes is critical of leaving these sensitive policy issues to the judiciary. Wittes is also critical of human rights and civil liberties groups for failing to present the Court with a useful alternative to the administration's extreme position and instead adopting an extreme position of their own. In Wittes's view, the Court essentially refused to choose between these two extremes and instead adopted a compromise position that really satisfied no one.

Mark Tushnet's essay, "'Our Perfect Constitution' Revisited," examines the Enemy Combatant cases through the prism of the "Perfect Constitution" theory, which assumes that the Constitution is perfectly capable of solving all constitutional problems that might arise, allowing the government to do what is necessary, yet checking the government's power so that it does not go too far. The problem, argues Tushnet, is that this theory means that it is judges, not the people or their democratic representatives, who will make crucial policy decisions on issues such as the detention of enemy combatants. Tushnet examines the *Hamdi* decision in great detail, illustrating that all of the Justices, no matter which position they took, argued their points while accepting the basics of the "Perfect Constitution" theory. Tushnet argues for an "imperfect Constitution" theory that he suggests would increase public deliberation over these important issues.

Ruth Wedgwood's essay, "The Supreme Court and the Guantanamo Controversy," analyzes the four possible sources of law Wedgwood believes might be invoked in regard to enemy combatants captured overseas: the US Constitution, treaties, customary international law, and statutes. Wedgwood's analysis of international law is more substantial than any of the other authors, but she ultimately concludes that all of these sources of law are problematic in these circumstances and ultimately unsatisfactory. In the end, Wedgwood is critical of what she terms the Supreme Court's "overambitious theory of jurisdiction" and suggests that perhaps the Geneva Conventions need re-drafting to properly address this new kind of war.

This collection of essays is a useful introduction to the Enemy Combatant Cases, especially for anyone not already familiar with American constitutional law. Nevertheless, although Berkowitz has clearly tried to present a real debate, the majority of the essays are fairly similar in their interpretation of the cases. Most of the authors agree that the Court has overstepped its institutional capacity, that there is need for greater Congressional action, and that the cases actually conceded many of the administration's key positions. It is unfortunate that there is no essay written from the perspective of the human rights and civil liberties groups that brought the cases in the first place and that none of the authors take the position that the Court should perhaps be playing a stronger role in the protection of individual rights in this time of crisis. It is

also disappointing that none of the authors address each other's points, so that there is not really a discussion or debate— the collection reads more as a grouping of articles that are linked together merely by subject-matter. Berkowitz's introduction fails to tie the articles together coherently or to frame the "debate" this work purports to be. The lack of debate aside, however, this work does summarize many of the key questions raised by three cases that are likely to have a lasting impact on both American and international law.

Law, Culture, and Ritual: Disputing Systems in Cross-Cultural Context. By Oscar G. Chase. New York, New York: New York University Press, 2005. Pp. vii, 207. $45.00 (cloth).

BY XINYING CHI

Sometimes, to understand ourselves better, we have to look at an Other. When we put ourselves in someone else's shoes, we are in a better position to discover how we are shaped by our own historical and cultural background, and how some of our most basic beliefs are in fact contingent on this background. This is the technique that Oscar Chase employs in *Law, Culture, and Ritual* to examine the cultural origins and the impact of American dispute resolution practices.

Chase begins with the "lesson" of the Azande, a Central African tribe. The Azande consult *benge*, the poison oracle, to determine the truth of contested facts. In one oracular ritual, a small chick is forced to swallow poison, and the truth of the facts is revealed by the chick's death or survival. Though we may think this is bizarre, Chase's point is that *benge* consultation in a trial is perfectly normal in a society in which supernatural forces are thought to pervade everyday life. Not only is it normal, he argues, it helps construct that society's culture. The *benge*-centered dispute processes contribute to the maintenance of Azande social hierarchy and the norms and assumptions of Azande mental life. To the outsider, such as Chase, the lesson of the Azande is that processes used for resolving disputes have a cultural origin and impact—what Chase refers throughout as the reflective and constructive properties of dispute resolution processes.

Having found a cultural explanation for the apparently bizarre ritual of the Azande, Chase turns the outsider's gaze

on dispute resolution practices common in developed countries. He argues that law and evidence in "modern disputeways" function like oracles. The law functions as an oracle to reveal the norms that the judge should apply to a dispute. Evidence functions like an oracle in that it is the source of the truth of contested facts that must be divined by either the judge or jury.

Law and evidence also have similar constructive properties as the *benge* oracle. They legitimize the dispute resolution process by assuring the neutrality and consistency of the result; they reflect social hierarchies of status and gender; and they express a deeply held metaphysical belief in rationality.

The essential insights of his approach thus revealed, Chase goes on to analyze a number of specific features of the American dispute resolution system. In Chapter 4 he examines a few peculiar features of American civil procedure—the civil jury, party-dominated discovery, relatively passive trial judges, and party-chosen expert witnesses. At a broad level of generality, he argues that this procedural exceptionalism reflects and reinforces American cultural exceptionalism, relying primarily on Seymour Martin Lipset's definition of the latter as involving a mixture of liberty, egalitarianism, individualism, populism, and laissez-faire.

In Chapters 5 and 6, Chase provides cultural explanations for the rise of two other American procedural phenomena: judicial discretion in procedural decisionmaking and alternative dispute resolution (ADR). He situates the shift in the early 20th century toward increasing judicial discretion within a larger social and cultural shift in values. Chase argues with great clarity that the development of "discretion" and the categorization of doctrines as either discretionary or legal allowed American jurists to acknowledge the contingency of certain decisions without conceding that all of law was contingent. He similarly attributes the rise of ADR to a combination of institutional, political, and culture forces.

Chase offers an illuminating discussion of the role of ritual in dispute resolution in Chapter 7. He argues that the ritualistic aspects of disputing reflects and reinforces cultural attitudes and expectations in ways that legitimate the dispute resolution system. For instance, the ways in which we address the court and the court refers to itself serve to depersonalize the

judge and to enhance judicial authority. The ritualistic ways in which lawyers and juries behave in court accord with our understanding of their role and status. The repetitive, procedurally prescribed ceremonies influence and sustain the culture from which they grew.

Chase expands on this point in Chapter 8, which focuses on how psychological and social processes facilitate dispute resolution processes' impact on culture. He lists a number of features universal to most official dispute resolution processes that enable them to maintain and create cultural values and expectations. In particular, their public, dramatic, and repetitive natures—in the American context, those rituals performed by judge, attorney, and jury that we see as participants and in the media—play an important role. The acknowledgement of the authority of the law (or the *benge* oracle) contributes to the constructive function: Official dispute resolution processes signal to members of society the norms of correct behavior.

To understand this book, one must abandon the idea that it is a comparative or an anthropological study. An expert in American civil litigation, Chase was driven to "exotic places" by a desire to understand the system in which he has been embedded his whole career. Thus, the Azande are merely a foil for self-examination. He explicitly embraces the tools of "thick description and 'cultural contextualization,'" prominently referencing Clifford Geertz throughout the book. But in reality, he adopts an existing "thick description" of the Azande as a parable to teach us a way of examining of American and Western dispute resolution mechanisms. For that purpose, therefore, it is almost irrelevant whether the ethnography of the Azande is accurate. For Chase, the Azande are paradigmatic of all "small-scale societies." Indeed, it seems almost methodologically necessary that Chase essentializes the "Other," for its role in his book is instrumental.

Once the reader realizes this, Chase's methodology illuminates by putting the reader in the outsider's perspective in regard to the reader's own system. Chapter 3 confronts the dilemma of perspective in a particularly clever way. Chase establishes first that law and evidence are like oracles to us, and second that our belief in them is based on a deeply held rationalist philosophy. Given these two premises, it follows that our very devotion to the oracles of law and evidence depends

on our denial of their oracular properties. To see our dispute resolution processes as culturally contingent, therefore, requires some willingness to suspend disbelief, to question what is natural and logical to us. Chase's very choice of words—describing the focus of inquiry as "disputing practices" rather than legal processes—allows us to abandon certain preconceptions about "law" and to see law as analogous to an oracle. This book helps those interested in American culture to occupy an outsider's perspective, to question what is natural and logical to them.

However, the book has a few weaknesses. One is, as suggested already, that the methodology of the book is initially deceiving. Chase does a solid job of putting Western American dispute resolution processes in cultural context, but by no means does he employ Clifford Geertz's thick description. This is not made clear in the Introduction. Second, some of Chase's specific claims are not fully argued or evidenced. In Chapter 6, he does a less than complete job of showing how ADR has cultural origin and impact. He gestures toward a fuller explanation of the constitutive nature of ADR in Chapter 8, but in this latter chapter he only provides examples of practitioners' and scholars' awareness of the ADR's potential impact on culture, never really satisfyingly explaining his views. Chase is also less successful in convincing the reader that the narrow interests of legal elites were not wholly responsible for changes in disputing practices, one of the highlighted claims of the book. If he succeeds in making this point, it is only by indirectly showing the close relationship between culture and dispute resolution processes. The empirical claim that one factor was more responsible than another for any given phenomenon, such as the development of judicial discretion, cannot be sustained by his admittedly speculative historical arguments. This weakness may just be one of imprecise writing. Elsewhere in the book, Chase acknowledges the notorious difficulty of making causation arguments between law and culture. Yet he must make such arguments in order to prove his broadest point that dispute resolution processes and culture mutually construct each other.

Finally, although Chase convincingly argues for the cultural contingency of American dispute resolution processes, he falls short of offering a tight theory for how the dispute resolution processes construct the culture in which they are

embedded. In Chapter 8, where he attempts to explain how dispute resolution processes impact culture, he seems to draw on performativity theory to work a connection between the "acting out" of disputing processes and its impact on culture. Broadly, the connection is this: An institution that acts out social practices and relationships dramatically, repeatedly, and publicly endorses them. Unfortunately, however, Chase does not flesh out this connection. Also confusing is the terminology he adopts from cultural studies to explain dispute resolution processes' impact on culture. For instance, in referring to dispute resolution processes' influence on culture, he uses the terms "constructive" and "constitutive," but he explains these terms only very vaguely, as "creating and maintaining" culture. Once immersed in the analysis of specific processes, the reader might discern that the effect of these processes is primarily one of reinforcing and legitimating basic norms and assumptions in the culture; Chase notes that officially imposed dispute resolution processes could also work changes in culture, but fails to specify just how this could occur.

The idea that dispute resolution processes impact culture in myriad ways leads to the main practical implication that Chase draws from his study. He asks policymakers to be aware of the effects that dispute resolution processes have on members of society, an important admonition given the burgeoning interest in law reforms based on comparative insights. However, being mindful of these effects is just the beginning. The reader may be left wondering how policymakers could operationalize his insights. Chase lays an important foundation in *Law, Culture, and Ritual.* The next step, perhaps, would be to theorize the constitutive impact of dispute resolution process on cultural mechanisms through an analysis of law reform efforts.

The Global Environment and International Law. By Joseph F.C. DiMento. Austin, Texas: University of Texas Press, 2003. Pp. 265. $55.00 (cloth) $21.95 (paper).

BY DAVE GUNTON

If self-criticism is the "new black" among environmentalists, then Joseph F.C. DiMento's *The Global Environment and International Law* is in style. In this tidy, accessible volume, Pro-

fessor DiMento appraises the efficacy of various multinational legal efforts to protect the natural environment, with an eye toward identifying the best approaches going forward. Writing for professionals as well as for "the citizen," DiMento categorizes environmental problems and actors, analyzes five case studies of multinational environmental agreements, predicts future developments in international environmental law, and recommends strategies to better protect the Earth's natural resources.

The author begins with a short history of international environmental law, then moves quickly to categorizing the problems and actors that the law must target. He divides the former into regional versus global crises and lists among the latter multinational corporations, smaller "national enterprises," governments, international regulatory bodies, and what DiMento terms "rogues, poor people, and the desperate." He argues that it is important to distinguish not only between problems caused by producers and consumers, but also between problems caused by wealthy and impoverished consumers. While the usual environmental critics and commentators are given their say, DiMento is also careful to treat his subjects evenly, for instance highlighting both corporate environmental sins and successful corporate efforts to promote "green management."

The heart of DiMento's book is an inward-looking appraisal of past international environmental agreements, focusing on the aspects of treaties that increase their chances for success and those that sow their own seeds of destruction. DiMento first reviews the competing claims that international environmental law has been, very broadly, a success or failure, and then presents case studies of five specific multinational protocols. He evaluates them both on their substantive environmental effects and on their ability to promote transnational cooperation and raise public awareness. The Montreal Protocol on CFCs is the only agreement that DiMento terms a clear success, while the Kyoto Protocol and its attendant conventions on global climate change ("emission limitations are both unrealistic in the short run and inadequate in the long run") are ranked as clear failures. He regards the Black Sea Environmental Programme on water pollution, the Basel Convention on hazardous wastes, and the NAFTA environmental side agreement as mixed successes. Like many environmental

protocols, these agreements have proven generally effective at raising public awareness and interjecting environmental concerns into cross-border commercial and political dialogues. At the same time, they have few empirical environmental gains to show for their efforts, and they suffer from vague treaty language and weak enforcement mechanisms. Effective agreements, DiMento concludes, typically feature a scientific consensus about the existence and causes of problems, a legitimate dispute resolution process, transparency, clearly defined NGO involvement, and a compliance-promoting mechanism, among other components.

DiMento concludes his survey with predictions on the trends that will shape the future of international environmental law, as well as with recommendations of his own. He sees the environmental "worldview" further penetrating the international political and trade discourse, greater NGO participation in multinational agreements, and a global science that can better establish the causal links between environmental offenders and effects. He also predicts that global business will vigorously push the case that less regulation is required, given the private sector's own initiatives to promote "green management" within.

For all of DiMento's willingness to look critically at past environmental efforts, his own set of recommendations reads like little more than a wish list. He calls for a return to command-and-control regulatory systems and new criminal and trade sanctions on environmental offenders. He imagines new subsidies for developing nations to promote high standards and a broad rewriting of international property rights, all to be accomplished by acts of "participation-centered global lawmaking" that will feature "a discourse with few if any parallels in complexity." Early in his book, DiMento scolds environmental measures that blithely require a fundamental change in human perception, behavior, or interest, and yet it is to just such a leap of faith that many of his own conclusions return.

The Global Environment and International Law does not say much that has not been said before but what it does say it says well, concisely, and by and large persuasively. This is a worthy primer for readers interested in a survey of the history of international environmental law and of the problems that chronically afflict international environmental legal agreements.

The Limits of International Law. By Jack L. Goldsmith and Eric A. Posner. New York, New York: Oxford University Press, 2005. Pp. 261. $29.95 (cloth).

BY DINO LAVERGHETTA

Neither indictment nor exaltation, *The Limits of International Law* seeks to provide an amoral explanation for why states create and comply with international law. The authors' persuasively argued text concludes that states are not compelled to comply with international law out of a sense of moral obligation but choose to employ international law when it is in their national self-interest to do so. Under the authors' theory, international laws do not restrain the self-interested actions of states. Rather, Goldsmith and Posner portray international laws as carefully chosen instruments of state action: surgically wielded by the state when useful to obtain a given aim and abandoned when no longer helpful. Convincing and provocative, *The Limits of International Law* invites the reader and the legal community to question the foundational assumptions upon which traditional international legal scholarship has been constructed.

Using rational choice theory and game theory analysis, the authors begin by developing a theoretical framework which is applied throughout the remainder of the book. The framework posits that there exist four broad scenarios in which self-interest compels states to engage in certain patterns of behavior with respect to one another: coincidence of interest, cooperation, coordination, and coercion. In the first scenario, what the authors term coincidence of interest, a pattern of behavior results from each state acting in its own self-interest without regard to the actions of other states. In such circumstances, it is merely coincidental that the self-interested actions of two states coincide. The second scenario described by the authors, termed coordination, arises where states receive higher payoffs if they engage in symmetrical or identical conduct. The third model of self-interested behavior, cooperation, occurs when states refrain from activities that are in their immediate self-interest in order to reap larger longer-term gains. Finally, in scenarios of coercion, more powerful states compel weaker states to act contrary to their own self-interests.

These four models, the authors argue, explain state behaviors associated with international law.

In Part I, the authors apply their theoretical framework to behavioral patterns associated with customary international law. Traditional scholarship defines customary international law as the uniform and consistent practices that states follow from a sense of legal obligation. This sense of legal obligation is commonly referred to as *opinio juris*. Goldsmith and Posner take particular issue with the *opinio juris* requirement, noting that scholars have yet to develop a convincing explanation for how or why behavioral patterns come to be looked upon as morally or legally binding. The authors further note that the traditional conception of customary international law cannot explain why states change their interpretations of the substance of international law or why states generally apply a conception of customary international law that best serves their interests. Goldsmith and Posner seek to develop a more comprehensive and explanatory theory. Applying the four theoretical models described above, the text demonstrates how self-interest gives rise to and sustains the behavioral regularities that comprise customary international law. The book argues that many of the behavioral regularities associated with customary international law may have arisen from a simple coincidence of interest: that is, individual states acting in their own self-interest without regard for the actions of other states. The authors also assert that the coordination and coercion models may be able to explain certain behavioral patterns associated with customary international law. The text, however, argues that the cooperation model is of little value in the analysis of customary international law, as opposed to the analysis of treaty law. In order to use cooperation as a means of overcoming a prisoner's dilemma, the authors argue, four conditions must be met: (1) cooperative moves must be clearly defined; (2) states must have low discount rates; (3) the parties expect the game to continue indefinitely; and (4) the payoffs from defection are not high compared to the payoffs of cooperation. Goldsmith and Posner assert that the difficulties in satisfying these conditions become much greater as the number of parties participating in the game increases. As such, the "universal" behavioral patterns associated with customary international law are unlikely to be explained by the cooperation model.

Part I concludes with an application of the authors' theoretical framework to specific historical examples of customary international law. Through this application, the authors attempt to demonstrate that prominent historical patterns of behavior are more easily explained by the authors' theoretical models than by traditional conceptions of customary international law.

Part II concerns treaty-based international law. Again, Goldsmith and Posner argue that their theoretical models provide a superior explanation for the states' creation of and compliance with treaties and other international agreements. Essentially, the text asserts that treaty law is instrumentally used by states to surmount the shortcomings of customary international law. International agreements serve a communicative function, providing parties with the information needed to cooperate and overcome the obstacles associated with multilateral prisoners' dilemmas.

In explaining state compliance with treaty law, the authors are forced to confront a quite intriguing question: If compliance with international law has little to do with a sense of moral or legal obligation, why should states prefer formal treaties to informal international agreements? The authors answer the question by pointing to three characteristics that distinguish treaties from international agreements. First, the text points to the participation of the legislature: Domestic legislators want to maintain influence in foreign affairs, while foreign counterparts seek the informational gains associated with formal hearings and legislative debates. Second, the authors argue that the default rules that adhere to formal treaties provide the parties with additional informational gains that can aid them in overcoming the obstacles to cooperation. The text, however, does not explain why states have chosen to apply these default rules only to formal treaties and not informal international agreements. Finally, Goldsmith and Posner assert that the formalities associated with treaties may help in conveying the seriousness of a state in entering into an agreement. The text, however, does not make clear how or why the formalities associated with treaties convey an increased commitment to the agreement. Indeed, the notion that the formalities associated with treaties convey an increased sense of commitment seems to suggest that legalization may signal the birth of a moral obligation not present where informal cooper-

ation between states is involved. The authors' explanation for why states may prefer formal treaties over informal treaties seems incomplete at best.

Part II concludes with lengthy applications of the theoretical models to treaty regimes in the realms of international human right and international trade. While perhaps overly thorough at points, the case studies do help to clarify and further flesh out the theoretical skeleton erected earlier in the book.

Part III seeks to address challenges to the theories. Most interestingly, the authors attempt to make clear why statesmen and nations utilize the language of law in masking pursuits of self-interest, if, as the authors argue, international law does not have a moral component and is simply an instrument of self-interest. Goldsmith and Posner only answer that "states naturally use the moralistic language of obligation rather than the strategic language of self-interest." Disappointingly, the authors never provide a satisfactory explanation of why this is true. The reader is left with the unpleasant feeling that the authors were simply unable to explain the inclination to mask self-interested actions in the cloak of legal-moral obligation without admitting that states and/or their citizens believe that international law does have a moralistic component that provides legal action with greater legitimacy than nakedly self-interested actions.

Those familiar with game theory will appreciate the comprehensiveness of the authors' explanations, while those unfamiliar with game theory may find that the text's outstanding substantive contributions are obscured by the oftentimes dense lexicon and intricacies of game theory analysis. In all, however, *The Limits of International Law* is an enjoyable and important read for all students and scholars of both international law and international relations. Many will undoubtedly disagree with Goldsmith's and Posner's conclusions; however, the text assures that the reader can no longer take for granted the dusty foundational assumptions underlying traditional conceptions of international law. Perhaps this is the text's most important contribution of all.

European Union Law in a Global Context: Text, Cases and Materials. By Trevor C. Hartley. New York, New York: Cambridge University Press, 2004. Pp. 434. $43.00 (paper).

BY KARLIS KIRSIS

With the spectacular collapse of the European constitutional project, some might wonder whether any reason remains to take an interest in European Union law. After all, many of its substantive areas are complex and seemingly mundane. In this book, *European Union Law in a Global Context*, Trevor C. Hartley demonstrates that studying EU law remains important even without an agreed-upon constitution. Hartley's book strives to make many of the intricate features of EU law accessible through a careful mix of case law, treaty excerpts, and insightful analysis that lays out much of what the EU has already accomplished and, as a result, why EU law remains an important field of study. Also, by focusing on EU law as a unique species of international law, Hartley has written a book that should be of interest to students of general international law as well.

While this focus on EU law in the context of international law does provide for many interesting comments and discussions throughout the book, it is this same feature that proves to be one of the book's greatest shortcomings. The author is clearly at his best when wrestling with the intricate features of EU structural and procedural issues. Unfortunately, many of the attempts throughout the book to compare elements of EU law with relevant subjects of international law detract from the overall clarity of presentation and result in a somewhat confusing mixing of topics that reduces the book's value as an introduction to either EU law or international law. Despite this fact, Hartley has produced a thoroughly readable survey of EU law that should be of interest to anyone seeking to gain an introduction to the field.

Before providing a brief overview of the book's structure, a word on its general approach to the topic would be helpful. EU law is a complex amalgam of treaty-based sources, legislative texts and case law. As any student of EU law might readily admit (especially those accustomed to common law cases), European Court of Justice (ECJ) opinions can be dry, long and exceedingly technical. Moreover, the fact that ECJ opinions

are issued with unanimous consent and without dissenting opinions means that much of the critical reasoning behind the outcome is left unwritten, with the words of the opinion reflecting carefully negotiated outcomes seemingly devoid of substance. Add to this the ever-changing enumeration of relevant treaty provisions (each new European treaty includes renumbered existing treaty provisions even when they remain textually the same), and a student is easily lost without some guide as to the issues being decided by the court. Hartley does a superb job of remedying these inherent problems associated with studying EU law by providing for uniform treaty citation throughout (generally to the EC treaty) and by editing down the relevant ECJ opinions to allow readers to focus on the most critical passages. Hartley also does an excellent job of prefacing each edited opinion with a short, engaging statement of the associated facts and concluding each opinion with a helpful summary and insightful commentary on the court's ruling, linking it to the larger themes of the chapter. All in all, the result is a pleasant experience that leaves the reader confident that an accurate and useful portrayal of the substantive law has been given.

The book is divided into seven parts: 1) an introduction to the European Union; 2) an introduction to international adjudication; 3) an examination of the relations between international law, community law, and national law; 4) an examination of the European community and the world system; 5) an exploration of the fundamental rights jurisprudence of the European Union; 6) an overview of direct actions in the European Court; and 7) a brief introduction to substantive EU law.

As explained earlier, Hartley is at his best when dealing with the nuts and bolts of the EU, and this is evident in this first section. Through an adept use of charts, treaty excerpts, and clear narrative, Hartley provides a helpful overview of the origins of the EU and its main legislative institutions and powers. Given the enormous complexity of some of the issues associated with this topic (like co-decision, cooperation, and subsidiarity), Hartley's achievement is all the more impressive.

In Part II, Hartley seeks to provide an introduction to international adjudication by surveying several relevant international institutions (including the International Court of Justice, the WTO and NAFTA), presenting the problem of compliance in international law and providing a brief overview of

the issue of interpretation in international law. The task confronting the author here is admittedly very large and the result is a swift treatment of each relevant topic. This section may be a necessary introduction for any student wishing to examine EU law as a species of international law who has not yet had an introduction to international law generally. However, it does seem to come at the cost of a certain degree of continuity in the book's overall structure.

Part III deals with what might be classified as procedural aspects of EU law such as the treatment of Community treaties by member state judiciaries, the direct effect of directives, and the enforcement of EU law in member state courts. True to the purpose of the book, the author presents each of these topics in light of their relevant counterparts under general international law, in an attempt to put them in context. While this does, at times, detract from the clarity of the presentation of such complicated topics, the overall structure of the section allows for some interesting and insightful analogies.

Perhaps not surprisingly, this book is at its strongest in describing the treatment of international law in the Community legal system and the power of EU institutions to enter into binding international treaties (Part IV). The author also provides a very nice treatment of the development of human rights as a field of law and its subsequent treatment in the EU system (Part V). Specifically, Hartley devotes a good deal of attention to the delicate dance between the ECJ and the German Constitutional Court on the issue of deference to EU fundamental rights protections. This has certainly been one of the more interesting developments in EU law and the author's treatment does the matter justice.

The final two sections of the book ("Part VI: Direct Actions in the European Court"; and "Part VII: Substantive Law – A Taste") provide a somewhat disjointed ending to an otherwise well-structured work. It is unclear why the issue of direct action in the EU system has been separated from the general section on the direct effect of EU directives and the enforcement of EU law in member states. It would seem that all these topics are similarly procedural and would all benefit from a comparison to their respective counterparts under international law. Thus, it is odd that this section on direct action has been carved out and removed from the issue of direct action under international law. The book's final section is exactly

what it says it is: a sampling of the incredibly rich areas of substantive law that have developed within the EU. The author is ready to acknowledge the limitations of this book and, instead of laying claim to any comprehensive treatment of EU substantive law, he seeks to develop in the reader an interest to explore these topics further. That goal is accomplished in this section and the reader finishes with a good impression of the myriad issues that confront the ECJ on a daily basis.

This final section is also a good reminder of what this book is not. It is not an authoritative textbook on EU law, nor does it lay any claim to being one. Rather, the author has sought to present the main aspects of the EU legal system in a manner that will encourage and facilitate comparison with other legal systems in the international order . This is no easy task, and Hartley strives valiantly to provide both perspective and depth of analysis on what is a huge topic. The result is a thoroughly readable examination of EU law that, despite some deficiencies, will no doubt be of use to scholars and students alike.

Decentralization and Democracy in Latin America. Edited by Alfred P. Montero and David J. Samuels. Notre Dame, Indiana: University of Notre Dame Press, 2004. Pp. ix, 300. $47.50 (cloth), $27.50 (paper).

BY NELSON WEN

Of all the forces that have helped shape modern Latin America, the sociopolitical trend of decentralization is perhaps the least discussed and most misunderstood. Broadly defined, "decentralization" constitutes the process by which national governments transfer power and autonomy to local and state authorities. Of course, this definition says little about the factors that enable decentralization, let alone the consequences of decentralization for the political and economic development of a nation. *Decentralization and Democracy in Latin America*, a recent collection of essays, edited and with an introduction by political science professors Alfred Montero and David Samuels, makes a substantial contribution to the contemporary discourse on decentralization by debunking many of the assumptions and misconceptions found in traditional approaches to the phenomenon.

The challenge in dissecting a topic as complex as decentralization in a region as varied as Latin America is to recognize the unique experiences of individual countries while also identifying characteristics of decentralization that are common to multiple countries. *Decentralization and Democracy in Latin America* attempts to address this problem by employing a combination of country-specific case studies and a few conceptual essays that take a more comparative, general approach.

Montero and Samuels contribute an enlightening and thorough introduction, which provides a brief exposition of the concept of decentralization and sets forth the general methodology of the book's authors. First, the editors distinguish between two types of decentralization: political and fiscal. Political decentralization is characterized by the direct election of subnational offices, whether state/provincial or local/municipal. The editors define fiscal decentralization as the degree to which subnational authorities control both the sources of their revenues and the manner in which those revenues are spent.

Having laid the definitional foundation, Montero and Samuels outline the central inquiries of the book and begin their critique of the misconceptions surrounding decentralization. The leitmotif of the study is the relationship between democracy and decentralization. Historically, the editors contend, decentralization has been simplistically characterized as correlating closely with democratization, either as a result of a "top-down" process in which national leaders willingly cede power to subnational authorities, or due to "bottom-up" pressures from local authorities and their constituents. Moreover, decentralization is often depicted as an irreversible process that, in Latin America, has resulted in part from neoliberal political-economic policies. However, Montero and Samuels conclude, and the case studies confirm, that democracy is neither a necessary nor sufficient precondition for decentralization. Nor do the "top-down" and "bottom-up" modes of analysis completely capture what the editors view as critical to understanding the incentives for decentralization: the interaction between national and subnational political elites. Instead, Montero and Samuels argue that decentralization is best understood as resulting not solely from any particular political or economic framework, but as a convergence of factors that include international economic pressures, aligned incentives of

politicians at all levels, and what the editors term historic "sociostructural" changes such as urbanization and economic development.

Although the editors do an admirable job of proposing a sophisticated definition of decentralization and outlining the *causes* of decentralization, the introduction could more clearly emphasize the importance of decentralization to understanding modern Latin America. The authors devote a brief section toward the end of the introduction to the consequences of decentralization but reference other scholars for more thorough analyses. Thus, to some extent the introduction assumes a certain level of knowledge about why decentralization merits a full-length study. But this is a minor critique, as the significance of the phenomenon becomes apparent throughout the course of the essays.

Montero and Samuels' bifurcation of decentralization into political and fiscal dimensions is reflected in their organization of the essays. The first section of essays is grouped into a section entitled "The Political Origins of Decentralization," and contains case studies on Bolivia, Brazil, Chile, Venezuela, and Mexico, along with an essay on the relationship between political and fiscal decentralization in South America. The remaining section is entitled "Consequences for Economic Reform," and includes a comparative essay on Argentina, Brazil, and Mexico, and a study on decentralization and market reform.

Chronology is important when ordering essays on a topic as broad as decentralization, and the editors succeed in placing the essays in an order that is conceptually logical and maximizes the educational value of each contribution. The first case study, by Kathleen M. O'Neill, focuses its analysis on decentralization in Bolivia, yet is an effective introductory essay because it begins with a generalized discussion of various theories of decentralization. O'Neill identifies five primary causes of decentralization: fiscal crisis, international pressure, pressure from local authorities and grassroots movements, sociostructural factors, and political incentives such as party pressures or electoral incentives (i.e., when decentralization enables the national government to maintain popular support). O'Neill then proceeds to test the applicability of each theory to Bolivian decentralization, and concludes that electoral in-

centives best explain why and when decentralization occurred in that country.

The remaining case studies illustrate the somewhat obvious, but nevertheless salient, point that the countries of Latin America have taken many different paths with regard to decentralization. There are countries such as Brazil and Argentina that can be loosely grouped together because state authorities have long exercised substantial autonomy from central government (but whose power was tempered by recentralizing dictatorships), and there are idiosyncratic cases like Venezuela, in which decentralization occurred despite (and in some ways because of) the political dominance of national parties. Taken together, the essays depict a process that resembles a swinging pendulum between decentralization and recentralization with decentralization taking new forms each time it appears.

Redundancy is avoided because each essay takes a different analytical approach to decentralization. David Samuels ("The Political Logic of Decentralization in Brazil") and Michael Penfold-Becerra ("Electoral Dynamics and Decentralization in Venezuela") differentiate the types of decentralization that occur within a country in different time periods, while Gary Bland ("Enclaves and Elections: The Decision to Decentralize in Chile") analyzes decentralization as both a process (the transfer of power through direct elections) and as a political system. Kent Eaton ("The Link between Political and Fiscal Decentralization in South America") does a comparative study of the correlation between the political and fiscal decentralization in Brazil, Argentina, Chile, and Uruguay. Finally, the section on "Consequences for Economic Reform," takes a more empirical approach to the topic by analyzing data evidencing fiscal decentralization as well as the substantive outcomes of policy decisions to decentralize.

In sum, the essays serve as an informative starting point for those not well-informed about decentralization, as well as a useful reference guide for more in-depth discussion of decentralization in particular countries. With *Decentralization and Democracy in Latin America* Montero, Samuels, and the contributors have presented careful research and arguments that should serve as a point of departure for further discussions of this much-overlooked phenomenon. However, the book's most valuable feature is that its subject overlaps all aspects of

the political, economic, and social life of Latin America, and should thus appeal to historians, economists, and policymakers alike.

Human Rights in Africa: From the OAU to the African Union. By Rachel Murray. Cambridge, United Kingdom: Cambridge University Press, 2004. Pp. 349. $80.00 (hardback).

BY JESSICA E. CHICCO

The transition of the Organization of African Unity into the African Union in 2002 provided a renewed window of opportunity to bring human rights concerns to the forefront of the organization's mandate. Rachel Murray adds yet another insightful study of human rights in the African context by looking at how this institution has approached human rights concerns. Critical of both the African Commission's lack of fervor and the lack of support, both financial and structural, from the Assembly of the African Union, Professor Murray outlines the network of organizations, both old and new, that play a role in monitoring, promoting, and enforcing human rights in Africa.

Murray begins with a historical overview in Chapter 1 of human rights in the Organization of African Unity and the structural and priority changes brought about by restructuring the OAU as the African Union. This introduction is followed by a chapter dedicated to analyzing the relationship between the OAU/AU and the African Commission on Human and Peoples' Rights. The author includes a thorough discussion of the newly established African Court for Human and Peoples' Rights. Murray dedicates the remaining chapters to describing the role of the OAU/AU in regards to specific prominent human rights issues.

In Chapter 3, Murray sets forth the link between human rights and democracy that has developed since the end of the Cold War and that has been advocated by the OAU through the informal promulgation of standards for a democratic state. The chapter analyzes governmental transitions brought about by military coups, as in the case of Sierra Leone and Niger, in relation to human rights violations. It then goes on to discuss the role of the election process and the perceived principles of democratic elections. The author notes that the OAU/AU has

understood human rights to be an important element of a state's obligation and has thus expanded on the concept of what constitutes a democratic state, suggesting the existence of a constitution, separation of powers, and protection of human rights as traits of a democracy. She concludes with a call for implementation of these standards by encouraging the AU to go beyond the "rhetoric."

In the fourth Chapter, the author analyzes the relationship between situations of conflict and human rights violations and enforcement. Murray begins by reviewing the role and limited involvement of the OAU/AU in conflict situations and its dependence on outside assistance from the UN or other organizations due to a lack of funding and logistical support. She then evaluates the function and effectiveness of different mechanisms for conflict prevention, management and monitoring. The chapter ends with a quick study of human rights and humanitarian law approaches in times of conflict and the responsibilities of states to protect human rights, especially in light of the threat of terrorism.

In Chapter 5, the author looks at how the OAU/AU has approached human rights issues particular to women, especially in the area of women's participation in development and decisionmaking in conflicts. The OAU/AU has focused on the need to increase women's participation, with a presumption that such involvement is likely to promote peace and development. Professor Murray, although applauding this effort to boost women's participation, notes the underlying assumptions of the role and character of women that are underscored by the OAU/AU's motivation. The chapter then turns to the Protocol on the Rights of Women in Africa, which falls in the domain of the African Commission, in which Professor Murray encourages more meaningful AU involvement. The section concludes with a case study of the Women's Committee on Peace and Development, including a discussion of its mandate and restructuring plans.

The rights of children are discussed in Chapter 6, with a particular focus on the African Charter on the Rights and Welfare of the Child and the eleven-member Committee established under the Charter to promote and protect the rights established therein. Professor Murray points to the flaws in the effectiveness of the Committee, incorporated under the AU, including states' delinquency in submitting reports and

the Committee's disuse of the review procedure for individual petitions. The chapter gives an overview of themes of the work of the OAU/AU in the realm of children's rights, including development, health, child labor, and children in conflict. Professor Murray reprimands the OAU/AU for its ad hoc approach and its lack of concrete action and encourages the AU to undertake the coordination of its standards with those of the Charter.

Chapter 7 is dedicated to the rights of refugees and explores how the OAU has approached refugee law through the "Africa-specific" Refugee Convention. It then turns to the mechanisms the OAU/AU has put in place to deal with refugee issues, including the Commission on Refugees (initially established to tackle the difficulties presented by refugees leaving Rwanda), the Bureau for Refugees, Displaced Persons and Humanitarian Assistance, and the Coordinating Committee on Assistance to Refugees, which unites the OAU with other organizations such as the ILO and the UNDP. The chapter ends with a review of the OAU/AU's present approach to the refugee situation and a discussion as to who bears the responsibility of ensuring refugee rights, with an emphasis on the role of the UNHCR in filling the gaps resulting from the lack of an implementing organ under the OAU Convention.

Lastly, in Chapter 8, the author looks towards development as a human right, and the function of the New Partnership for Africa's Development. The author describes a human rights-based approach to development, including a brief description of what the OAU/AU has identified through practice as elements of this approach—democracy, the right to participation, environmental protection, and various socio-economic rights. Again, Professor Murray considers how the OAU/AU has answered the question of responsibility, noting that it has recognized that multiple actors share the duty to provide for this right. The conclusion sets forth an assessment of the New Partnership for Africa's Development and a hope for greater collaboration between the organization and the AU Commission.

Throughout, the author frames the work of the OAU/AU in the context of the work of the UN and other international organizations, and highlights the sometimes complimentary role they play in the human rights field. The book puts forth a complete survey of the most prominent human rights issues in

Africa as they relate to the work of the OAU/AU. While there has clearly been some attention dedicated to human rights issues, Murray remains critical of the efforts undertaken under the guidance of the AU, repeatedly stating that many of the areas lack coherent action and have halted at standard setting. The author calls for specific action to be taken, such as greater collaboration among AU organs and the African Commission, the consolidation of standards, and greater attention to the implementation of these standards. Concise overviews of the history of the institutions and human rights concerns that have affected Africa both aid the reader who might otherwise lack the necessary background and pave the way for a close analysis of the African Union's (often missed) opportunities to transform its approaches to human rights concerns.

Private Rights in Public Resources: Equity and Property Allocation in Market-Based Environmental Policy by Leigh Raymond. Washington, DC: Resources for the Future, 2003. Pp. x, 253. $55.00 (cloth), $21.95 (paper).

BY JORDAN FLETCHER

In *Private Rights in Public Resources: Equity and Property Allocation in Market-Based Environmental Policy*, Leigh Raymond discusses the role played by equity norms in the formulation of environmental policy. Focusing on market-based regulation, Raymond asks how distributional concerns influence initial allocation of rights in licensed property schemes.

Both academically rigorous and accessible, Raymond's study situates an empirical examination of the environmental policymaking process within a framework of property theory. The author concludes that in the cases of sulfur dioxide regulation under the Clean Air Act Amendments (1990), land policy under the Taylor Grazing Act (1934), and the ongoing negotiations to regulate emissions of global greenhouse gasses, specific and competing equity-based norms of ownership informed the behavior of political actors. He argues that, in certain circumstances, future initial allocations of licensed property rights could exhibit a similar dynamic.

In recent years, the prominence of market-based tools in environmental regulation has grown. These mechanisms attempt to control resource consumption and pollution through

the use of economic incentives. In contrast to traditional command-and-control style regulatory tools, market-based schemes seek to promote efficiency and flexibility—lowering the overall social cost of achieving a given level of environmental protection by decentralizing decision-making to actors in the marketplace. In these contexts, Raymond employs the term "licensed property" to describe private rights which provide a significant degree of security and exclusivity but remain ultimately unprotected from future government adjustment or cancellation without compensation. He notes the scant attention paid by academic literature on public choice and market-based policy to initial allocation of rights and the impact of equity concerns in this allocation process. Raymond argues such attention is crucial since market-based policies can have significant distributional impacts. Additionally, if equity norms do in fact influence the decisions of political actors, understanding how this process occurs could be of great importance.

Chapter 1 defines and describes "market-based" and "licensed property" schemes and locates the three case studies within the landscape of licensed property regimes. Raymond challenges the widespread notion that such market-based tools are a new development by citing a long history of diverse usage in environmental management. He then considers the lack of attention to initial allocation of rights and equity concerns, noting that such allocations have generally been considered irrelevant to ultimate efficiency, or else referred to derisively as rent-seeking by private interests. Raymond refutes these views and rejects normative and pragmatic arguments commonly made against consideration of equity in market-based resource policy.

In Chapter 2, Raymond provides a general overview of the property theory on which he bases his analysis. He contrasts justifications and purposes of property rights offered by the works of John Locke, Morris Cohen, David Hume, P.J. Proudhon, and then explains how each of these views might inform a particular allocation process for licensed property. He concludes by demonstrating how the theories of G.W. Hegel and Immanuel Kant may offer insight into the process by which contradictory ethical norms may be reconciled to inform workable initial allocations of licensed property rights.

After laying down this analytical framework, Raymond examines his three case studies in turn. He uses written and oral accounts of the administrative, legislative, and diplomatic struggles to understand the dynamics of the process by which final sets of distributive principles and outcomes were created. He proceeds in each case first by demonstrating that forms of licensed property were created to address ecological problems and that the political actors involved raised numerous arguments founded on notions of equity regarding the distribution of rights. Next, Raymond seeks to show that the final allocation rules followed carefully a few specific equity norms. Finally, Raymond argues that, in all three cases, policymakers arrived at the form and content of the norms by harmonizing competing theoretical principles. In particular, Raymond describes the American cases as exhibiting a conflict between Locke's "intrinsic" justification of property and Cohen's "instrumentalist" version, a conflict ultimately synthesized though a Hegelian dialectical process of "fractious holism." Similarly, in the international climate change context, Hume's "possessory" framework continues to clash with Proudhon's "egalitarian" principles. Raymond suggests that this conflict might be resolved through a Kantian synthesis similar to the Hegelian one which occurred in the United States.

Summarizing his findings, Raymond expresses surprise that a similar framework of theoretical conflict and resolution should manifest itself in such widely divergent contexts. He hypothesizes that the more a resource is perceived to be tangible and immediately beneficial, the more initial allocations may favor Lockean claims based on prior use. Conversely, where resource use lacks a plausible connection to the Lockean model, other notions of property and equity may be dominant. Finally, Raymond suggests the implications of his findings for students and policy makers. From a theoretical perspective, he notes that his results shed light on the use of property theory to conceptualize the relationship between different policy instruments, and he hopes that the demonstrated importance of equity norms in guiding political behavior will provoke scholars and practitioners to pay greater attention to such norms in the future. From a pragmatic standpoint, Raymond argues that the influence of equity norms in the policymaking process suggests that the range of possible policy op-

tions is narrower in practice than Coasean market-based theory might otherwise suggest.

Overall, *Private Rights in Public Resources* offers an easy-to-read and accessible presentation of complex concepts in property theory, as well as an insightful analysis of the competing equity norms underlying the political debates which produce market-based environmental policy. It should be of considerable interest to students, scholars, and practitioners concerned with natural resource policy, particularly those who seek to understand such policy questions within the context of equity and human rights.