Book reviews

Tom Ginsburg, Mark D. Rosen, & Georg Vanberg, eds. *Constitutions in Times of Financial Crisis*. Cambridge University Press, 2019. Pp. 1044. £85.00. ISBN: 9781108492294.

Crises put constitutions to the test. The US Supreme Court emphasized the persistence of constitutions in its landmark case on the federal power to create a bank in 1819: "we must never forget that it is *a Constitution* we are expounding . . . a Constitution intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs."[1] When US states adopted measures to combat the effects of the Great Depression on its citizens more than 100 years later, this reference provided the starting point of constitutional analysis.[2] When the US Supreme Court upheld a state law enabling courts to ease mortgage conditions for debtors under the contract clause of the US Constitution, its famous holding illustrates the struggle between the integrity of constitutional law and the demands of crises: "While emergency does not create power, emergency may furnish the occasion for the exercise of power."[3] When almost another century later the financial crisis of 2007–09 put constitutions all over the world under pressure, state actors had to resolve this conflict between constitutional constraints and practical necessities yet again.

The remarkable volume *Constitutions in Times of Financial Crisis* explores in depth exactly this relationship. The editors, Tom Ginsburg, Mark D. Rosen, and Georg Vanberg, have succeeded in composing a valuable book that, as a whole and in individual contributions, benefits from an interdisciplinary perspective and comparative approach. The study of financial crises as a phenomenon is demanding because the course and consequences of each crisis highly depend on the existing political economy, constitutional setting, and institutional capacities. The editors approach this challenge by bringing together authors who engage with the research question from the perspectives of political science, law, history, and economics. They address financial and economic crises in Europe, the United States, Latin America, as well as East and Southeast Asia, covering a time span of more than 200 years. The result is a rich and complex study that provokes further thought and advances an important

1 McCulloch v. Maryland, 17 U.S. 316, 407, 415 (1819).

2 Home Building & Loan Assn. v. Blaisdell, 290 U.S. 398, 443 (1934). *See* Mark D. Rosen, *Legislatures and Constitutions in Times of Severe Financial Crisis*, *in* Constitutions in Times of Financial Crisis at 71, 76; Barry Cushman, *The Place of Economic Crisis in American Constitutional Law: The Great Depression as a Case Study*, *in* Constitutions in Times of Financial Crisis at 95, 96, 99, 107–8, 116.

3 Home Building & Loan Assn. v. Blaisdell, 290 U.S. 398, 426 (1934).

debate. Constitutional law has long not been at the forefront of scholarship on financial crises. Instead, the discussion has often focused on matters of concrete policy. But, as Eric A. Posner rightfully points out, "it is wrong to ignore the constitutional questions [as] the technocratic policy questions are tied up with the legal and constitutional issues in complex ways" (at 40). The book contributes to filling this gap.

The volume's starting point is the globally shared experience of the financial crisis of 2007–09, which developed into the Eurozone sovereign debt crisis and caused further economic crises. While the consequences for different countries and their financial markets, economies, and legal systems varied widely, the crises posed common challenges. Measures to stabilize financial markets, alleviate debt burdens, and aid economic recovery needed to be quick, coordinated, avoid creating moral hazard, and reestablish trust.[4] These crisis exigencies provide the backdrop against which to investigate the interdependencies between constitutional law and crisis responses. While many authors in the volume under review focus on these recent crises, others explore historical predecessors. Two crucial questions frame the volume and provide the subtext throughout: How do constitutional norms influence state action during crises, and, vice versa, how do these crisis measures impact the design, application, and interpretation of constitutional law?[5]

In order to examine how legal rules constrain or empower state actors, the contributions conceptualize emergency powers, crisis demands, and constitutional reactions. Reading them together draws attention to common challenges and their potential solutions. But at the outset, there is a question of definition pertaining to the scope of analysis. What counts as a "financial crisis," and why and how can we draw a comparison between different instances of a crisis? The editors do not prescribe a definition in their introduction ("Introduction: Liberal Constitutions During Financial Crises").[6] This induces a broad interpretation. With its global and historical perspective, the volume encompasses analyses of a diverse set of crises and emergencies in the financial and economic area. This is one of its strengths. Specifically, aside from the most recent conglomerate of crises, i.e. the financial crisis of 2007–09, the great recession, and the ensuing Eurozone sovereign debt crisis, the authors engage with the fiscal crises in revolutionary France and the Weimar Republic (Ferejohn), the US Savings and Loan Crisis of the 1980s (Posner), the US state and local pension crises (Rosen), the Great Depression (Cushman; Vanberg & Gulati), the EU's constitutional crises (Fabbrini), economic crises in Latin America since 1900 (Negretto), and the 1997 Asian financial crisis (Dressel). The corresponding state measures that the

[4] Stefanie Egidy, Finanzkrise und Verfassung 58–70 (2019).

[5] *See* Tom Ginsburg, Mark D. Rosen, & Georg Vanberg, *Introduction: Liberal Constitutions During Financial Crises*, *in* Constitutions in Times of Financial Crisis at 3, 3–4. *See also* Xenophon Contiades & Alkmene Fotiadou, *Constitutional Resilience and Constitutional Failure in the Face of Crisis: The Greek Case*, *in* Constitutions in Times of Financial Crisis at 261, 261 (asking: "are constitutions impacted by the financial crisis, and do they play a role in addressing it?").

[6] *See* Ginsburg, Rosen, & Vanberg, *supra* note 5. Only John Ferejohn, *Financial Emergencies*, *in* Constitutions in Times of Financial Crisis at 18, 18, explicitly defines his subject as "financial emergencies." Others emphasize certain main characteristics of their set of crises or refer to a specific instance of crisis.

contributions assess are equally heterogeneous, ranging from granting financial assistance to struggling financial institutions or states, to imposing austerity measures and legislating on economic conditions.[7] This heterogeneity of crises and reactions makes it challenging to draw concrete comparative insights from the volume at large. Each crisis exhibits its own distinct causes and characteristics. These crucially determine the requirements and limits of suitable state responses, which affects both the constitutional evaluation of measures and their impact on constitutional law. Understanding the concrete crisis mechanisms is therefore necessary in order to examine the interaction between a particular crisis and the applicable constitution. For example, while a fiscal crisis, characterized by a mismatch between revenue and expenditure, could be solved through budget cuts, a systemic banking crisis might demand immediate access to liquidity. Transferring the insights from one financial crisis to another requires making these different underlying characteristics and exigencies visible. They are the subject of a large body of economic scholarship, in particular with regard (but not limited) to the most recent financial crisis of 2007–09 and the Eurozone sovereign debt crisis.[8] These insights could have provided a helpful overarching framework beyond individual references[9] to connect the contributions.

The benefits of a common point of reference become evident in the chapters on the Eurozone sovereign debt crisis. Two chapters analyze how the supranational structure of the EU poses difficulties with regard to its crisis responses. Federico Fabbrini ("The Institutional Origins of Europe's Constitutional Crises: Grexit, Brexit, and the EU Form of Government") examines the institutional shortcomings of the EU's reliance on an intergovernmental mode of exercising authority based on negotiations. He proposes establishing the office of a directly elected EU president in order to increase the executive's effectiveness and legitimacy. Turkuler Isiksel ("Constitutionalism as Limitation and License: Crisis Governance in the European Union") describes the EU's supranational structure of "functional constitutionalism" (at 190–6). She conceptualizes the integration process as a "power-building exercise" (at 190) in which limits on power such as budget discipline rules operate as necessary commitment devices. Before this background, three case studies focus on the role of the judiciary examining the supranational and national case law on austerity measures (Brems; Contiades & Fotiadou; Violante & André).

Overall, the chapters offer fascinating insights into the interaction between financial crises and constitutions. Four broader perspectives should be carved out. They

[7] Ferejohn, *supra* note 6, at 22, offers a typology of general emergency powers; for a typology of financial crisis containment measures, see also Anna Gelpern, *Financial Crisis Containment*, 41 Conn. L. Rev. 1051, 1071–8 (2009).

[8] *See, e.g.*, Martin F. Hellwig, *Systemic Risk in the Financial Sector: An Analysis of the Subprime-Mortgage Financial Crisis*, 157 De Economist 129 (2009).

[9] Concrete comparisons between types of crises, such as security and financial crises (*see* Ferejohn, *supra* note 6, at 18–19; Eric A. Posner, *Rule-of-Law Objections to the Lender of Last Resort*, in Constitutions in Times of Financial Crisis at 39, 50, 55–6), or instances of crisis (*see, e.g.*, Posner, *supra*, at 40–1 n.4), are limited to the analysis within each chapter.

concern institutional interactions, judicial decision-making, individual rights, and constitutional reactions.

First, the volume deeply engages with cooperation and conflict between state actors during financial crises. The prevailing narrative throughout the volume seems to confirm the common understanding of crises as a moment of executive power. The contributions focus on the executive and the judiciary, undeservedly leaving a more marginal role for the legislature. Moreover, central banks—often important actors during financial crises—are mostly incorporated in the general assessment of executive powers.[10] Their unique feature of independence and their special instruments unfortunately remain largely unexamined.

Two chapters most saliently focus on the concept of emergency power as well as the conditions and dangers of its use. John Ferejohn ("Financial Emergencies") examines how revolutionary France and the Weimar Republic dealt with fiscal emergencies. He carves out the conflict between the need for a quick crisis resolution and the constraints of ordinary legal processes and constitutional rights. Ferejohn observes a preference of states to choose ordinary means to respond to financial emergencies despite their limited adequacy. He points out that creating legislative emergency powers threatens permanently to entrench crisis measures, with the consequence of the executive overstretching its authority in future crises, thus upending the balance of powers into the constitutional order without the necessary consideration. Eric A. Posner ("Rule-of-Law Objections to the Lender of Last Resort") emphasizes the executive's inherent authority to exercise the necessary crisis powers. Comparing government responses to the US financial crisis of 2007–09 with the Savings & Loans crisis of the 1980s, he characterizes Congress as "too slow, too inexpert, and too polarized" (at 49) to take swift encompassing emergency action, and makes it responsible for impeding a suitable executive crisis response. He concludes that, during the US financial crisis management of 2007–09, "constitutional constraints played a limited role, possibly none at all" (at 56).

The potential counternarrative to executive primacy, i.e. the functioning and institutional capacity of the legislature in crises, remains largely untold. The authors point out the limits and pitfalls of legislative action during crises, but—what is consistent with their arguments—they do not engage much with the value and power of legislative

[10] Only Posner, *supra* note 9, engages with the power and measures of the US Federal Reserve throughout his analysis. Ferejohn, *supra* note 6, at 19, 22, addresses central bank measures, such as devaluing the currency, and categorizes Federal Reserve actions in his typology. Georg Vanberg & Mitu Gulati, *Financial Crises and Constitutional Compromise*, *in* Constitutions in Times of Financial Crisis at 117, 137–41, assess the judicial review of the European Central Bank's Outright Monetary Transactions (OMT) program; *see also* Gonçalo Saraiva Matias, *Foreword* to Constitutions in Times of Financial Crisis at ix, ix–x. Teresa Violante & Patrícia André, *The Constitutional Performance of Austerity in Portugal*, *in* Constitutions in Times of Financial Crisis at 229, 230–1, include troika measures in their analysis, which involve the European Central Bank; see also on the troika and the OMT announcement, Turkuler Isiksel, *Constitutionalism as Limitation and License: Crisis Governance in the European Union*, *in* Constitutions in Times of Financial Crisis at 187, 199, 201.

crisis resolution.[11] There is a visible tension between (implicitly) acknowledging the power of legislatures swiftly to enact comprehensive crisis programs, on the one hand, and criticizing their reactions as reluctant, unsuitable, and insufficient, on the other,[12] which would deserve more attention. Yet, legislative crisis measures mainly play a role as the subject of judicial review. This seems surprising given that many countries took swift legislative action during the financial crisis of 2007–09. These coordinated responses ultimately were crucial for stabilizing financial markets. While the legislative history of the US Emergency Economic Stabilization Act of 2008[13] could be one of stalemate as the initial attempt to pass it failed, it could also be highlighted as the first comprehensive legislative program enabling the executive to stabilize financial institutions.[14]

Only Mark D. Rosen ("Legislatures and Constitutions in Times of Severe Financial Crisis") concentrates on the legislature's capacity to act, using the pension crisis in US states as an example. He argues that constitutional rights provisions, such as the contract and pension clauses in the United States, grant no absolute protection against economic policy measures, but allow legislative limits if the end is sufficient and the means are suitable. Rosen develops a set of behavioral rules ("Special Norms") for this kind of legislative action, which include duties to act, to engage with constitutional consequences, and to make politics through "persuasion and compromise" (at 84–8). In a similar vein, Xenophon Contiades and Alkmene Fotiadou diagnose "accelerated lawmaking" (at 277) as a symptom of the Eurozone sovereign debt crisis. They therefore analyze how the judiciary uses proportionality review to ensure that the legislature "studied, and took seriously, alternative measures and their potential impact" (at 267) even during crises and under time constraints.

Second, many chapters share a focus on courts with their function as prominent interpreters and potential enforcers of constitutional constraints in crises. The prerequisite for any judicial engagement with crisis measures is a corresponding mandate. Two contributions focus on balanced budget rules, which could assign this task to the judiciary. R. Daniel Kelemen ("Commitment for Cowards: Why the Judicialization of Austerity Is Bad Policy and Even Worse Politics") conceptualizes fiscal rules as an attempt of politicians to outsource their enforcement to courts during the Eurozone sovereign debt crisis in order to avoid responsibility for national austerity measures. He concludes that this "judicialization of austerity" (at 146) was unsuccessful in constraining states in times of crises due to the shortcomings of balanced budget rules and also contributed to the rising resentment towards the EU. Tom Ginsburg ("Balanced Budget Provisions in Constitutions") assesses the limits of budgetary

[11] Posner, *supra* note 9, at 50, for instance, emphasizes the role of the US Congress to provide post-crisis oversight.

[12] *Compare* Cushman, *supra* note 2, at 98, and Contiades & Fotiadou, *supra* note 5, at 273, *with* Ginsburg, Rosen, & Vanberg, *supra* note 5, at 7, and Posner, *supra* note 9, at 52–4.

[13] Pub. L. 110–343, 122 Stat. 3765 (2008).

[14] *See* Steven M. Davidoff & David Zaring, *Regulation by Deal: The Government's Response to the Financial Crisis*, 61 Admin. L. Rev. 463, 512–4, 517–8 (2009) for an account of the legislative process; *see* Posner, *supra* note 9, at 53, on "Congress' initial refusal to pass EESA."

authority beyond immediate crises. He empirically tests whether constitutional balanced budget rules as a "frequent response to financial crises" (at 59) create fiscal restraint and function as a commitment device. However, he concludes that neither the legislature nor the courts rigorously enforce balanced budget amendments.

Once courts exercise their mandate and review crisis measures, they need to choose to enforce or suspend constitutional constraints. This raises the question of whether crisis circumstances affect adjudication as an exogeneous or endogenous factor. Barry Cushman ("The Place of Economic Crisis in American Constitutional Law: The Great Depression as a Case Study") illustrates how the US Supreme Court rejected the emergency rationale in its adjudication of cases brought against increased regulation of economic activity to combat the effects of the Great Depression. He argues that the economic conditions did not exogenously influence the case outcomes, but were an endogenous factor. He found that the US Supreme Court considered the economic context of measures when it was relevant for the doctrinal analysis, for instance in its review of the necessary and proper clause. Eva Brems comes to a similar conclusion when she identifies features of successful cases, for example the fact that the contested measures single out certain groups for austerity measures.[15]

Several chapters conceptualize these kinds of decisions on the spectrum between judicial retreat and activism.[16] This analysis of judicial behavior helps us to understand better the use of the emergency rationale and its impact. Xenophon Contiades and Alkmene Fotiadou ("Constitutional Resilience and Constitutional Failure in the Face of Crisis: The Greek Case"), for instance, ascertain that the Greek Council of State's adjudication shifted from a phase of judicial self-restraint to one of judicial activism accompanied by judicial self-awareness and backlash-consciousness. Georg Vanberg and Mitu Gulati ("Financial Crises and Constitutional Compromise") develop a formal model explaining this type of judicial behavior. They argue that both weak and strong courts have an incentive to engage in "strategic judicial retreat" (at 129), the former in order to avoid the reputational costs of defiance, and the latter so as not to undermine effective crisis measures. Vanberg and Gulati choose the US Supreme Court's *Gold Clause* Cases to exemplify a weak court and the German Federal Constitutional Court's 2016 decision on the European Central Bank's Outright Monetary Transactions (OMT) program as a judgment of a strong court. They conclude that "[u]nder certain conditions, *moderately* powerful courts may be more effective in preserving the integrity of the constitutional order . . . than either weak or powerful courts" (at 131).

Third, fundamental rights are present throughout the volume, both as constraints for crisis measures and parameters for judicial evaluation.[17] Eva Brems ("Protecting

[15] Eva Brems, *Protecting Fundamental Rights During Financial Crisis: Supranational Adjudication in the Council of Europe*, *in* Constitutions in Times of Financial Crisis at 163, 173.

[16] *See also* Brems, *supra* note 15, at 176, with regard to judicial restraint of the ECtHR, and Violante & André, *supra* note 10, at 258–9, with regard to the Portuguese Constitutional Court.

[17] This includes property rights, freedom of contract, the freedom of speech, social rights, the principle of equality, the principle of proportionality, and due process rights. *See, e.g.*, Ginsburg, Rosen, & Vanberg, *supra* note 5, at 3; Ferejohn, *supra* note 6; Tom Ginsburg, *Balanced Budget Provisions in Constitutions*, *in* Constitutions in Times of Financial Crisis at 58, 65; Rosen, *supra* note 2; Cushman, *supra* note 2; Vanberg & Gulati, *supra* note 10, at 122.

Fundamental Rights During Financial Crisis: Supranational Adjudication in the Council of Europe") studies the adjudication of the European Court of Human Rights (ECtHR) and the European Committee of Social Rights (ECSR) on national austerity measures. She contrasts the ECtHR's wide margin of discretion with regard to property rights in its binding judgments on individual complaints with the strict scrutiny applied to a limitation of social rights by the ESCR, which issues non-binding views to collective complaints. Ultimately, she advocates for an increased and open dialogue between the two institutions. Teresa Violante and Patrícia André ("The Constitutional Performance of Austerity in Portugal") show, through a detailed assessment of case law concerning austerity measures, that the Portuguese Constitutional Court enforced the constitutional constraints against the legislature. However, they criticize that the Court disregarded the underlying supranational pressures and failed "to engage in a productive dialogue with the legislature" (at 260). Similarly, Contiades and Fotiadou describe how the Greek Council of State became "a key player" (at 264) invalidating austerity measures on the basis of fundamental rights.

Fourth, the volume conceptualizes the consequences of crises for constitutions. In their earlier work, Contiades and Fotiadou proposed an overarching framework classifying four categories of constitutional responses to the financial crisis of 2007–09: adjustment, submission, breakdown, and stamina.[18] This typology proves a useful point of reference to situate the reactions of constitutions to crises examined in this volume.[19] Applying this framework, Contiades and Fotiadou explain that the Greek constitution did not formally change under the impression of the recent financial and economic crisis. Yet, they identify signs of significant informal change and constitutional erosion.

One of the volume's strengths lies in the richness of perspectives. Noteworthy is its empirical point of view. Three studies conduct regression analysis to test their hypothesis. These quantitative studies complement the theoretical and qualitative insights. Testing the complex relationship between constitutions and crises involves making difficult choices about the selection of data and variables, statistical assumptions, as well as the interpretation of results.[20] Nevertheless, these studies can uncover links and create an understanding that would not be possible otherwise. Ginsburg explores the influence of constitutional balanced-budget provisions on fiscal policy worldwide. Gabriel L. Negretto ("Economic Crises, Political Fragmentation, and Constitutional Choice: The Agenda-Setting Power of Presidents in Latin America") conducts a quantitative analysis of constitutional reforms as a response to economic crises in eighteen Latin American countries from 1900 to 2014 and supplements his findings with a case study of Argentina and Mexico. He concludes that, in a fragmented

[18] Xenophon Contiades & Alkmene Fotiadou, *How Constitutions Reacted to the Financial Crisis*, *in* Constitutions in the Global Financial Crisis: A Comparative Analysis 9 (Xenophon Contiades ed., 2013).

[19] Violante & André, *supra* note 10, at 260; Contiades & Fotiadou, *supra* note 5, at 261, 277, 279; Björn Dressel, *Constitutions, Crisis, and Regime Change: Perspectives on East and Southeast Asia*, *in* Constitutions in Times of Financial Crisis at 305, 306–7.

[20] *See* explicitly on the limitations, Ginsburg, *supra* note 17, at 69–70.

political setting, economic crises lead to a shift of legislative powers to the president, including proactive agenda-setting power and reactive legislative veto rights. This, he argues, fundamentally altered the institutional design of the executive over time. Björn Dressel ("Constitutions, Crisis, and Regime Change: Perspectives on East and Southeast Asia") investigates how constitutions as well as their application and interpretation developed in particular in response to the Asian financial crisis of 1997–98 and the global financial crisis of 2007–09. He points out that political factors influence formal constitutional change, while the impact of financial crises promotes informal constitutional change.

The volume's aim—as expressed by Gonçalo Saraiva Matias' Foreword—is to "help us all to better prepare for the constitutional impact of future crises" (at xi). There will be future financial crises challenging constitutional law.[21] Just at this time, the coronavirus pandemic is causing an economic shock of grave magnitude. This gives the subject matter of this volume an urgent immediacy and importance. The book encourages us to ask what we can learn for the—near and further—future, and will hopefully inspire scholars to benefit from its essential analyses. This would have the potential to leave us more prepared for the next financial crisis.

Stefanie Egidy
Max Planck Institute for Research on Collective Goods, Bonn, Germany
Email: egidy@coll.mpg.de
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Pau Bossacoma Busquets. *Morality and Legality of Secession: A Theory of National Self-Determination.* Palgrave Macmillan, 2020. Pp. 386. €103.99. ISBN: 978-3-030-26588-5.

With the exception of Quebec, peaceful separatist movements occupied a rather marginal place in the consolidated Western liberal democracies over the second half of the twentieth century and the first decade of the twenty-first century. In the early 2010s, however, things started to change. In Scotland, independentism grew and in fact became so strong that it managed to force a referendum on secession (which it lost) in 2014. In Catalonia, the independence movement also grew in a very significant way, up to the point of becoming Spain's first political and constitutional problem in 2017.

In the heat of this new political context, new theoretical developments have emerged on how we should deal politically, morally, and legally with secession. In *Morality and Legality of Secession*, Pau Bossacoma offers a new, sophisticated, and ambitious theory of secession. The book is divided into three parts, each one corresponding to three levels of theoretical discussion

[21] *See* Carmen M. Reinhart & Kenneth S. Rogoff, This Time is Different: Eight Centuries of Financial Folly 68–73, 203–22, 260–2 (2009).

that deserve to be approached separately. In the first one, with Rawlsian spirit and method, he seeks to provide a moral and political justification to secession. In the second, he analyzes how international law deals with the issue of secession. He concludes that, although unilateral declarations of independence are not incompatible with international law, only colonies and other territories that have suffered serious injustices such as illegal occupation and massive violations of human rights are entitled to a unilateral right to independence. And in the third and final part, he makes a laudable and persuasive effort to give normative and political reasons in favor of the constitutionalization of a right to secede in plurinational States. Bossacoma ends his book by providing some general normative guidance on when and how extra-constitutional secession could be justified.

One of the book's greatest virtues is its comprehensiveness: it attempts to answer all the major moral and legal objections raised against the justification of secession. Besides making a normative proposal, the book also functions as a descriptive balance of the theoretical debate about secession. In this sense, it is also an extremely informative book.

The most important point, in any case, is that Bossacoma offers a justification for secession that is not only innovative from a theoretical point of view, but also appropriate for our times in the context of plurinational liberal democracies. As I will detail below, theories of secession are usually either designed for colonial or calamitous political contexts—and this makes them either outdated or misplaced to provide normative solutions in cases like Scotland or Catalonia—or, when designed for liberal-democratic contexts, they are too detached from reality. Bossacoma provides theoretical and normative foundations for dealing with secession in contexts of liberal democracies.

What is most attractive about *Morality and Legality of Secession* is that even though Bossacoma's sympathies are on the secessionist side, he offers good reasons and arguments for states to cope with the problem of secession according to some of the principles of political liberalism (or at least according to some interpretation of political liberalism). Bossacoma argues that the idea of constitutionalizing a right to secession is not a way to benefit the cause of secessionism, but that of political liberalism. This is an intelligent, virtuous, and to a large extent persuasive strategy by Bossacoma.

But *Morality and Legality of Secession* also has some weaknesses. In what follows, I reconstruct what I take to be some of the most important points in the book, and I raise some doubts with regards to them.

Usually, theories of secession are divided into two main groups. On the one hand, there are theories that consider secession to be a way of compensating for serious injustices that certain political, national, or cultural groups have suffered in the past. On the other hand, there are theories that understand that no past grievances are needed for secession to be morally justified. It is sufficient for a political community (whether or not such a community could be considered a nation) to express, by majority, its desire for independence. The latter theories thus claim that there is a primary moral right to secession, as opposed to the former, for which the right to secession can only be considered a remedial one.

Bossacoma's theory cannot be easily accommodated either as a primary-right theory or as a remedial-right theory. According to Bossacoma, the principles of democracy, agreement and negotiation, liberal nationalism, territoriality, and some other foudnational values of what he calls "justice as multinational fairness," require that minority nations be granted a qualified primary right to secession. The right would be qualified and scalar in the sense that the more just the state treatment of minority nations is, the higher the requirements for them to secede ought to be. And vice versa. Thus, on the one hand the right to secession is not unlimited or unconditional (as primary-right theories roughly claim). On the other hand, whereas remedial right theories claim that one or more unjust situations are necessary for a right to secede to be

justified, Bossacoma's theory asserts that "it is relevant but not necessary to plead these causes to vindicate" (at 142) a right to secede. For him, the conditions of injustice do not determine the existence of a right to secede, because a national group is entitled to a right to secession on the basis of the aforementioned principles and regardless of the fact of being a mistreated group. Past grievances and iniquitous episodes are, in Bossacoma's theory, gradual requirements to exercise the right to secede—the more unjust the State treatment of a minority is, the lower the requirements for that group to secede are.

According to the theory defended in *Morality and Legality of Secession*, if the nations in a plurinational state were under the veil of ignorance (at 13), they would adopt a multinational contract. Under this institutional arrangement, national minorities would have the constitutional right to both internal and qualified external self-determination—that is, a conditional primary right to secession. The intuition that Bossacoma seeks to trigger seems to be the following one: since nations do not know whether they would be minority nations or majority nations, they would prefer to secure, among other things, a constitutional right to secession. If in the *Theory of Justice* and in *Political Liberalism* Rawls proposed a hypothetical contract between individuals, and in *The Law of Peoples* he proposed a hypothetical contract between states, Bossacoma proposes to complement the Rawlsian system with a third hypothetical contract—one between nations belonging within the same state. This is certainly an original and suggestive way to justify a right to secede to national minorities.

Nevertheless, a problem arises. To illustrate it, I will very briefly bring in some of Bernard Williams's critical ideas and relate them to the Rawlsian model.[1] According to Williams, it is part of our very nature to have plural and contradictory moral sentiments. This is one of the traits that makes us moral agents. The Rawlsian model states that, behind the veil of ignorance, moral agents would choose a harmonized hierarchy of moral principles. According to Williams, Rawls seeks to cancel moral conflict, or at least believes that the original position would make it possible to cancel it. However, the idea of moral conflict is inherent to the concept of moral thinking and of moral agency. Therefore, a harmonious hierarchy of moral sentiments or principles could not emerge from the original position. Rather, a conflict between them would emerge. It would not be possible (nor even desirable, says Williams, on pain of "denaturing" human morality) to dissolve contradictory sentiments by putting the parties behind the veil of ignorance.

It is not clear whether Williams was right on this objection to Rawls. But Williams's critique becomes intuitively plausible if we think, as Bossacoma wants us to do, that the parties behind the veil of ignorance would be national communities. The reason is that different members of the same nation can, and usually do, have different and very often contradictory moral intuitions. These members may explicitly or implicitly recognize themselves as conforming a nation, but from this it does not follow that they share compatible moral intuitions beyond those that help constituting the nation (let alone the possibility of them sharing the very same moral intuitions). Let us illustrate the point with an example. For some people the moral intuition of intergroup solidarity is more salient than for other people the intuition of belonging to the same national community. This disparity occurs in any medium-size national community (which is true of the Catalan or Scottish national minorities, which would constitute the paradigmatic examples, together with Quebec, of national minorities entitled to a qualified primary right to secession).

It is plausible to argue that nations are "naturally" heterogeneous when it comes to moral intuitions—such that, even if it were possible to put them behind the veil of ignorance, their members would differ at the most basic moral level. And if this is the case, it could happen that

[1] *See* Bernard Williams, *Political Philosophy and the Analytical Tradition*, *in* Philosophy as a Humanistic Discipline at 155 (2006).

some of their members would not sign the multinational contract proposed by Bossacoma, that includes internal self-determination and a qualified right to secession. Those members of the national community whose intergroup solidarity moral intuition is more salient would, by hypothesis, reject the constitutionalization of a qualified primary right to secession. This is only an oversimplified example. There are many relevant considerations that I am not taking into account. But the example is meant to suggest that the inherent moral heterogeneity of national communities could have an impact on the possibility of all members (or even a majority) of the same nation choosing to sign the same multinational contract.

To sum up this criticism, Bossacoma may be assuming that an excessive moral homogeneity of national communities behind the veil of ignorance would be morally homogeneous. But if these nations have a moral nature, as Bossacoma claims (at 16), then they will not necessarily be so—on the contrary, according to Williams, it is more plausible to think that heterogeneity is part of the nature of being moral. Due to the existence of contradictory moral intuitions within the same nation, it is far from obvious that nations would make a unified or harmonized choice behind the veil of ignorance.

Bossacoma could reply by claiming that the contracting parties "could be thought to be the democratic representatives of the contracting nations" (at 27). But this does not overcome my objection. Different representatives of the same contracting nation could have different and non-compatible moral intuitions and thus make potentially contradictory decisions when it comes to the content of the multinational contract. A way out for Bossacoma could be to claim that there will be just one single representative for each contracting nation behind the veil of ignorance. Yet this way out has two problems. First, the objection raised by Williams against Rawls pops up again—since individuals, to the extent that they have moral natures, have contradictory moral intuitions or sentiments themselves, and it is therefore not clear that the veil of ignorance could produce a harmonized set of moral principles. And second, and perhaps most importantly, to leave in the hands of just one single person the hypothetical fate of a national community would be democratically arbitrary.

To be clear, I am not claiming that the constitutionalization of a qualified right to secession cannot be morally and rationally justified. I am just expressing some doubts regarding the Rawlsian method as the proper route to justify it.

Bossacoma is right to be pessimistic about the possibility of international law accepting something other than a remedial right to secession. In contrast, his optimism regarding the possibility of liberal democracies constitutionalizing a right to secession is unfounded. Not only is there no empirical evidence to suggest that this could be the trend in the midterm future, but also, if we put on the glasses of realistic utopia as Bossacoma wants us to do, it is more likely that some mechanism to deal with secession without guaranteeing a right to secession would be constitutionalized. It is more plausible to imagine, for instance, the constitutionalization of the state's obligation to negotiate full devolution, or the calling of a referendum to improve internal self-determination. It is more realistic to think that liberal democracies, rather than constitutionally guaranteeing the possibility of breaking up their territorial unity, will prefer to constitutionalize mechanisms for dealing with secession that do not imply a right to secede.

It should be noted that, in Bossacoma's model, having a right to secession does not necessarily involve the breaking up of the territorial unit of the state: "recognizing a right to secede does not necessarily cause secession, but possibly more devolution of powers and other forms of internal self-determination" (at 54). But if the aim is to explore a *realistic* utopia, why not think that it is more likely that states will be directly inclined to constitutionalize these alternatives? It is true that negotiating the improvement of self-determination could result in the secessionist region becoming asymmetrically more powerful in comparison with other regions of the state. But in principle states are likely to prefer to manage internal tensions arising from regional power

asymmetries than to legalize the possibility of losing all sovereignty on one of their territories. I am not claiming that Bossacoma's arguments to justify the constitutionalization of a qualified right to secession are insufficient. What I am saying is that it is more realistic—while still largely utopic—to think that States will prefer to constitutionalize negotiations triggered by the demand for secession than to constitutionalize, even in a qualified way, the breakup of territorial unity.

Towards the end of the book, Bossacoma engages in a risky and admirable exercise. He tries to model, in a liberal spirit, how a unilateral and extra-constitutional secession should take place. It is admirable because the most comfortable position for a defender of the ideal of the rule of law, like Bossacoma, would be to claim that beyond the limits of constitutional law it is impossible to justify anything. But Bossacoma answers the challenge and tries to model what could be the least harmful route for the underlying liberal principles of the rule of law to justify a unilateral and extra-constitutional secession.

He is extremely careful and demanding when modeling such a possibility—only when secessionists have exhausted in good faith all available constitutional mechanisms and the state remains completely unmoving could unilateral and extra-constitutional secession be justified. Thus, Bossacoma provides guidance for dealing with secession in the context of *pouvoir constitué* but also in the context of *pouvoir constituant*.

All those interested in the topic of secession from a legal and theoretical standpoint should read *Morality and Legality of Secession*. Especially those who are not sympathetic to secessionism should read it. The book will probably persuade them of the need to constitutionalize some kind of procedure to cope in a liberal manner with secession demands, while leaving their substantive anti-secessionist thoughts intact.

Pau Luque
Institute for Philosophical Research,
National Autonomous University of Mexico (UNAM), Mexico.
Email: pauluquesanchez@gmail.com
doi: 10.1093/icon/moaa075

Barbara Havelková and Mathias Möschel (eds.). *Anti-Discrimination Law in Civil Law Jurisdictions*. Oxford University Press, 2019. Pp. 296. $84.48. ISBN: 978-9198853138

1. Introduction

When books are positively reviewed in academia, it is usual to remark that they are "illuminating." It is a sign of stylized politeness. But on this occasion, I mean to use this expression quite literally: as someone who is familiar with a part of the world filled with civil law jurisdictions other than the European ones addressed in the book—namely, Latin America—I have found this volume to be a watershed: it has allowed me to understand issues that had remained obscure, it has given sense and nuance to many developments that were just bubbling in my mind, and it has helped me to connect previously isolated ideas. I have learned a lot, and precisely because that is an experience that we do not have every day, it has heightened my spirits in these times of generalized difficulty.

In what follows, I give a sense of what the reader will find in the book, with ample reference to the parameters and concepts that Havelková and Möschel offer in the introduction, which are as illuminating and important as the ensuing chapters (Section 2). Afterwards, I comment on some of the aspects that have caught my attention during the reading. I will use my background knowledge about hybrid Latin American systems (which, in contrast to the countries covered in the volume, combine background civil law traditions with constitutional systems with American-style components) to show how the contributions explain many things, yet at the same time set the stage to continue the exercise, test further hypothesis, and develop complementary inquiries. I will thus refer to the advisability of tracking developments under other framings and narratives of migration (Section 3), to the potential usefulness of looking at judicial review models in the countries under analysis (Section 4), to the relevance of history (Section 5), and to the need to acknowledge the ways in which antidiscrimination law is not individualistic (Section 6).

I will close with a brief, more general assessment (Section 7). While the volume largely intends to illustrate how legal, social, and cultural aspects have prevented antidiscrimination law from attaining its full potential in European civil law jurisdictions, its reading has also made me more conscious of the intrinsic limitations of this body of law. Even at its best (in versions that include fighting of structural inequalities, transformed procedural rules to ease access to justice, and remedial novelties), antidiscrimination law can be no more than an important but necessarily contained tool in the wider context of what we should imagine as a full-fledged constitutionalism of equality.

2. Overview: Antidiscrimination law as a graft

The editors present the volume as an exercise in testing a definite hypothesis: that antidiscrimination law is a fundamentally US and UK product which has been transplanted into European civil law jurisdictions "from above," when the European Union issued its famous two directives on the matter to be transposed by all member states;[1] however, it is a product that does not align well with the legal architecture and culture of those systems. The arrival of this body of law would have been a "legal irritant" on jurisdictions "that were either not willing, not prepared, or not capable of dealing with it" (at 3).

According to the editors, the contributions in the volume generally support the "misfit" hypothesis, but also the need to qualify or modulate it in light of several factors (at 4–9). One is time: sometimes, as it did in Germany, initial resistance gradually subsides over time. The second factor is the area of the law involved: in several of the countries under analysis, antidiscrimination does better in the domain of employment law and labor courts than in the domain of administrative or constitutional law, where interaction with established concepts and institutions has proved more complex. The third factor is the concept of antidiscrimination in focus: in countries such as Spain or Greece, there have been specific difficulties with indirect discrimination; the concept of discriminatory harassment has been welcomed in some areas and completely ignored in others; quotas and other modalities of positive action have generally been unproblematic in fields such as disability (but they often predate the antidiscrimination wave and are associated to other legal strategies) and resisted in others (more by courts than by legislators). Fourth, not all "grounds" are equal: in most countries, prohibitions of age discrimination, for instance, are doing better than those on other grounds; in some (like Czechia, Italy, or Romania), gender-discrimination clauses are doing particularly poorly. The final element identified as relevant is the need to distinguish developments in courts and those before equality bodies, because the scenario is sometimes radically different: what is easy and successful in the latter may not

be so in the former. As the editors observe, while providing a great metaphor that reminds me of fragrant apricot harvests on my home island in the Mediterranean, antidiscrimination law may be imagined as a "graft": depending on the rootstock, it has thrived, or it has struggled (at 10).

The second goal of the volume is to explore the factors that might explain the different degrees of fit, the variations, or the anomalies. The contributions, especially those in Part I (by Jule Mulder, Stephanie Hennette-Vauchez, and Elsa Fondimare; Barbara Havelková; Lisa Waddinton; Laura Carlson; and Michael Wrase), develop their own hypotheses, and the editors suggest organizing the factors they raise along a continuum going from the legal to the extralegal: (i) preexisting law and its interpretations; (ii) institutional choices and mobilization; (iii) constitutional and legal foundations and narratives; and (iv) the wider political and social context, in particular with regards to the preference for individual versus collective solutions to social problems.

The role of preexisting law is acknowledged as crucial. The editors underline that some of the problems we now associate with discrimination have been partly addressed under other legal rubrics, whose associated legal regime may alter the operation of antidiscrimination rules: if an aspect was addressed through criminal law, for instance, there might be remnants of "intent" or other subjective requirements that have little place in contemporary antidiscrimination analysis; if discrimination must be denounced in civil suits, the available remedies included in traditional codes may not be appropriate for "recognition" injuries, or not efficacious to prevent problematic patterns (at 10–13). With regards to institutional choices, the editors underline their importance, in view of the chapters' findings, by mentioning three examples: the decision to create or not to create a non-jurisdictional equality body, which may completely alter antidiscrimination dynamics; the role civil society and particularly non-governmental organizations (NGOs) are allowed to play by standing or other procedural rules; and the role played by trade unions in support of or in opposition to antidiscrimination claims (at 13–16). With regards to "constitutional and legal foundations and narratives," the editors call attention to the wide-ranging effects of general understandings of the law and its applications. In many civil countries, "formalist" understandings still prevail whereby judges are believed to unproblematically apply what is contained in the rules, something that is definitely in tension with the sort of context-sensitive, sociologically and even psychologically informed reasonings associated with antidiscrimination. Other sources of resistance on the part of judges or scholars may come from their attachments to constitutional options whose logic conflicts with antidiscrimination—such as the "universalistic" formulas characteristic of French constitutional law (at 16–18). The last explanatory dimension relates to the way the wider political and social context in each jurisdiction includes a tendency toward more individualistic or more communitarian or statist solutions to social problems. In the jurisdictions under study, antidiscrimination is often seen as a bad way of dealing with injustices: it is considered a divisive strategy which threatens to disrupt the integrity of general, welfare-state, equality-oriented social policies (at 18–23).

Part II of the book offers valuable jurisdiction-specific studies. The editors present them as focusing on enforcement and effectiveness (at 25). Susanne Burri surveys the mechanics, successes, and failures of pregnancy antidiscrimination efforts before the Netherlands Equality Body; Martin Risak and coauthors dive into the case law of the Austrian Equal Treatment Commission; Stamatina Yannakorou and Dimitris Goulas focus on the problems of fighting employment discrimination in Greek courts; Elena Brodealâ analyzes what the Strasbourg court has said about Romania's extremely scarce anti-gender-discrimination judicial record; Titia

[1] *See* Council Directive 2000/43/EC of 29 June 2000, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, 2000 O.J. (L 180/22); Council Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation, 2000 O.J. (L303/16).

Loenen analyzes employment discrimination on grounds of religion in the Netherlands; Marie Mercat-Burns studies the relative success of indirect discrimination in employment litigation in France, despite the country being often portrayed as a leader in resisting the antidiscrimination paradigm; María Amparo Ballester Pastor underlines the extent to which the judicial protection against sex discrimination has faced in Spain obstacles related to understandings of the law and procedural and institutional structures; and Mathias Möschel reports on the surprising use of harassment provisions in racial antidiscrimination cases in Italy.

All the contributions in the second part recount in detail many arid, everyday legal developments, and thus sensibly provide empirical substance for responsible comparative inquiry to build upon. The combination of chapters that articulate identifiable, thought-provoking general theses with chapters that map out a great amount of specific developments is something the book must be definitely commended for.

3. The many narratives of migration, framing, and anti-essentialism

The mere articulation of the misfit hypothesis seems to me illuminating, since in many countries the distinctive links between the prevailing global antidiscrimination grammar and a range of institutional and conceptual assumptions inherent to the common law tradition is not necessarily perceived—and the book shows these links exist. In addition, the existence of the European Union antidiscrimination directives has enormous comparative fecundity—since it provides a single, common phenomenon whose reception in different scenarios may be easily compared.

The persuasive force of the exercise should not obscure the fact, however, that in other civil law jurisdictions the drivers and directions of antidiscrimination migration are different, and that even in the countries covered in the volume, the overall picture probably changes if one gives more weight to the whole range of constitutional framings under which antidiscrimination-related developments have prospered. In last-wave Latin American democracies, for instance, antidiscrimination categories arrived largely horizontally through "diffusion" dynamics,[2] from different sources and at different times, depending on the country. Sometimes, categories arrived vertically through use of the very influential Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), or the use of the Inter-American Court of Human Rights' rulings, but many others through citations to the European Court of Human Rights (whose authority in Latin America may be only persuasive), or to the doctrines of other regional courts (such as the Colombian Constitutional Court, a great exporter of criteria). The unidirectional and vertical dynamics appropriately described in the book for the case of the European civil law jurisdictions does not occur everywhere.

In some countries, moreover, there are antidiscrimination developments that predate the boom of US doctrines. Scholars in Argentina have documented, for instance, that the Supreme Court subjected legal classifications to scrutiny already in the first half of the twentieth century, based on the rights' limitations clause of the 1853 Constitution which is still in force.[3] This clause generated abundant adjudication based on reasonableness, under two modalities: reasonableness in weighting and reasonableness in the selection—the latter being the vehicle of equality/discrimination scrutiny.[4] In the 1980s, the reasonableness test was turned into a more structured test in equality cases,[5] basically in interaction with the US tiered-scrutiny tradition, but also with German-style proportionality analysis, especially in politically sensitive cases where the court seeks to be maximally transparent about its reasoning.[6] Similarly, at a much later stage, in Mexico, antidiscrimination springs from an evolution of the scrutiny of classifications advanced under proportionality analysis.[7] And while in most Latin American

countries the prevailing rules on the allocation of the burden of proof and the way this burden is distributed in common-law antidiscrimination adjudication diverge in the same exact way as the volume documents in the case of Czechia and other European civil law countries,[8] in Argentina the Supreme Court *does* use presumptions of unconstitutionality and shifts the burden of proof in discrimination cases.[9]

All this evinces nuance and variation and suggests that obtaining a more encompassing account of antidiscrimination in civil law jurisdictions probably demands the parallel charting of developments under several legal figures, especially proportionality—which has important roots and extensive use in European jurisdictions—but also fundamental rights other than equality. The editors actually acknowledge these other framings in the introduction but present them largely as a "surrounding" factor that interacts with the implementation of antidiscrimination law, or as an imperfect substitute. Yet from a substantive viewpoint, they should be probably considered variants of a single basic notion. In the United States, some scholars have underlined the substantial amount of "equal protection" that is done under liberty, privacy, or due process rights adjudication.[10] While the labeling differentiation made in the book ("antidiscrimination," "general equality," "dignity," or "liberty"-based adjudication) makes methodological sense in the context of the particular comparative project it undertakes, antidiscrimination clauses are present today in most of the world constitutions, and our conceptual usages in their context should not "naturalize" certain developments at the price of obscuring others—or presenting them as deviant. We should strive to find conceptual usages inclusive of a wide range of developments, which could then be assessed on their merits, and not on the basis of how close or distant they are from those initiated in a particular country or set of countries.

4. Models of judicial review and division of powers

Most of the contributions, especially in Part I, explicitly or implicitly privilege "legal culture" explanations, if under very flexible terms that encompass Michael Wrase's careful reconstruction of the use of this concept in political science and legal anthropology, but also a large range of other references: for example, general social preference for tolerance, political negotiation, or pragmatism; the role that certain agents (labor unions, NGOs) are allowed to play in the raising and management of social claims; the role of procedural rules in adjudication; the importance

[2] Zachary Elkins, *Diffusion and the Constitutionalization of Europe*, 43 Comp. Pol. Stud. 969 (2010); Zachary Elkins & Beth Simmons, *On Waves, Clusters, and Diffusion: A Conceptual Framework*, 598 Ann. Am. Acad. Pol. Soc. Sci. 33 (2005).

[3] *See* Constitución Nacional [Const. Nac.], art. 28 (stating that "[t]he principles, guarantees and rights recognized in the preceding sections shall not be altered by the laws that regulate their exercise").

[4] *See* Juan Francisco Linares, Razonabilidad de las leyes: El 'debido proceso' como garantía innominada en la Constitución Argentina 10, 160 (1970) (1944).

[5] The leading case is Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Repetto, Inés María c/ Bs. As. Prov. de s/ inconstitucionalidad de normas legales, 8/11/1988, Fallos 312:1902 (Petracchi and Bacqué, JJ., concurring) (Arg.).

[6] *See* Laura Clérico & Federico De Fazio, Reasonableness and Proportionality in Argentina: A Matter of Interactions (Jan. 2020) (Unpublished manuscript) (on file with author).

[7] *See* Arturo Bárcena Zubieta, Proportionality and Human Rights in Mexico (Oct. 2019) (Unpublished manuscript) (on file with author).

[8] *See* Francisca Pou Giménez, Unilateralism, Dialogue, and False Necessity: The Distribution of the Burden of Proof in Proportionality Analysis (Feb. 2020) (Unpublished manuscript) (on file with author).

[9] *See* Clérico & De Fazio, *supra* note 6.

accorded to the administrative state; the taste for welfare solutions over individual adjustments; or the traditional understandings of the law and the functions of the judiciary.

I wonder if some of these elements could also be captured by resorting to an intermediate category—between the "softness" of culture and the "hardness" of detailed institutional regulations—whose explanatory power is not tested in the book: namely, judicial review models, in combination with the corresponding division-of-power and democracy traditions. The jurisdictions covered in the book are not only civil law, but also ones where judicial review of legislation was established only in the second half of the twentieth century, under a Kelsenian, centralized, *erga omnes* model of abstract review, not under an American-style decentralized, incidental, *inter partes* model (with peculiar features in the case of Sweden, where only a limited modality of review in a framework of parliamentary supremacy exists, and in the case of the Netherlands, with a *sui generis* system).[11] Maybe part of the reluctance the book eloquently registers is only the other side of institutional architectures in whose context constitutional judges decide only at the request of a very limited set of institutional actors, must evaluate public action in the abstract, and choose between two clumsy alternatives: declaring the validity of a general norm, or expelling it from the legal system. The institutional architecture of this modality of judicial review—even considering the emergence of interpretive rulings of "conditional validity" and other intermediate solutions, including "additive" levelling-up or levelling-down resolutions in equality cases—may not be well tuned to address problems that, as the contributions in the book repeatedly underline, require attention for context, empirical information, and in many cases, the careful crafting of difficult equilibrium solutions (think about the cases where judges must vindicate both non-discrimination on religious grounds and non-discrimination on the basis of sexual orientation). The adoption of a Kelsenian model has moreover a natural relation with an understanding of democracy and the division of powers where the Parliament is politically and constitutionally the central actor.

This might explain the relative low profile of antidiscrimination rulings in the case law of the German Federal Constitutional Court, despite its being overall pretty active—more than the US Supreme Court, if less politicized.[12] And it might also explain the far greater penetration of common-law type antidiscrimination categories in Latin America, where judicial review systems typically include both centralized and decentralized review—in several countries, decentralized review is present from the nineteenth century. The possibility of examining statutes and public policy as applied, and of crafting remedies with effects only for the case at hand, surely animates judges to dare to engage more deeply in antidiscrimination reasoning. Complementarily, North and South American political systems rely on a constitutional tradition of checks and balances, not of strict separation of powers, which responds to a more diversified, less parliament-centered understanding of democracy (in whose context presidents are directly elected and judges enforce a constitution that is accorded supremacy over the parliament).

[10] Cary Franklin, *The New Class Blindness*, 128 Yale L.J. 1 (2018) (arguing that, despite the fact the Supreme Court did not recognize class as a suspect classification within equal protection doctrine, a nontrivial number of fundamental rights came to be recognized as such because they were essential for guaranteeing the liberty and equal citizenship of poor people); Kenji Yoshino, *The New Equal Protection*, 124 Harv. L. Rev. 747 (2011) (arguing that the Supreme Court has moved away protection for disadvantaged people from group-based equality claims to individual liberty claims under due process guarantees).

[11] In the Netherlands, there is no judicial review of legislation under the Constitution, but judges can review statutes under European Union and international law, and they can also review infra-legal norms under the Constitution. The system has a "decentralized" flavor that differentiates it from other continental law European countries—something that might explain, in line with the hypothesis I advance, the greater penetration of antidiscrimination law that the contributions in the volume register.

An exploration along these lines is certainly a complex and demanding project, which must account also for the attributions of ordinary judges, and may lead nowhere, but I find it worth mentioning.

5. The importance of history

The frequent references to the relevance of legal traditions in the chapters suggest the extent to which history, sometimes with its whims and accidents, should be probably paid more attention in comparative constitutional studies. Over the last decades, comparative constitutional studies have privileged, in my view, the study of the common over the study of the different and engagement with "thick" description. They have also probably suffered from a presentist bias: for all the interdisciplinarity far cry, historians are rarely amid the energic social science crowd that gathers in comparative seminars and projects. The time to correct this, for the benefit of the field, might be now.

Take for instance Havelková's contribution on Czechia, which highlights that courts in the country have fared badly in applying ground-related antidiscrimination guarantees while dealing well with adjudication under the "general equality principle," operated as control of "discrimination *simplex*"—control of arbitrariness. While she is centrally interested in describing the situation and its negative implications for the effective addressing of discrimination, she says in passing that some of the causes behind it "are post-socialist in nature, while some are likely common to (most) civil law jurisdiction" (at 79, 93, with an additional mention to gender-related socialist legacies). Yet everything the chapter highlights (the reduction of discrimination scrutiny to arbitrariness scrutiny, the non-shifting of the burden of the proof, the role of the principle of *iura novit curia*) is present, or was historically present, in Latin American countries. Could there be parallels between those two clusters of "new democracies," beyond their shared civil law legal backgrounds? Would a comparative historic study reveal different or additional explaining factors?

Take the uncontested nature of quotas for the disabled in Europe, studied by Lisa Waddington, whose fate differs from other quota schemes because of the particular European need to socially support the men that had been injured in the two world wars. On the other side of the spectrum, extreme resistance to quotas and struggle around "colorblindness" in the United States is surely explained by the particulars of its history of racial relations, not only by an ethos of individualism. Might the relatively uncontroversial character of quotas in Latin America be related to the tradition of corporatist power-sharing that has been central in some regional countries?

Take, finally, the Netherlands' cultural specificities, brilliantly portrayed from different angles by Mulder, Burri, and Loenen. All of them underline the relevance of the country's culture of tolerance, distinctively before sexual and religious minorities. Yet could one imagine two groups more difficult to simultaneously privilege in protection, given the rejection of sexual diversity by so many religious groups? As in the other examples, these legal developments would greatly benefit from study in conjunction with historical inquiry.

6. Anti-individualism, or the ample diversity of groups?

Several contributions (those on France, Germany, Sweden) underline the association of antidiscrimination law with individualism, as opposed to the more communitarian or collective sensibilities that would favor other, generally state-led efforts at addressing social needs. Antidiscrimination invites people to focus on differences, not commonalities, and may be pictured as a "private law" solution to social problems. Laura Carlson retrieves the roots of the system in

[12] Dieter Grimm, Constitutionalism: Past, Present and Future 210 (2016).

fourteenth-century century England: "The Crown/State then did not have the administrative enforcement capacity to ensure that laws were followed, so a system of informers was created. This eventually led to the development of the theory of the private attorney general" (at 133).

While the divide is fully convincing in terms of contrasting approaches to antidiscrimination law operation and enforceability, it should not obscure the degree to which antidiscrimination law also promotes and naturalizes a society of groups, and may be said to enjoy, at that level, an anti-individualistic texture. Antidiscrimination law relies on the ability of claimants to be convincing with regards the primary social existence of groups: a successful claim is one that proves that I resent a damage, disadvantage, offense, or curtailment of autonomy, only because of my group affiliation. I must portray myself as a member of the group (women, transexual, poor, disabled), and I must show that it was group adscription (and not desert) that was controlling in the treatment I received. In my view, this helps explain why antidiscrimination law is more attractive in immigration societies where there are fewer competing collective sources of belonging and identification, as compared to societies with national minorities, rooted local allegiances, or long-standing linguistic and professional bonds. Different degrees of harmony with antidiscrimination paradigms could be then associated not so much to the divide between European homogenous societies versus immigration and postcolonial ones (at 22), but to the sort of diversities, cleavages, and axes of belonging more prevalent in the different countries.

This could explain the relative attractiveness of antidiscrimination in contemporary Latin America—despite historic reliance on general equality clauses and other categories. Latin American societies' main historic source of diversity is indigenous peoples—something that is finally reflected in distinctive constitutional solutions, although still a source of discrimination. But leaving that aside, they are probably closer to the immigrant societies of the common law world than to the European societies filled with national and linguistic communities. No matter what the civil law background is, the sort of identity politics that now thrives in Latin America largely follows antidiscrimination categories. Regional networks of women, racial and ethnic minorities, or LGBTT+ people make their voices heard and engage in politics. Antidiscrimination discourse, to sum up, might fare better in some societies not because they are more individualistic, but because the weight of ground-related personal affiliations is less diluted by socioeconomic, national, linguistic, or geographic affiliations.

7. Conclusion: The mirror and the way forward

Like any well-conceived and well-executed comparative project, this volume helps, above all, to better perceive the different realities or scenarios under analysis. We learn a lot about the law of European civil law jurisdictions but also about the common-law antidiscrimination paradigm. The editors and some contributors are worried by how antidiscrimination law loses edge when it is conflated with a general principle of equality or interacts with preexisting elements, but the reading has also made me aware of the contrary peril—very immediate in a world where developments in Anglo-Saxon countries become naturally "global": the peril of accepting that antidiscrimination is the only proper, natural, technical legal translation of constitutional equality mandates—the risks of conflating equality with non-discrimination, as largely occurs in common law jurisdictions (at 20).[13]

Antidiscrimination categories are powerful, and at this point, a most valuable world-wide common heritage. But how things have turned out in the United States, where so many of them originated, suggests the many ways in which, as other human creations, they can fail—and end up contributing to preserve, rather than eradicate, social subordination.[14] And while the situation in Europe has been for decades more optimistic and inspiring,[15] the unending search for more effective strategies (from "proactive measures" to the turn to "mainstreaming"), and the unending documentation of difficulties (from debates on intersectional and multiple

discrimination to the difficulties of dealing with socioeconomic discrimination)[16] suggest that we must not only worry for its effectivity, but also urgently ponder how to complement it. We need equality-promoting constitutional frameworks where courts are bound to have far more importance than in parliament-centered postwar welfare paradigms, yet on the basis of legal tools more comprehensive than current antidiscrimination law. Other-than-equality guarantees and institutions are important for equality, and in the latter domain, innovations may come from many countries—Latin American constitutionalism, for instance, contains incipient equality-promoting tools not present in more traditional constitutions.[17] We must treasure and care for what we have, and simultaneously strive to imagine much more.

Francisca Pou Giménez
Instituto Tecnológico Autónomo de México (ITAM), Mexico
Email: francisca.pou@itam.mx
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[13] The editors cite here Sandra Fredman, Discrimination Law (2011). For a summarized account of Fredman's efforts to thicken and substantivize antidiscrimination, see also Sandra Fredman, *Substantive Equality Revisited*, 14 Int'l. J. Const. L. 712 (2016).

[14] *See, e.g.*, Reva B. Siegel & Jack M. Balkin, *Remembering How to Do Equality*, *in* The Constitution in 2020, at 93 (2009); Reva B. Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 Stan. L. Rev. 1111 (1997).

[15] Grainne de Búrca, *Evolutions in Anti-Discrimination Law in Europe and North America: The Trajectories of European and American Anti-Discrimination Law*, 60 Am. J. Comp. L. 1 (2012).

[16] Sandra Fredman, *Making Equality Effective: The Role of Proactive Measures*, Oxford Legal Research Paper No. 53/2010 (European Commission, Directorate-General for Employment Social Affairs and Equal Opportunities, Unit EMPL/G/2 (2009, 2010)); Christopher McCrudden, *A Comparative Taxonomy of "Positive Action" and "Affirmative Action" Policies*, *in* Non-Discrimination in European Private Law 157 (Reiner Schulze ed., 2011); Mark Pollack & Emily Hafner-Burton, *Mainstreaming Gender in the European Union*, 7 J. Eur. Pub. Pol'y 432, (2000). For an interesting effort at putting antidiscrimination in an emancipatory light, see Alberto Raul Coddou McManus, A Transformative Approach to Anti-Discrimination Law in Latin America (Dec. 2018) (Ph.D. thesis, University College London), https://bit.ly/2RC5G4H.

[17] The Oxford Handbook of Constitutional Law in Latin America (Conrado Hübner Mendes & Roberto Gargarella eds., 2020); Routledge Handbook of Law and Society in Latin America (Rachel Sieder, Karina Ansolabehere & Tatiana Alfonso Sierra eds., 2019).