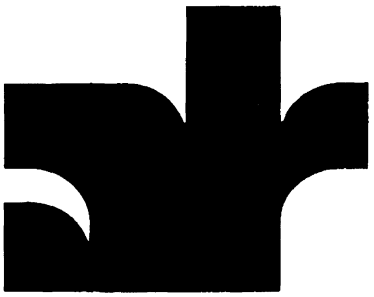

# REVIEW ESSAY

*John Gava*[*] *and Janey Greene*[**]

## THE LIMITS OF MODERN CONTRACT THEORY: HUGH COLLINS ON *REGULATING CONTRACTS* [†]

This is a long-overdue book. For too long the results of large numbers of empirical studies have been ignored by mainstream contract scholarship. These studies have shown that business people rarely use contract in settling disputes, relying instead on trust and non-legal sanctions. Indeed, these studies suggest that, far from being a template around which business organises its transactions, contract is often seen as an impediment to trade and, where used, its use is tactical rather than constitutive.[1] Whilst these empirical findings do not

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* BA, LLB, (Macq), LLM (Sydney); Senior Lecturer, Law School, Adelaide University.

** BA, JD (Tennessee); Lecturer, Law School, Adelaide University.

† A review essay of Hugh Collins, *Regulating Contracts* (Oxford University Press, Oxford 1999). We would like to thank the Research Discussion Group at Adelaide University Law School and David Campbell for their helpful comments.

1 See for example, Stewart Macaulay, 'Non-Contractual Relations in Business' (1963) 28 *American Sociological Review* 45; Thomas Palay, 'Comparative Institutional Economics: The Governance of Rail Freight Contracting' (1984) 13 *Journal of Legal Studies* 265; David Charny, 'Non-legal Sanctions in Commercial Relationships' (1990) 104 *Harvard Law Review* 373; David Campbell and Donald Harris, 'Flexibility in Long-term Contractual Relationships' (1993) 20 *Journal of*

necessarily render contract irrelevant, they do impose a duty on those who are concerned with doctrinal contract scholarship to explain why their efforts are still relevant and are not the modern day equivalent of determining how many angels can dance on the head of a pin. Hugh Collins' book is an important response to this body of empirical literature. Whether it works is, of course, another matter.

Collins' argument is that traditional contract doctrine no longer performs its primary function, which is to be a regulatory tool to help make market transactions more efficient and effective. In order to achieve this goal, he believes that contract doctrine should be comprehensively changed, taking into account market custom and information surrounding market transactions as well as the intimate commercial relationship between disputants. He believes that this project is inevitable given the disintegration that he discerns in contract today, a disintegration which is occurring both in the courts and in the thought of contract scholars. He also believes that this reconstituted contract will have considerable advantages over public regulation as a tool for government regulation of the market.

However, to argue that a book is overdue is not to accept that it has successfully met its aims. We believe that it has not but, before we explain why, it is appropriate to outline Collins' argument.

## COLLINS' ARGUMENT

Collins bases his proposal for a new type of contract law on his understanding of market transactions. He sees transactions as having three components: the deal, the relationship between the parties, and the contract. The deal aspect of a transaction is concerned with the benefits associated with a particular transaction. The relationship aspect concerns how any particular deal fits into the longer-term relationship between the parties. The contract is the legal form of the particular transaction. Collins believes that the relationship between the parties is often the most important of these components, so important that the direct benefits of a particular deal have to be weighed against the advantages associated with the relationship between the two parties. This may mean that one or both of the parties may not try to maximise the gains from a transaction if this threatens the larger gains to be made from continuation and enhancement of the relationship. The legal aspect of the contract is, according to Collins, the least important aspect of the transaction and rarely invoked because of the costs and difficulties associated with law and the harm that recourse to the law could cause to the relationship.[2]

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*Law and Society* 166; Steve Hedley, 'The "Needs of Commercial Litigants" in Nineteenth and Twentieth Century Contract Law' (1997) 18 *Legal History* 85.

2 Hugh Collins, *Regulating Contracts* (1999) 127–40, 149–73.

In fact, according to Collins, the presence of trust and the existence of efficacious non-legal sanctions make recourse to the law largely unnecessary. Trust between parties will minimise disputes and allow those that develop to be settled far more amicably and efficiently than through the assertion of strict contractual rights in court. Collins believes that trust, which he sees as the most important ingredient in commercial relationships, will be harmed by use of the law because recourse to law threatens the social bonds necessary for the formation and maintenance of trust. Collins does recognise, however, that contract can be used to settle disputes, especially where trust relations have broken down or where the parties calculate that the gains from litigation outweigh those expected from the maintenance of the business relationship.[3]

It is in this context that Collins wishes to consider the rules and principles that make up classical contract.[4] He begins by spelling out the role he sees for contract. This he identifies as being a governmental tool for the better regulation of the market. By this he means regulation that increases the efficiency of the market. Collins then asks whether contract achieves this purpose. He does not think that it does, relying, implicitly, on the empirical work which shows how marginal contract doctrine is to everyday commerce.[5] This, then, leads him to consider how contract's role as a regulatory tool can be improved. For Collins, contract can only carry out its role if it openly and consistently incorporates market custom and sociological insights into its rules and decision making. In his words, what is needed is a hybrid system uniting the hitherto divergent economic, social and legal discourses which will allow law to deal with commerce in its various guises of deal, relationship and contract.[6]

Collins recognises that opponents to this proposal will have ready criticisms and apparent problems and much of the book is devoted to responding to anticipated criticisms. He does so at an impressive level of detail and, while we do not believe that his arguments are convincing, it is clear that he has tried to answer many potential criticisms in a comprehensive manner.

Collins believes that his proposed hybrid system is the logical conclusion to what he sees as the productive disintegration of contract doctrine.[7] This disintegration is

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3 Ibid.

4 For a number of reasons that are of no immediate importance for this review Collins uses the broader term of 'private law' far more frequently than he does the term 'contract'. Referring to contract does not threaten the integrity of his argument and is more consistent with the title of his book.

5 Collins, above n 2, 5–7.

6 Ibid 41–55.

7 Ibid 41.

happening, Collins believes, because judges recognise that the traditional law is not appropriate for today's business conditions and expectations,[8] but their adherence to what he calls the closure rules, which limit the parameters of legal discourse, does not allow them to properly incorporate insights from economics and sociology into their reasoning.[9] Collins believes that these insights are necessary because the courts will have to be sensitive not only to background economic and social aspects of trade but also to the particular aims of particular business people in particular transactions. It is only by doing this that contract can achieve its full potential as a form of market regulation.[10]

Collins recognises that a possible criticism of his position might come from those who argue that public regulation is designed to do the job that he has allocated for contract. In response, he argues that it is well established that public regulation has not always lived up to expectations and that contract, in his proposed hybrid system, offers advantages of flexibility and reflexivity over public regulation. He also recognises that his proposed hybrid system might raise issues of the legitimacy of judicial law making, but he concludes that contract remains vital enough to ensure that it does not become just another form of social or economic discourse.[11]

Collins devotes several chapters of his book to the examination of how his proposed hybrid system deals with issues of quality (of goods or services) and power in contracting, especially consumer contracts and government contracts. These chapters seem to have been included for reasons of comprehensiveness and are essentially elaborations of his major theme. While these chapters make for interesting reading and add to one's understanding of issues involved in the regulation of varying types of contract, they do not really develop the central argument. Because of this we will not concentrate on them in this review.

## PROBLEMS WITH HIS ARGUMENT

The book is premised upon the view that the primary, perhaps only, role of contract law is as a regulatory tool to construct and maintain 'successful markets'. Readers who do not accept the primacy of this role for contract will not be persuaded by the logical edifice which Collins builds on this foundation. The book does not take seriously the constitutional heritage bequeathed by the common law and contract's place within that heritage. It does not consider the body of historical work which

8 Ibid 49–52.

9 By closure rules Collins means the limits imposed by rules of procedure and evidence on the information which is available to a court hearing a contract case.

10 Collins, above n 2, 56–93, 143–8, 191.

11 Ibid 56–93.

challenges an easy belief in a functionalist role for contract.[12] It does not imagine even briefly that contract may never have been important for the market but that its development may have been driven mainly by institutional and intellectual factors.[13] Had Collins considered these alternative or additional roles of contract law, he might have recognised that his proposal for the reconfiguration of the private law of contract to make it a more efficient tool for market regulation might come at a cost which greatly exceeds any hoped for benefits. In other words, even if his arguments for a hybrid form of contract law are internally consistent and persuasive, it may be that the other roles played by contract are so important that they trump any concerns about contract's role in enhancing economic efficiency.

That the hoped for (efficiency) benefits could and would, in fact, flow from the reconfiguration of contract as a hybrid discourse incorporating economic and sociological 'know-how' is the central argument of the book. Taking the book on its own terms then, the question becomes just how successful this argument is.

The argument can be evaluated on various levels. At the broadest, the entire argument is aimed at addressing a perceived problem: that contract law plays a relatively unimportant role in the market. As Collins recognises, the empirical evidence shows the market getting along quite happily without contract being of paramount importance. Why this is a problem is never explained. Why does the market need a market-savvy contract law when, as Collins stresses throughout the book, trust and non-legal sanctions are the preferred tools for market players? In fact, an entire chapter of the book examines how well two important industries get on with minimal or no help from the law of contract.[14] Is the problem for Collins that the law is in danger of being sidelined, of being rendered irrelevant?

If Collins is suggesting that his proposed hybrid contract would make a contribution to the efficient operation of the market by fostering trust, then a new set of problems arises. If he believes that the direct use of law will help the creation and maintenance of trust he needs to respond to the arguments such as those made

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12 See, for example, Alan Watson, *Legal Origins and Legal Change* (1991) 69–105; A W B Simpson, 'The Horwitz Thesis and the History of Contracts' (1979) 46 *University of Chicago Law Review* 533; A W B Simpson, 'Innovation in Nineteenth Century Contract Law' (1975) 91 *Law Quarterly Review* 247; James Gordley, 'Contract, Property, and the Will: The Civil Law and Common Law Tradition' and David Lieberman, 'Contract Before "Freedom of Contract"' in Harry Scheiber (ed), *The State and Freedom of Contract* (1998) 66 and 89.

13 One of us has dealt with these arguments in greater detail in John Gava, 'Is Privity Worth Defending?' in Peter Kincaid (ed), *Privity: Private Justice or Public Regulation* (2001) 199–232.

14 Collins, above n 2, Chapter 9, 'Contract as Thing' 202–22.

by Carol Rose who argues the opposite. Like Collins she believes that trust is usually the most useful mechanism for solving disputes. But she also believes that trust will only be effective if there is the threat of legal action in the background. This legal action need not be effective; in fact, it should not be too effective or attractive for otherwise it will diminish the attractiveness of trust. Rose believes that law can foster and maintain trust but only by being relatively inefficient.[15] Collins' aim is to make law more attractive to those in commerce. If Rose is right, Collins' approach will undermine rather than strengthen trust in the marketplace.

If Collins' goal is to improve the capacity for trust to be created and maintained in the market, we have a much more viable strategy but one which carries a fatal flaw for Collins' project – there would be little place for contract in such a scheme. To use economic terminology, contract is a micro tool, operating on individual transactions. The fostering of trust would be a macro tool, working at the level of industries and/or regions and would involve economic and social planning. It is likely that private law would play a minor role in developing such conditions.[16]

At a slightly lower level of abstraction, it is not clear that Collins' hybrid strategy would work. Describing it as he does, comparing what he calls social, economic and legal discourses, the project seems plausible enough. But such terminology obscures more than it clarifies. Is contract or private law a 'discourse'? Or is it the law, a historically accepted form of state power which applies the common law's conceptions of justice to disputes between contracting parties? As Atiyah so convincingly argues, law is not an intellectual discourse; it is a formal, closed system of rule application that does not, in any intellectually rigorous fashion, advance knowledge.[17] To call it a discourse allows Collins to make his argument but is he really comparing like with like? Is law really similar to the essentially academic disciplines of economics and sociology? One can imagine mixing

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15 Carol Rose, 'Trust in the Mirror of Betrayal' (1995) 75 *Boston University Law Review* 531, 554–7.

16 See, for example, Simon Deakin, Christel Lane and Frank Wilkinson, 'Trust or Law? Towards an Integrated Theory of Contractual Relations between Firms' (1994) 21 *Journal of Law and Society* 329 and E Lorenz, 'Neither Friends nor Strangers: Informal Networks of Subcontracting in French Industry' in Diego Gambetta (ed), *Trust: Making and Breaking Cooperative Relations* (1988) 194–210, where the implicit lesson is that structures conducive to the creation and maintenance of trust are the most important components of a working trust environment, not the operation of the law. For example, one could imagine government-supported organisations for particular industries to facilitate intra-industry links and the transfer of information, all designed to foster trust.

17 Patrick Atiyah, *Pragmatism and Theory in English Law* (1987). See also Richard Posner, 'Legal Scholarship Today' (1993) 45 *Stanford Law Review* 1647.

discourses, removing bits that one wants and discarding unwanted parts. But does this work when the things that are to be mixed are fundamentally unalike?

This point about the law not being a discourse that can have attractive bits of other discourses grafted onto it may be perceived as semantic quibbling, but the concern is recognised as real by Collins. He argues that, while the discourse of the private law of contract needs to assimilate socio-economic discourses, it is important that the legal component not be swamped by the others. For Collins the legal discourse (or, in everyday terms, the rules and principles) of contract should maintain a degree of autonomy.[18] But he never explains just why law must retain this autonomy, how much autonomy should survive or how to ensure that survival. At points he just seems to assume the law is resilient enough to look after itself in this regard.[19]

That law should retain autonomy is simply asserted. Perhaps this is a sort of 'motherhood' statement which does not need defending. It is certainly one with which we are happy to agree. But in the context of an extended set of proposals which would see the autonomy of law at best eroded significantly, the mere assertion that law should survive as a discrete 'discourse' is perhaps not enough. Central to the possibility of judges' doing what Collins wants from them — regulating commerce by taking into account the general economic and social context of a contract as well as the particular economic and social aspects of particular transactions — is the problem that if this could be done, which is most unlikely, it could only be done in a way which would make law just another form of socio-economic discourse. So Collins' own reasons for valuing some autonomy for law would perhaps shed light on the extent to which he is willing to sacrifice that autonomy.

This question of how much autonomy is enough is not addressed either. Is it possible that the merging of the three systems will be haphazard and incomplete because of the necessity of maintaining law's core, yet undefined, autonomy? Is it possible judges will have a mishmash of information but no real expertise and skill in analysing and using the information? Or is it that Collins requires the mystique and authority of the law and of the courts to give his hybrid system legitimacy?

On a more pragmatic level, the role Collins assigns to judges is not a viable one. As described above, he expects them to be able to apply a law in a fashion which takes into account the economic context of transaction making in the marketplace, the sociological reality of interactions between market players, the intimate economic and social relationships between the transacting parties before the court, and, if that

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18 Collins, above n 2, 53–5.

19 Ibid 54.

were not enough, when the government is a contracting party, to be sensitive to the governmental functions associated with such contracts.[20] All this as well as, of course, having the appropriate expertise in an autonomous law. One could imagine that a superhuman made up of Oliver Williamson, Max Weber, Ronald Dworkin's Hercules and Sir Humphrey Appleby might succeed at doing some of this but even this superhuman would baulk at getting into the heads of disputing contracting parties! How are ordinary judges ever going to come to terms with such a mandate?

Collins never explains how judges are to acquire the expertise that he wants of them. Is it really likely that judges could acquire knowledge of particular markets, have the skill to deal with specialist knowledge coming from economists and sociologists and still remain judges within an autonomous legal tradition?

And the problem is more than one of human capacity to take information on board. Collins seems to believe that the information that his hybrid system requires is available in a form that can be readily discovered and applied. How are the judges to even find out about economic and social context if the appropriate studies do not exist? Will the judges do them? Who will pay for this? The parties or the government? He also fails to recognise that much of the information that he alludes to may not exist in a discrete form, just waiting to be discovered. Isn't it likely that such notions as market custom are often contested and in continual development rather than existing as neat, tidy bundles of information?[21] In fact, as will be shown below, these problems are likely to make the hybrid judging amateurish in the extreme.

An even greater practical problem with the book is the continued insistence that the judges will have to be sensitive to the particular relationship of the two parties before the court. How a judge, or anyone short of God, will be able to do this is not explained. Collins is indeed insistent on this point, referring again and again to the necessity of judges' being fully aware of the parties' expectations about the deal and about their longer-term relationship.[22] For example, Collins is quite willing to impose on judges the task of determining what duty of good faith or co-operation the parties had envisaged.[23] Just how they are to do that is not made clear. Collins

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20 For his claim about government contracts, see 319–20.

21 See for example, Lisa Bernstein, 'The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study' (1999) 66 *University of Chicago Law Review* 711, 711–17; Richard Craswell, 'Do Trade Customs Exist?' in Jody Kraus and Stephen Walt (eds), *The Jurisprudential Foundations of Corporate and Commercial Law* (2000) 118–48.

22 Collins, above n 2, 143–8, 163, 165, 167, 173, 180–2, 191–2, 201, 255, 266–7, 272.

23 Ibid 271.

accepts that the relationship between contracting parties is a dynamic matter, changing to take account of changes in the market and, possibly, deepening through the fact of being a dynamic relationship operating through trust.[24] If this is the case it is misleading to talk about a neat, tidy, identifiable amount or extent of a duty. Rather, it is more likely to be an inchoate, ever-changing part of a close, commercial yet also social relationship. Wouldn't the judges effectively impose their view on the parties? If not, might they not impose the ex post facto duty as currently believed by one of the parties? If the parties agree, they would not be before the courts, of course. If they disagree we have either two understandings, both valid because both are genuinely held but neither controlling because they are not mutually held, or we have opportunism. What is a Collins-style judge to do in such circumstances?

As part of the hybrid project Collins insists that the closure rules, as he describes them, which operate to stop judges considering information which Collins believes to be vital for the operation of his proposal, be changed. It would have been appropriate for these changes to be considered in detail. While Collins does refer to several rules and make a number of proposed procedural changes, his discussion of how these would work is scant.[25] There is no consideration of the possible implications of making such changes. One has to remember that common law contract, as a part of the common law, is part of an integral whole. Wholesale changes to rules and procedures must have effects and these have to be considered to show that the changes do not have unanticipated and undesired effects. This Collins fails to do.

## Some Examples of Hybrid Reasoning

One only has to examine in some detail some of the examples of hybrid reasoning to see how unconvincing Collins' argument is. His treatment of the celebrated contracts case, *Williams v Roffey*,[26] for example only 'works' for Collins if one accepts that a study conducted ten years before that case is relevant in explaining the background to that case as well as the background to that particular relationship. He ignores the fact that between the study and the case there was the small matter of ten years or so of Thatcherism and all the changes that this wrought to commerce and work relationships in the United Kingdom. Is it not possible that there were dramatic changes in the industry, in the nature of business more generally and in the attitudes of the particular parties to the case in that time? In order to treat this case as an example of his preferred mode of reasoning, Collins has to speculate that a potentially outdated study was useful to the court and then

24 Ibid 129, 160–72.
25 Ibid 89–90, 298–301.
26 [1990] 1 All ER 512.

further speculate whether the study provided any insights into this particular business relationship. And even speculation from the study cannot supply evidence to help the court understand the place of this particular deal within the context of the parties' longer-term business relationship. He points to no evidence about the importance of the deal to the parties other than suggesting that the history of events in the dispute showed that it was important to the parties.[27]

The treatment of another celebrated case, *Williams v Walker-Thomas*,[28] raises similar concerns about his general thesis. He begins by noting that, while the case report did not reveal all the details about the general context of the trade (high interest selling to poor consumers in Washington DC), the details can be understood from a study conducted of the company.[29] If one digs a bit deeper, however, it becomes questionable whether one can be as sanguine about this as Collins. First, the study was published some fifteen years after the case was decided. How can we be sure about continuity of behaviour for the company and in the nature of the customers or in the general economy or that of the particular area, Washington DC? Secondly, even if we ignore these concerns, Collins is viewing the case at a macro level. This sort of evidence is too coarse to tell us about the transaction and the parties at the level of detail that Collins himself has demanded. How can we be sure that the study's findings are relevant to this particular deal and this particular relationship (or any other deal or relationship involving the company)? We cannot be sure, of course, and this example is an indictment of his call for a hybrid judging which would intervene in transactions with almost surgical precision.

Collins' analysis of the case is full of expressions which illustrate how speculative his discussion is (and how speculative the efforts of a hybrid judge would be as well). Such phrases as 'we can be reasonably confident', 'we can be sure', 'it seems', 'we may surmise', 'may have been illusory', 'one may surmise' and 'it may be the case'[30] indicate that Collins is guessing. Any judge who attempted to follow Collins' path would be reduced to the same level of speculation. And in this case there is an academic study to fall back on. What about cases before the courts where there is no such study? Is this not this a recipe for ill-informed speculation

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27 Collins, above n 2, 144–8. One only has to read Richard Danzig's celebrated discussion of *Hadley v Baxendale* (1854) 156 ER 145 to see, potentially, how idiosyncratic a particular deal can be. Richard Danzig, '*Hadley v Baxendale*: A Study in the Industrialization of the Law' (1975) 4 *Journal of Legal Studies* 249.

28 350 F 2d 445 (DC Cir 1965).

29 Collins, above n 2, 262–3. The study cited is David Greenberg, 'Easy Terms, Hard Times: Complaint Handling in the Ghetto' in Laura Nader (ed), *No Access to Law: Alternatives to the American Judicial System* (1980) 379.

30 Collins, above n 2, 262–4.

by judges lacking the skill and expertise to find and analyse the relevant information in courts lacking the institutional capacity (financial, intellectual and structural) to find such information? And, at no stage does Collins' analysis attempt to explain the nature of the relationship between the company and this particular customer, either for the deal or the longer-term relationship between them.

A final example will reinforce our concern about Collins' thesis. In his discussion of unfairness in contracts Collins makes a wise argument about the complexities surrounding the whole area. As he shows, if one accepts his tripartite classification of deal, relationship and contract it makes sense to accept the possibility that what appear to be unfair, even extreme, terms in a contract may be balanced by concessions granted in other aspects of the overall relationship. One of the parties may trade one-sided conditions in the contract to help develop the relationship between the parties or to ensure that a particular deal goes ahead.[31] Collins, again wisely, accepts that this sort of calculation is going to be an idiosyncratic judgment made by the parties, one that judges should be hesitant to interfere with.[32] This is perfectly sound. But, of course, it runs counter to his fervent attack on what he calls formalism and to his proposed hybrid, activist, judges. But after having made this analysis Collins then backtracks, arguing that commercial actors would be surprised if the courts followed strict rules which enforced terms in contracts which imposed extremely harsh bargains.[33] In other words, within a few pages we have Collins arguing that judges should be hesitant about finding substantive injustice because it is possible or even likely that the parties have come to a mutually satisfactory agreement when all aspects of the deal, relationship and contract are considered *and* arguing that judges should decline to enforce substantively unfair terms (without mentioning his earlier discussion).

This example shows the strengths of Collins' scholarship and its weaknesses – where his attachment to his hybrid model leads him to contradict his own thoughtful, considered opinion. It would, indeed, be difficult for a judge sympathetic to Collins' position to know whether to intervene or not in cases involving alleged unfair terms because Collins argues that judges should intervene and should not intervene, without explaining this apparent contradiction.

## CONCLUSION

Hugh Collins' book has received favourable comment amongst reviewers.[34] Yet we claim that his argument is flawed. We believe that he fails to consider seriously a

31 Ibid 258–62.

32 Ibid 266.

33 Ibid 271.

34 See, for example, David Campbell, 'Reflexivity and Welfarism in the Modern Law

role for contract apart from being a governmental tool for the more efficient working of the market. We also believe that his strategy fails for several reasons. First, it amounts to a serious challenge to his self-imposed requirement that judges and the law of contract remain distinctively autonomous. Second, the judiciary does not have the capacity to master the sorts of information that Collins believes is necessary for his hybrid model to work. Third, Collins demands of his hybrid judges a God-like capacity to understand the motivations, desires and tactics of individual contractors. This is demanding the impossible. Fourth, even if one ignores all the above, Collins fails to heed his own lessons that market players may use formalism for their own purposes, rendering his activist judges obstructionist rather than facilitative.

Why have the reviewers been so impressed by the book? One obvious reason is that there are many parts of it that are praiseworthy. Collins' analysis of the business deal, business relationship and contract is wonderfully clear and persuasive. His analysis of unfair contracts and government contracting is also illuminating. In fact, we agree with much of what he says. It is the conclusions that he draws from these analyses that seem unpersuasive and so often contrary to his own insights.

A second reason for the book's positive reception may be that it fills a demand. For many academic lawyers, especially those interested in empirical work and the role of law in the market, Collins' book must seem like a godsend. Finally, we have a serious, full-length analysis of contract in light of the many studies on the use of contract in the real world. Were the reviewers so impressed by the fact that someone has taken the empirical studies seriously enough to try to re-conceive the role of contract in light of their findings that they were somewhat forgiving of the problems inherent in this particular re-conception?

A third reason for the book's popularity may lie in the fact that it rides a wave of recent scholarship which tries to incorporate law as a technique for the movers and shakers of the managerialist state. Although Collins prefers Tuebner to Habermas for his high theory, both can be seen as theorists of law as technique, as a managerial tool which enriches the government armoury in its never-ending attempt to fine tune the market and gives lawyers ever more *entrée* into positions of power in the managerialist state.[35]

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of Contract: A Review of Hugh Collins' *Regulating Contracts*' (2000) 20 *Oxford Journal of Legal Studies* 477; Anthony Ogus, Review of *Regulating Contracts* by Hugh Collins (2000) 116 *Law Quarterly Review* 681; Guy Osborn, Review of Hugh Collins' *Regulating Contracts* (2001) 64 *Modern Law Review* 147.

35 See, for example, Kathe Boehringer, 'Freedom of Speech: Jurisprudence' in Phillip Bell and Roger Bell (eds), *Americanization and Australia* (1998) 123–48; Andrew Fraser, 'A Marx for the Managerial Revolution: Habermas on Law and Democracy'

Irrespective of such reasons we can agree with one reviewer that this is one of the most important books written on contract in recent years.[36] However, it is important in a negative sense. We believe that this book may itself be seen as a productive failure, establishing that one possible response to the empirical reality of contract's limited role in the market will lead to a dead end. Collins' most important achievement in this book may have been to show that even the most sophisticated appeal for an activist, functionalist judiciary is not a fruitful way to understand the role and trajectory of contract in the twenty-first century.

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36 (2001) 28 *Journal of Law and Society* 361.
Campbell, above n 34.