FOREWORD

This rich and provocative book describes how Roman law in the classical period (circa 300 B.C.E. to 300 C.E.) and the common law during what future generations may view as its classical period (circa 1800 C.E. to 2000 C.E.) provide the legal infrastructure —legal forms and procedures for resolving disputes— that enables people to engage in mutual activities, and to create, amass, protect, and transfer wealth. As the authors explain, this legal infrastructure helps people solve problems of asymmetric information and mis-aligned incentives across a broad range of activities and resources. The authors present these bodies of law as offering today's law and economics scholars practical lessons in mechanism design. That said, and strikingly, they observe the basic architecture of Roman law and the common law was not a product of conscious design. Both systems began with procedural rules that allowed private parties to bring some types of disputes to public tribunals for resolution. The basic architecture of private law in Roman law and the common law was created to make sense of a large body of result-oriented caselaw that was loosely organized around these procedural rules.

The perspective of mechanism design directs us to look at private law as rules of engagement that may be more or less successful in enabling people to overcome problems of asymmetric information and mis-aligned incentives in mutual activities, disputes over resources, and actions that affect others. One premise of the book is that Roman law and the common law are fairly successful in enabling people to solve these problems. The longevity of these legal systems and their track record makes this a plausible premise. When Roman law and the common law converge on a solution, then perhaps we might generally assume this is a good mechanism for facilitating private ordering. When they diverge, then perhaps we might profitably interrogate and analyze the differences with an eye to determining whether one approach is superior to the other as a matter of mechanism design.

This perspective and the richness of Roman law and the common law yield many provocative observations. I will briefly sketch one of these observations to give you an idea of what you will find in this book.

The observation concerns contract law. Roman law provided people with a set of well-developed form contracts that covered different types of commonplace transactions. People could make a contract outside of these forms but this required a fair bit of effort on their part, including in modern civilian jurisdictions involving a notary to whom people would explain their novel contract. Apparently, one function of the notary is to ensure both parties understood the novel contract. Under the common law, in principle every contract is a novel contract and the parties have the power to define the terms. In practice, form contracts dominate in common law systems. But these often are private forms. When one party supplies a form, then the other party is expected to read and understand the form, and fails to do so at her own peril. This arrangement has led to no end of mischief. The authors persuasively argue that Roman law is superior to the common law in this respect.

You will find many equally provocative arguments in this book. For example, the authors argue Roman law of property is superior to the common law because the common law of real property (land law) is rooted in feudal concepts of tenure. The authors argue this had several unfortunate consequences in common law systems, including land law being unnecessarily complicated, the law of personal property (chattel law) being under-developed, legal rights with respect to ideas and expression (i.e., intangible resources) being mistakenly characterized as matters of property law, and making it easy to cloak with a veil of legality the theft of land and resources belonging to indigenous peoples.

The perspective of mechanism design enables the authors to pack an enormous amount of information about Roman law and the common law in the book. I cannot evaluate the accuracy of their description of Roman law. Thus, it was news to me that Roman law used the institution of slavery to perform tasks that we associate with the law of business organizations. I can attest their account of the common law is impressively complete and accurate given the amount of material covered in a short space. Indeed, the authors understand better than many Anglo-American legal scholars the centrality of equity to the common law of contract and property.

A book as rich and provocative as this invariably raises many questions that must be left unexplored. One such question is whether private law, as the authors conceive of it, is scalable as population and wealth grows. The authors conceive of private law as a system of rules that facilitates private ordering by helping people solve problems of asymmetric information and mis-aligned incentives, and that is developed by public tribunals

gradually over time as people bring disputes to public tribunals to resolve. Such a system existed when ancient Rome flourished, and when Great Britain became a world empire and English-speaking peoples colonized much of the modern world. But the world today is vastly wealthier, and vastly more crowded, than it was when these systems flourished. Time will tell whether private law will adapt. The authors make a persuasive case that the success or failure of private law should be evaluated through the perspective of mechanism design, and that this is a fruitful perspective for understanding the history of private law.

Mark GERGEN
Professor of Law and Associate Dean,
University of California, Berkeley, School of Law