tion behind them. Rereading John XXIII's *Mater et Magistra* (Par. 104-121) in the light of Waldron's work, I find a nicely nuanced discussion of the need for property as a means of appropriating one's own labor (SR) and as a prerequisite to responsible action in the world (GR). Political developments in recent years have given new importance to this document and to the body of doctrine of which it forms a part. This material is rooted in classical and medieval natural law traditions, and in Christian and Jewish religious traditions stretching back to the passage from Leviticus (c. 25) requiring buyers of land to give it back in the jubilee year. Waldron, who deals with neither natural law nor theology except as Locke appeals to them, could have found considerable support in them for some of the positions he finds most attractive.

But it is not fair to ask that a work so broad in scope should be broader still. It is only because Waldron has handled so well the material he set out to handle that I wish he had handled more. There is in fact no need for him to do so. A book like this is intended to be the beginning, not the end, of thinking about the subject it covers. Waldron has provided insights that can be used in analyzing any theory of private property, whether he has taken it up or not.

HARD JUDICIAL CHOICES: FEDERAL DISTRICT COURT JUDGES AND STATE AND LOCAL OFFICIALS. By Philip J. Cooper.[1] New York, N.Y.: Oxford University Press. 1988. Pp. 374. $16.95, paper.

Richard B. Collins[2]

The title of this book suggests an attempt at new enlightenment on the dilemma of the hard case. But Professor Philip Cooper's introduction disclaims any purpose to "sit in judgment on the judges by declaring whether they should or should not have issued the orders in question" (civil rights injunctions). His more modest goal is to present "a rather different view of the judicial process, one that . . . provides a better understanding of the interactions of federal courts and state and local officials." This is to be descriptive and analytical, not prescriptive, except for some "suggestions regarding the ways in which administrators and judges can improve their relationships." Hard choices are the milieu, not the problem.

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Professor Cooper's modesty recedes as we get into the book. While he rarely criticizes the federal district judges, his sympathies firmly lie with plaintiffs in civil rights cases. He is more than a little critical of Supreme Court decisions favoring state defendants. This leads to some doubtful assertions about legal doctrine. Cooper presents the Burger Court as the counter-revolution that was: *Washington v. Davis* "altered" the law and imposed "an extremely difficult burden for plaintiffs to meet"; *Rizzo v. Goode* was "a dramatic departure from a rule of law"; the Court "made it extremely difficult to obtain redress against institutional police misconduct"; the Burger Court "substantially" weakened the exclusionary rule, and it remade the law of standing and the "so-called" abstention doctrine to defeat civil rights claims. All this will cheer Cooper's fellow communicants, but he does little to convert the heathen.

Cooper's subject is federal equitable remedies for civil rights violations by state governments and institutions. He examines five areas: racial discrimination in housing, school segregation, mental health hospitals, prisons, and police misconduct. A chapter discusses legal rules governing each topic generally, followed by a chapter relating one court case in detail, respectively *United States v. City of Parma, Milliken v. Bradley, Wyatt v. Stickney, Rhodes v. Chapman,* and *Rizzo v. Goode*. These ten chapters are preceded by a general overview of the subject and followed by a summing up.

Readers who know civil rights law well have little to gain from the book. The five chapters about particular cases add some interesting detail to that generally known, based on background information and on Cooper's interviews with administrators, lawyers, and district court judges, but nothing surprising or important emerges. Cooper and the losing side speculate about whether the *Rizzo* decision might have gone to plaintiffs with changes in strategy or if the district judge had been less cautious, but this is routine second-guessing.[3] Cooper's general chapters are based on familiar analyses of the issues he tackles, and some of the most important legal problems are not confronted.

The book's value is for readers who are basically unfamiliar with these disputes—for instance, students in undergraduate courses in political science or law, and those who want a crash course in civil rights law—a refreshing change from the customary form of basic legal texts.[4] The subjects and cases are well selected

3. Even more so is Professor Cooper's commentary on the effects of President Nixon's Supreme Court appointments.

4. It is not, however, instructive on how a book should be edited and proofed. There are too many howlers, and some sentences are gibberish.

and interesting, and most of the chapters relating them are reasonably well done. Cooper's antipathy to the Burger Court does not intrude enough to spoil his narrative.

Unfortunately, Cooper begins with his weakest subject, housing discrimination. His general discussion here is inferior to the others, and it follows his introductory chapter, also not strong, so the book gets off to a bad start. The housing lawsuit that Cooper relates, the least well known of his five major cases, involved the most intrusive judicial remedy sustained in these cases, mandating public housing in a city that did not want it, the Cleveland suburb of Parma. The justification was racial discrimination, and so the discussion would have been much easier to understand had it followed rather than preceded the school segregation chapters.

Professor Cooper often mentions critics of equitable remedies in civil rights cases, but he does not explain the bases for their criticisms. Readers are given the impression that most critics are simply political opponents of the results, such as proponents of racial segregation. One would never gather from this book that anyone might believe *Brown v. Board* to be right but *Green* to be the wrong, or an unwise, way to carry out *Brown*. "All deliberate speed" gets its customary flogging. Cooper outlines differences between negative and affirmative injunctions, and he classifies injunctions according to their specificity and the complementary breadth of choice left to state administrators. But he does not explain the constitutional issues of federalism, separation of powers, and judicial role that underlie choices among remedies and, as the Court reasons, among possible definitions of the rights themselves.[5] Federalism is mentioned several times but not seriously examined.[6] Separation and judicial role get no attention at all.

To the extent that Cooper's case studies are instructive on the constitutional issues, they suggest that federal district judges are more sensitive to structural issues than some critical broadsides suppose. Judge Johnson's notorious receivership for Alabama mental health hospitals seems less daring when examined closely.[7] While Judge Hogan's liability finding in *Rhodes v. Chapman* was overturned by the Supreme Court, it is interesting to read about his

5. *See generally*, P. ATIYAH & R. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW 150-56 (1987); Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661 (1978).

6. Professor Cooper's one doctrinal statement on the subject asserts that "there simply is not much of a constitutional basis for claims that federal statutes and court orders in the field of mental health illegally invade the province of the states."

7. Johnson's appointment of the Governor of Alabama as receiver strikes me as whimsical, but Professor Cooper is not amused.

caution in devising a remedy, rejecting a laundry list of affirmative orders sought by plaintiffs. Judge Roth's sweeping integration order in *Milliken* is politically more understandable when we learn that it was originally sought by counsel for white parents in Detroit. Even Judge Battisti's public housing mandate in *Parma* can be explained in part by the city's scorched-earth legal defense, resisting any liability rather than attempting to limit its scope to negative liberty.[8]

The great question of whether federal judicial remedies are effective in dealing with major social problems is only indirectly elucidated by *Hard Judicial Choices*. The span of cases Cooper has selected takes us from the gross problems faced in *Brown* and the earliest mental hospital and prison cases to more recent disputes that have wound up depending on the fine distinctions so beloved by lawyers and so inexplicable to everyone else. Cooper joins the criticism leveled by some on the left against the Burger Court, but he attends too little to the fact that the issues had changed since the Warren Court era. Had he done so, he might have addressed the fundamental difficulties posed by public law injunctions.[9]

THE ORIGIN OF SPECIES REVISITED: THE THEORIES OF EVOLUTION AND OF ABRUPT APPEARANCE. By W.R. Bird.[1] New York, N.Y.: Philosophical Library. 1989. 2 Volume set. $65.00.

Phillip E. Johnson[2]

As a Yale law student, Wendell Bird published a 1978 *Law Journal* Note, which argued that the exclusive teaching of evolution in the public schools violates the religious liberties of creationist students and their parents. This unfashionable thesis failed to convince the courts, but the note won an academic prize and even achieved a singular form of commercial success. Friends who were student editors at Yale tell me that fundamentalist churches order it

8. Cooper quotes extensively, and with apparent astonishment, hyperbolic arguments of Parma's counsel, equating the federal government with Hitler and the court's decree with the hydrogen bomb. Cooper may have insufficient knowledge of the reward structure for lawyers.

9. For a thoughtful assessment, see Horowitz, *Decreeing Organizational Change: Judicial Supervisions of Public Institutions*, 1983 DUKE L.J. 1265 (1983).

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2. Professor of Law, University of California (Berkeley). An expanded version of this review will appear in FIRST THINGS (Oct. 1990).