

# 1. Introduction

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Latin American constitutional law has undergone a profound transformation in the last twenty-five years. On the one hand, a significant number of countries in Latin America reformed or issued new constitutions in order to consolidate or expand their liberal democracies.<sup>1</sup> The constitutional transformations in Brazil (1988), Colombia (1991), Paraguay (1992), Peru (1993), Argentina (1995), Ecuador (1998) and Chile (2005) had, among other objectives, the aim of re-legitimizing their political systems, establishing a new balance between the branches of the government, expanding their bills of rights or modernizing their political and legal institutions.<sup>2</sup>

On the other hand, the new constitutions of Venezuela (1999), Ecuador (2008) and Bolivia (2009) aimed to move away from the liberal model that had historically been the norm of the majority of the States in the region.<sup>3</sup> The constitutions of these three countries were issued in order to materialize a new political model that would allow for efficiently attacking the problems of poverty, inequality and exclusion that affect the majority of

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<sup>1</sup> Roberto Gargarella (2013), *Latin American Constitutionalism, 1810–2010. The Engine Room of the Constitution* (Oxford: Oxford University Press), Ch. 9.

<sup>2</sup> Rodrigo Uprimny (2011), “The recent transformation of constitutional law in Latin America: Trends and challenges”, *Texas Law Review*, **89** (7), 1587–1610. An exception to this trend may be the Dominican Republic’s 2010 Constitution which, among other things, decrees that abortion is banned under any circumstances, including when the mother’s life is at risk (Article 37) and bans any form of same-sex union (Article 55). In addition, the 2010 Constitution denied citizenship and its attendant rights to those living “illegally” in the country (Article 18), a provision that, as confirmed by the nation’s Constitutional Tribunal, prohibited descendents of those born to Haitian parents illegally in the country after 1929 to the benefits of citizenship. See Kristymarie Shipley (2015), “Stateless: Dominican-born grandchildren of Haitian undocumented immigrants in the Dominican Republic”, *Transnat’l L. & Contemp. Probs.*, **24**, 259.

<sup>3</sup> Javier Couso (2014), “Radical democracy and the ‘new Latin American constitutionalism’”, at: [https://www.law.yale.edu/system/files/documents/pdf/sela/SELA\\_13\\_Couso\\_CV\\_Eng\\_20130516.pdf](https://www.law.yale.edu/system/files/documents/pdf/sela/SELA_13_Couso_CV_Eng_20130516.pdf) (accessed 5 September 2017).

their citizens.<sup>4</sup> At least partially inspired by what has been called twenty-first-century socialism, these constitutions have sought to erect a radical democracy in these three South American countries.<sup>5</sup> To achieve this objective, these constitutions granted extensive powers to the executive branch, weakened the powers of the judicial branch, issued a notable number of social and economic rights, recognized a broad range of rights to cultural minorities, and transformed some of their political and legal institutions to make them compatible with their version of a principle of cultural diversity.<sup>6</sup>

Finally, Latin American constitutional law has become more robust and international in nature.<sup>7</sup> In turn, academic production on the topic has increased in the region. Not only has the number of publications increased, but so also has their quality; many Latin American constitutional law scholars and law schools have inserted themselves into the international academic networks of constitutional law.<sup>8</sup> Likewise, some Latin American legal interventions have drawn regional and international attention. The decisions affirming social and economic rights by the Constitutional Court of Colombia,<sup>9</sup> the efforts by the Brazilian Public Ministry to affirm socioenvironmental rights at both the federal and state levels,<sup>10</sup> the rights of nature set forth in the Ecuadorian Constitution,<sup>11</sup>

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<sup>4</sup> Roberto Viciano and Rubén Martínez Dalmau (2010), “Aspectos generales del nuevo constitucionalismo latinoamericano”, in *El nuevo constitucionalismo en América Latina* (Quito: Corte Constitucional del Ecuador).

<sup>5</sup> Rickard Lalander (2011), “¿Descentralización socialista? Reflexiones sobre democracia radical, participación política y el neoconstitucionalismo del siglo XXI en Bolivia, el Ecuador y Venezuela”, *Politeia*, **34** (47), 55–88.

<sup>6</sup> Javier Couso (2017), “Back to the future? The return of sovereignty and the principle of non-intervention in the internal affairs of the states in Latin America’s ‘radical constitutionalism’”, Ch. 5 in this volume.

<sup>7</sup> Roberto Viciano and Ruben Martínez Dalmau (2010), “¿Se puede hablar de un nuevo constitucionalismo latinoamericano como corriente doctrinal sistematizada?”, in *El nuevo constitucionalismo en América Latina* (Quito: Corte Constitucional del Ecuador).

<sup>8</sup> See, for example, the Instituto Iberoamericano de Derecho Constitucional, at: <http://www.juridicas.unam.mx/iidc/> and the Seminario en Latinoamericano de Teoría Constitucional (SELA), at: <http://www.law.yale.edu/intellectuallife/SELAoerview.htm> (both accessed 5 September 2017).

<sup>9</sup> See, in general, Manuel José Cepeda-Espinosa (2004), “Judicial activism in a violent context: The origin, role, and impact of the Colombian Constitutional Court”, *Wash. U. Global Stud. L. Rev.*, **3**, 539.

<sup>10</sup> Lesley McAllister (2008), *Making Law Matter: Environmental Protection and Legal Institutions in Brazil* (Stanford, CA: Stanford University Press).

<sup>11</sup> Eduardo Gudynas (2009), “La ecología política del giro biocéntrico en la nueva Constitución de Ecuador”, *Revista Estudios Sociales*, **32**, 34–47; and Marco Aparicio (2011), “Nuevo constitucionalismo, derechos y medio ambiente

or the Bolivian interpretations of the principle of multinationality,<sup>12</sup> for example, have become valuable and original objects of study for students and legal academics around the world.

However, the results of Latin American constitutionalism are varied.<sup>13</sup> While in some countries there have been advances on issues like the stability of the democratic processes, the protection of civil and political rights and the limiting of presidentialism, not surprisingly perhaps, all of the promises of Latin American constitutionalism have not been fully realized. Notably, the promises of equality, inclusion, dignity and autonomy of persons made by these new constitutions have not been delivered fully.<sup>14</sup> Similarly, in spite of the achievements mentioned above, outside the region Latin American academia and legal institutions largely remain on the margins of the discussion about the present and future of constitutionalism, and they continue to be considered secondary interlocutors on these matters.<sup>15</sup> In particular, their relationship with U.S. legal academia remains predominantly vertical and one-sided.<sup>16</sup> Latin American academia tends to be considered a space for reproduction and diffusion of the constitutional law products generated in countries of the Global North, like the United States. But as the articles gathered demonstrate, which form the basis of the chapters in this book, that need not be the case.

In contrast, U.S. constitutionalism has historically occupied a central position in the world.<sup>17</sup> The United States' legal and political institutions have long been considered paradigmatic examples of liberal theory and practice. The influence of the Constitution of 1787 is undeniable and its achievements on matters of the stability and prosperity of the political

en las constituciones del Ecuador y Bolivia”, *Revista General de Derecho Público Comparado*, **9**, 1–24.

<sup>12</sup> Jorge Lazarte (2009), “Plurinacionalismo y multiculturalismo en la Asamblea Constituyente de Bolivia”, *Revista Internacional de Filosofía Política*, **33**, 71–102.

<sup>13</sup> Roberto Gargarella (2017), “Constitutionalism in the Americas. A comparison between the U.S. and Latin America”, Ch. 4 in this volume.

<sup>14</sup> Guillermo O’Donnell (1998), *Polyarchies and the (Un)Rule of Law in Latin America* (Notra Dame, IN: Helen Kellogg Institute for International Studies).

<sup>15</sup> Daniel Bonilla (2013), “Introduction”, in Daniel Bonilla (ed.), *Constitutionalism of the Global South: The Three Activist Courts of India, South Africa and Colombia* (Cambridge: Cambridge University Press).

<sup>16</sup> Daniel Bonilla (2013), “Legal clinics in the Global North and South: Between equality and subordination”, *Yale Hum. Rts. & Dev. L.J.*, **16**, 176.

<sup>17</sup> See Ugo Mattei (2003), “A theory of imperial law: A study on U.S. hegemony and the Latin resistance”, *Ind. J. Global Legal Stud.*, **10**, 383, at 447; Wolfgang Wiegand (1996), “Americanization of law: Reception or convergence?”, in Lawrence M. Friedman and Harry N. Scheiber (eds), *Legal Culture and the Legal Profession* (Boulder, CO: Westview Press), p. 137.

community it regulates are broadly admired.<sup>18</sup> Countries from all regions of the world have been inspired by (or have reproduced) much of its content.<sup>19</sup> U.S.-based academic production on constitutional law is also vast and often of high quality, and has permeated global discussion on the topic. The work of authors like Ronald Dworkin, Cass Sunstein and Bruce Ackerman, to name only three widely known professors, is discussed around the globe.<sup>20</sup>

However, over the last few years, there has been discussion of the weakening of the U.S. constitutional model,<sup>21</sup> or its decreased relevance in the international context.<sup>22</sup> For example, Supreme Court Justice Ruth Bader Ginsburg affirmed that, if a country were drafting a new constitution today, she would recommend that it look not towards the United States, but towards Canada, South Africa or Europe.<sup>23</sup> Her colleague

<sup>18</sup> Heinz Klug (2000), "Model and anti-model: The United States Constitution and the 'rise of world constitutionalism'", *Wis. L. Rev.*, **3**, 597; Louis Henkin and Albert J. Rosenthal (eds) (1990), *Constitutionalism Rights: The Influence of the United States and Constitution Abroad* (Columbia: Columbia University Press).

<sup>19</sup> George Athan Billias (ed.) (1990), *American Constitutionalism Abroad: Selected Essays in Comparative Constitutional History* (New York: Greenwood Press); George Athan Billias (2009), *American Constitutionalism Heard Around the World, 1776–1989: A Global Perspective* (New York: New York University Press); Duncan Kennedy, "The globalizations of law and legal thought", in David Trubek and Alvaro Santos (eds) (2006), *The New Law and Economic Development: A Critical Appraisal* (Cambridge/New York: Cambridge University Press), pp. 19, 57.

<sup>20</sup> Ugo Mattei (1994), "Why the wind changed: Intellectual leadership in western law", *Am. J. Comp. L.*, **42**, 195.

<sup>21</sup> Bruce Ackerman (2013), *The Decline and Fall of the American Republic* (Cambridge, MA: Belknap Press); Immanuel Wallerstein (2003), *The Decline of American Power: The U.S. in a Chaotic World* (New York: The New Press); Randall L. Schweller and Xiaoyu Pu, "After unipolarity: China's visions of international order in an era of U.S. decline", *International Security*, **36** (1), 41.

<sup>22</sup> David S. Law and Mila Versteeg (2012), "The declining influence of the United States Constitution", *New York University Law Review*, **87** (3), 762; Tom Ginsburg, Zachary Elkins and James Melton (2012), Response: "Comments on law and Versteeg's 'The Declining Influence of the United States Constitution'", *New York University Law Review*, **87**, 2088; and Fernanda G. Nicola (2017), "The global diffusion of U.S. legal thought: Changing influence, national security and legal education in crisis", Ch. 9 in this volume.

<sup>23</sup> In an interview in Egypt, Justice Ginsburg said: "I would not look to the U.S. constitution, if I were drafting a constitution in the year 2012. I might look at the constitution of South Africa. That was a deliberate attempt to have a fundamental instrument of government that embraced basic human rights, had an independent judiciary. It really is, I think, a great piece of work that was done. Much more recent than the U.S. Constitution: Canada has a Charter of Rights and

Justice Stephen Breyer recently explored the obligations of U.S. jurists to look beyond U.S. laws in arriving at their constitutional judgments.<sup>24</sup> More concretely still, recent research shows that the influence of the U.S. Constitution has decreased notably since the 1980s.<sup>25</sup> The contribution in this volume by Law and Ginsburg yet further endorses that conclusion. Ever fewer constitutions show the imprint of the Constitution of 1787.

Many arguments are offered to explain the supposed decline in its influence. Included among them are the argument that the U.S. Constitution does not serve modern constitutional needs because it recognizes very few rights, does not mention collective or social, economic and cultural rights, and is tremendously difficult to reform, impeding the flexibility needed in a rapidly changing world.<sup>26</sup> Political and economic arguments have been added to these explanations based on issues of constitutional theory and practice, including the weakening of the U.S. economic system, the problems of bipartisanship the United States faces, and the country's decreased political prestige.<sup>27</sup>

Furthermore, the emphasis that some prominent voices in U.S. constitutionalism put on issues such as originalism<sup>28</sup> or the right to bear arms<sup>29</sup> also leads to indifference in many international academic circles. These and other issues reveal a provincialism of some U.S. constitutionalism that also leads to a certain degree of rejection (or disinterest) by judges

Freedoms. It dates from 1982. You would almost certainly look at the European Convention on Human Rights . . .". The interview is available at: <http://www.memritv.org/clip/en/3295.htm> (accessed 5 September 2017).

<sup>24</sup> Stephen Breyer (2015), *The Court and the World: American Law and the New Global Realities* (New York: Knopf).

<sup>25</sup> Law and Versteeg (n 22).

<sup>26</sup> James Allan and Grant Huscroft (2006), "Constitutional rights coming home to roost? Rights internationalism in American courts", *San Diego L. Rev.*, **43** (1), 2.

<sup>27</sup> The literature about the decline of the U.S. is today wide and amply debated. Some of the most well known publications are Paul M. Kennedy (1987), *The Rise and Fall of the Great Powers* (London: Random House); Joseph S. Nye, *Bound to Lead: The Changing Nature of American Power* (1990) (New York: Basic Books); Niall Ferguson (2004), *Colossus: The Rise and Fall of the American Empire* (New York: Gardners Books); and Kevin Phillips (2006), "American theocracy: The peril and politics of radical religion, oil, and borrowed money in the 21st century", *Society and Business Review*, **4** (1), 82–83.

<sup>28</sup> Antonin Scalia (1989), "Originalism: The lesser evil", *U. Cin. L. Rev.*, **57**, 849 and Antonin Scalia (1997), *A Matter of Interpretation* (Princeton, NJ: Princeton University Press).

<sup>29</sup> See the second amendment of the U.S. Constitution where the right to bear arms is recognized.

and legal academics from other parts of the world.<sup>30</sup> Moreover, the fact that the greater part of U.S. constitutionalists have little interest in the constitutional theory and practice of other countries leads to a perception of superiority and isolation that is questioned in various academic spaces around the world.<sup>31</sup>

## DOMINANT NARRATIVES: DEVASTATED LEGAL LANDSCAPES AND LIBERAL PARADISE

One might imagine that, given the immense geographical territory occupied by the Americas, in addition to the rich and complicated political, social and economic history of the continent since its colonization, the political and constitutional history of the United States and Latin America would, in turn, be constituted of both light and shadows, strengths and weaknesses. Surprisingly, however, these nuances are frequently lost in the dominant interpretations of the political and legal past and present of the countries forming the Americas. Thus, in the dominant narrative, Latin American history is homogenized, and its identity and history are both presented as single and continuous, and viewed negatively. U.S. history, by contrast, is presented as a unit without discontinuities that is viewed positively.<sup>32</sup> In this telling, Latin American constitutional history is typically described as a succession of dictatorships or *caudillo* and authoritarian governments. Its constitutions are conceived as mere rules on paper, legal norms that do not have application in the daily life of its citizens. Latin American law is thus commonly perceived by U.S. constitutionalism as a body of “failed law”.<sup>33</sup>

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<sup>30</sup> Ran Hirschl (2014), *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford: Oxford University Press), pp. 192–223. Justice Scalia’s position on the role of comparative and international law in the U.S. legal system is a paradigmatic example of this argument. See, David C. Gray (2007), “Why Justice Scalia should be a constitutional comparativist sometimes”, *Stanford Law Review*, **59** (5), 1249.

<sup>31</sup> A paradigmatic example is *Knight v. Florida*, 528 U.S. 990, 997 (1999). See also David S. Law and Wen-Chen Chang (2011), “The limits of global judicial dialogue”, *Wash. L. Rev.*, **86**, 523, 525–27.

<sup>32</sup> See Keith Rosenn (1990–91), “The success of constitutionalism in the United States and its failure in Latin America: An Explanation”, *University of Miami Inter-American Law Review*, **22**, 1 and Miguel Schor (2006), “Constitutionalism through the looking glass of Latin America”, *Texas International Law Journal*, **41**, 1. For a critical view, see Jorge L. Esquirol (2013), “Legal Latin Americanism”, *Yale Hum. Rts. & Dev. L.J.*, **16**, 145–70.

<sup>33</sup> Jorge L. Esquirol (2008), “The failed law of Latin America”, *Am. J. Comp. L.*, **56**, 75.

Moreover, to the extent that it has an identity, Latin American constitutionalism is oftentimes seen as a mere replica of U.S. or European constitutionalism.<sup>34</sup> Latin American constitutional law is in this way interpreted as a derivative product that has little to offer to the global legal discussion, one that lacks great value as an object of academic study.

This narrative was synthesized powerfully in *Zappa v. Cruz*,<sup>35</sup> a 1998 decision from the United States District Court for the District of Puerto Rico. The decision merits interest for at least two reasons. First, the context for a lengthy interrogation of the understanding of law in Latin America as opposed to the United States is, at first glance, quite ordinary. In *Zappa*, the plaintiffs, non-Spanish speaking persons of Anglo descent, successfully argued that the circumstances of administering the exam to receive a license to sell real estate in Puerto Rico violated their constitutional Equal Protection rights, claiming that the English-language exam was more difficult than the Spanish-language exam and that, in any case, the exam was graded to give preference to native-born Puerto Ricans. As will be examined below, this led the U.S. District judge to explore the meaning of “culture” as it relates to law. In the end, as will be seen, the judge resoundingly affirmed the identity of Puerto Ricans as heirs to an enlightened U.S. legal tradition and not a dark, personality-driven Latin American legal tradition, proudly declaring that Puerto Ricans “live in a culture of personal freedom. That culture of freedom has nothing in common with any so-called Latin American culture and everything in common with the culture of the United States.”<sup>36</sup> Second, and notably, the decision was issued by a Spanish-speaking federal judge from the United States born in Puerto Rico – by some estimations part of Latin America – but trained as a lawyer in the United States.<sup>37</sup> In the relevant part, the Court observed as follows:

The political history of Latin America is one of dictatorship and its concomitant evils, corruption and civil war. Deriving from the notion of *caudillismo*—the distinctly Spanish philosophy of the ordering of man and his universe under which the individual’s ego is so strong that it preempts broader concepts like community or nation—Latin American political systems have been little more than personality cults paying homage to political leaders, from the conquistadors, like Pizarro and Cortés, to the leaders of independence, like Bolívar and Hidalgo, to more recent heirs to power like Santa Ana, Perón, Castro, and

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<sup>34</sup> Bonilla (n 15).

<sup>35</sup> *Zappa v. Cruz*, 30 F. Supp. 2d 123 (1998).

<sup>36</sup> *Zappa v. Cruz* (n 35), at 140.

<sup>37</sup> For a biography of Justice Jaime Pieras, see: <http://www.prd.uscourts.gov/?q=node/208> (accessed 5 September 2017).

Pinochet. Under political systems based on *caudillismo*, the governed in Latin American [*sic*] have placed less importance on ideals like liberty and justice than in the leader who is to incarnate those ideals. And the governing dictators have, also in the spirit of *caudillismo*, emphasized political separation over unity as a means of distinguishing and aggrandizing their personae. Employing personalistic political systems and elevating men over ideas have led to, in contrast to the United States, nations of men, not laws.<sup>38</sup>

The above-quoted language shows how the *Zappa* Court's interpretation of Latin American constitutionalism revolves around a set of ideas that homogenizes and impoverishes its history. Latin America is described as a devastated political and legal landscape. In particular, at least four aspects of the quoted language deserve emphasis. First, Latin America is seen as a geographically indistinct region. For the Court, Latin America constitutes a single space with no relevant borders. Mexico and Argentina, Ecuador and Brazil, or Costa Rica and Chile are thought of as a single space where there is no difference in terms of legal history. The issue here is not that there are no similarities between the region's countries. Among other things, of course, these countries share a colonial past, the Roman Catholic religion, language, traditions from the Iberian peninsula (Spanish and Portuguese), as well as notable levels of inequality, poverty and violence. To be sure, their multicultural populations constantly struggle to materialize the ideals of liberal democracies. Of course, one could cite as many differences, beginning with differences of geography and climate to resulting differences in immigrant populations and their contributions to the history of individual countries. The fact that the Court does not do so, however, highlights its preference for the narrative that prefers to see Latin America as a region of failed law.

Second, the Court's ruling assumes that Latin America is characterized by a unified and continuous regional history. In this view, the region is characterized by a single political and constitutional history, and it is rated negatively. In this telling, the region's history has an established beginning, the Conquest and European colonization, and it has a common present, the end of the twentieth century. The political and constitutional history of the countries that form Latin America is irrelevant. The Court identifies no appreciable differences; there are no nuances that must be explained.

Third, the quoted language is noteworthy because its tale of a Latin American history without discontinuities or differences is also marked by the idea that culture, on the one hand, and law and politics, on the other, have an organic relationship. Thus, Latin American authoritarianism is

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<sup>38</sup> *Zappa v. Cruz* (n 35), at 138.

the fruit of a distinctly “Spanish philosophy”: *caudillismo*. For this U.S. Federal Court, Spain-derived cultures have as one of their political products the cult of the charismatic leader and his prioritization in the legal order. In this narrative, Latin America is a region that inherited a lack of respect for the law from its Spanish forebears. Thus, Latin American culture is also characterized as a single culture emanating from a single source: Spain.<sup>39</sup> The Court also ascribes a static quality to this intertwined Latin American culture–law narrative. The description, finding that *caudillismo* is the essential characteristic of Latin culture, does not seem to allow, for example, the possibility of citizen-led change. Instead, it suggests that Latin America can only reach liberal democracy if the region stops following its essential ways of being and existing.

Fourth, the Court assumes a particular position between structure and contingent exception. Structurally, Latin America is an authoritarian culture. If we dig deeply, the Court argues, it would be possible to find some exceptions to the rule in its history, for example, democratic movements and successes in political and legal experimentation. Nevertheless, for the *Zappa* Court, these exceptions would only confirm the existence of the rule.

In contrast, the Court presented U.S. constitutionalism and political history in radical opposition to those of Latin America. If South and Central America is an example of a devastated legal and political landscape, the United States is the promised land, a liberal paradise incarnate. In the words of the Court:

In the United States, on the other hand, we have struggled to ensure that both the letter and spirit of our Constitution, and especially the guarantees of individual liberty contained in the Bill of Rights, have been upheld and left unmolested by the government. While we have not won every battle, as various unhappy chapters in U.S. history attest, we continue to win the war and the United States remains a bastion of liberty, justice, and opportunity. The tenets of our political system are well-known and much imitated—it is a government of “we the people,” by “we the people,” and for “we the people.” The people have retained the power by limiting that of the government. First, the Constitution enumerates the powers of the national government, establishing a federal system under which the individual states, within their jurisdictions, both share concurrent authority with the national government and enjoy powers not given the national government. Second, the enumerated powers of the national government are divided amongst the legislative, the judicial, and the executive branches. By that system of checks and balances, our founding fathers ensured that those who might have

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<sup>39</sup> One has to wonder where this narrative leaves Portuguese-speaking Brazil or, for that matter, the English- and Dutch-speaking former colonies in the north-east of the continent and the Antilles.

in mind dictatorial authority within the national government would be hobbled in any attempt to consolidate power. Third, and perhaps most importantly, the Constitution ensures that certain individual liberties may not be infringed upon by either the national or, via the Fourteenth Amendment, the state governments. These individual liberties, aside from abridging the governments' ability to impose upon individual citizens . . . enhance the citizenry's ability to police the government . . . Under this system, the citizens of the United States have the right to pursue the ends they desire, subject only to the laws created by those they elect, whose powers are cabined as described by the Constitution.<sup>40</sup>

For the Court, the United States is, in short, the conceptual and material opposite of Latin America. The Court suggests this is so for at least four reasons. In each instance, notably, the United States and its legal and constitutional traditions are placed in opposition to those alleged to be the Latin American way. First, the Court celebrates the United States for its tolerance of diversity, as follows: “[a]lthough often given the moniker, ‘melting pot,’ the United States is perhaps better described as a mixing bowl, a place where many ‘cultural’ elements coexist to form a whole without losing their individual flavors.” In the United States, declares the Court, “classifications based on such criteria [i.e. ethnic or racial or other identity factors] are considered wrong, both morally and legally. Indeed, such classifications are wrong precisely because they do not work . . . [and] the nation as a whole has generally strived to rise above such classifications, especially during the last century.”<sup>41</sup> By implication, as the Court’s opinion goes on to demonstrate, this is the opposite of Latin America, where diversity and difference are not tolerated.<sup>42</sup> The fact that this ignores the cultural, social and political diversity of Latin America, a region whose history is as heavily marked as that of the United States by diverse waves of immigration from Africa, Asia and Europe,<sup>43</sup> only

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<sup>40</sup> *Zappa v. Cruz* (n 35), at 139, affirmed by *DiMarco-Zappa v. Cabanillas*, 238 F.3d 25 (1st Cir., 2001).

<sup>41</sup> *Zappa v. Cruz* (n 35), at 135–36.

<sup>42</sup> See, e.g., *Zappa v. Cruz* (n 35), at 138.

<sup>43</sup> See generally, for example, Teresa A. Meade, *History of Modern Latin America: 1800 to the Present* (2016), 2nd edn (Chichester: Wiley-Blackwell). Specifically, it can be noted, for instance, that in addition to receiving more African-born slaves than any other country, Brazil has the world’s largest communities of expatriates from Japan and the Levant. See, e.g., Walter Hawthorne (2010), *From Africa to Brazil: Culture, Identity, and an Atlantic Slave Trade, 1600–1830* (Cambridge: Cambridge University Press) (on forced African immigration to Brazil); Jeffrey Lesser (2013), *Immigration, Ethnicity, and National Identity in Brazil, 1808 to the Present* (Cambridge: Cambridge University Press) (on Asian, European and Middle Eastern immigration); Stewart Lone (2001), *The Japanese Community in Brazil, 1908–1940: Between Samurai and Carnival* (Basingstoke:

underscores the surprising power of this trope. Yet each of the Court's categories used to evaluate Latin America, when employed to evaluate the United States, renders positive conclusions.

Second, the history of the United States as a geographic and political entity is characterized by unity and continuity, but one where that unity and continuity represents a progressive movement and process of constant improvement. In this account, since it was founded, beginning with the Revolution and the proclamation of the Constitution of 1787, the U.S. political community has been, in the Court's narrative, committed to and worked to materialize liberal ideas. As the Court sees it, the U.S. liberal Constitution is a set of rules in action, not rules on paper. The principles of popular sovereignty, legality, separation of powers and individual rights do not exist merely in the Constitution's text, but form part of the daily life of all U.S. citizens. This stands in sharp contrast for the Court with the history of Latin America, which has suffered the imposition of "personalistic [*sic*] political systems and elevating men over ideas", creating "nations of men, not laws".<sup>44</sup>

Fourth, in the United States, regardless of their moral convictions, the Court argues that U.S. citizens are committed to a series of political values that allow for protecting their differences. According to the Court, the U.S. political community distinguishes between morality and justice. In the private sphere, U.S. citizens can construct their moral projects without the undue intervention of the state. There they can believe whatever they think is relevant, provided that they do not violate the rights of others by doing so. In the public sphere, however, there is a consensus around liberal values. Political values are clearly distinguished from the moral values that guide the life projects of the individuals that form the political community. While the Court recognizes that there have been some dark times in the political and constitutional history of the United States, these are presented as an exception to the rule. In stark contrast, in Latin America, explains the Court, the rule of men and not laws resulted in a situation

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Palgrave Macmillan). Argentina's history also is marked by heavy immigration from Italy and other European countries (see, e.g. May E. Bletz (2010), *Immigration and Acculturation in Brazil and Argentina: 1890–1929* (Basingstoke: Palgrave Macmillan). The entire region has witnessed waves of Chinese immigration (see, e.g., Walton Look Lai (2010), *Indentured Labor, Caribbean Sugar: Chinese and Indian Migrants to the British West Indies, 1838–1918* (Baltimore: Johns Hopkins University Press) and Robert Chao Romero (2012), *The Chinese in Mexico, 1882–1940* (Arizona: University of Arizona Press)). These examples are merely illustrative, but make clear that the region has as much a claim to be a "melting pot" or "mixing bowl" as does the United States.

<sup>44</sup> *Zappa v. Cruz* (n 35), at 137–38.

in which “few Latin American leaders have felt themselves bound by any constitutional restraints. The result is a national history filled with poverty, suffering, repression, corruption, sycophancy, torture, assassination, and death in the field of battle.”<sup>45</sup> In this last quotation, the Court thus again affirms not only the image of Latin America as a devastated legal and political landscape, but also betrays a willingness to disregard difference and nuance: Latin America has “a” national history.

Admittedly, *Zappa* is but one example of a narrative imagining Latin America as a devastated legal landscape in contrast to the U.S. realization of a liberal paradise. There are, no doubt, more complex narratives about U.S. and Latin American constitutional law. However, it is our suggestion that the views expressed in *Zappa* are hardly the imaginings of one rogue federal judge. Indeed, the opinion was positively cited subsequently by other federal courts, repeating some of *Zappa*'s stereotypes of Latin American *caudillos*.<sup>46</sup> But our suggestion is that it may be a paradigmatic example, one that attests to widely held views of “failed” Latin American law.<sup>47</sup> One premise that underlines the chapters that appear in this volume is the view that this interpretation, one that idealizes U.S. constitutionalism and underrates Latin American constitutional achievements, is radically flawed. The authors whose work appears here strive, from a variety of perspectives and angles, to erode the dominance of a view like that

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<sup>45</sup> *Zappa v. Cruz* (n 35), at 138.

<sup>46</sup> See *American Civil Liberties Union of Florida, Inc. v. Miami-Dade County School Bd.*, 557 F.3d 1177 (11th Cir., 2009), a case involving a history textbook's description of Cuba as not being sufficiently critical of the Cuban government, quoting *Zappa* (n 35), at 139, to the effect that “[s]ince 1898, Cuba, without benefit of the United States Constitution, has wallowed in poverty and corruption, mostly under dictatorial rule.” Or consider the positive treatment of *Zappa* in a 2000 case involving a challenge to the inability of Puerto Ricans to vote, in which the Federal District Court for Puerto Rico lamented that “the United States citizens residing in Puerto Rico, who sit in the farthest frontier of the United States in the Atlantic and who have been U.S. citizens in good standing for close to 100 years, have embraced and made theirs a political culture similar to that of the United States and different from the political culture of other Latin American countries, and yet have not enjoyed the rights that go hand-in-hand with their political culture”. *Igartua de la Rosa v. U.S.*, 107 F.Supp. 2d 140 (D.C.P.R., 2000). The *Igartua de la Rosa* Court positively quoted the *Zappa* decision, 30 F.Supp. 2d at 140, as follows: “If there is no political freedom, there can be no economic freedom where individuals can develop their innate abilities. That is why the United States' main claim to glory is not predicated upon the powerhouse of Wall Street but the Bill of Rights that protected the rights of citizens in a free society which created a society of equals devoid of the caste system and made possible a Wall Street and the American Dream.”

<sup>47</sup> Esquirol (n 33).

expressed in *Zappa*. In the process, the articles collected here together reveal some of the many achievements, innovations, challenges, weaknesses, and struggles of Latin American constitutionalism in particular and Latin American law in general.

## THE GENERAL AND SPECIFIC OBJECTIVES OF THE BOOK

The articles collected, which form the chapters in this volume, cover a wide range of topics, dealing with the constitutions, law and constitution, and law-making histories and processes in countries across the Americas. The chapters offer a rich tapestry of analysis and reflections about constitutionalism in the abstract; they also contain specific and comparative case studies. In the process, the collection, taken together, reveals not only the strengths and ambitions of modern constitutional practice, but also its challenges and debilities. In this, the chapters contribute to debates about constitutionalism in ways both general and more specific. On the one hand, the authors in this volume are concerned not only with constitutionalism in the Americas but with modern questions of constitutionalism and constitution-making in general. On the other, the authors are concerned with specific, regional ambitions, tensions, conflicts, and contributions.

## CONSTITUTIONALISM IN THE AMERICAS AND GLOBAL CONSTITUTIONALISM: GENERAL THEMES

At the most general level, the chapters reveal many of the concerns and preoccupations that characterize much debate about the role of constitutions in modern democratic states, and not only in the Americas. The shared concerns in the chapters can thus be divided into four aspects. First, the chapters reveal a consistent focus on the central question of what *interests* constitutions serve to protect. “Interest” in this context refers to the individuals and groups that constitutional (or any legal) provisions seek to support and promote. Second, they demonstrate a concern about the *functions* of constitutions in democratic societies; they ask about the aims pursued by constitutions. For example, should a constitution serve as a general outline of what individuals may do within a given social order and, conversely, what the government should not do? Or should constitutions be more aggressive statements of policy commitment, detailing the substantive protections a nation will provide its citizens? Third,

they evidence engagement with the question of what *form* of constitution or constitution-making best serves the aims of governmental stability and prosperity in modern democracies. This aspect follows directly from the question of function. Thus, for example, a constitution mostly dedicated to the articulation of political and civil rights (such as the U.S. Constitution) will likely have a shorter form and leave more questions of governance unspecified than a constitution that consists of a charter of a wide range of social, economic and other positive rights (as is the case in most Latin American constitutions). Fourth and finally, the chapters address questions of the reach and the limits of *context*, and specifically the implications of – and reasons for – borrowing from one constitutional model and tradition and importing it into another. This is to recognize that different social systems, cultures, histories and related concerns inevitably affect the situations in which constitutions are prepared, making it a risky proposition to introduce wholesale large sections of the legal charters of other countries, where words and concepts may have an entirely different valence, and so different effects. As a consequence of this focus on context, a final concern seen in these chapters is comparative.

### **Interests**

The Federalist Papers written by Alexander Hamilton, John Jay and James Madison addressed the question of what interests constitutions protect. For example, in Federalist No. 84, Alexander Hamilton famously objected to the inclusion of a Bill of Rights in the U.S. Constitution, when he affirmed as follows: “it is evident, therefore, that . . . [bills of rights] have no application to constitutions professedly founded upon the power of the people, and executed by their immediate representatives and servants. Here, in strictness, the people surrender nothing, and as they retain every thing, they have no need of particular reservations.” What is of interest here in the quoted language is Hamilton’s concern with the question of whether and how to protect the interests of the many as against the few. More than two centuries later, as some of these essays demonstrate, that continues to be a central question that constitutions are meant to address. Thus, for example, Roberto Gargarella examines constitutional “*organization of powers*, and . . . the *structure of rights* – and the way in which they relate to each other”, first in the U.S. context and then in the case of some Latin American constitutions. In his account, the U.S. constitutional model effected a high degree of what he calls “internal consistency” by organizing governmental powers in the service of comparatively modest rights’ provision goals, namely “the promotion of individual freedom and the limitation of power”. Thus, the interests protected by the the U.S. Constitution are

largely limited to individual ones and, at the time of its drafting, largely the individual rights of white males. (Notably, in this context, Gargarella labels the “constitutional failure” to address slavery to constitute “the main omission – the main internal inconsistency – of the U.S. Constitution”). By contrast, in Gargarella’s telling, many Latin American constitutions are much more inclusive and generous in terms of their rights’ structures, although powers are not organized in such a way as to permit those rights to be fully exercised. He therefore finds them to be less internally consistent – the generous rights structure is not balanced by an organization of powers that facilitates that structure. The consequence, for Gargarella, is that the organization of powers in most Latin American constitutions is “characterized by its verticalism and its hostility towards democracy and popular participation in politics”. Simply put, the interests the constitutions say they protect are held at bay by other aspects of the same documents.

For contributor David Landau, the key question to ask in terms of the interests protected by constitutions is whether the document protects what he labels the “majoritarian” or “counter-majoritarian” interests. Landau’s analysis suggests, somewhat in contrast to Gargarella, that constitutions generally tend to serve majoritarian goals. The “myth of the heroic court” in cases like *Brown v. Board of Education*<sup>48</sup> aside, suggests Landau, courts up and down the Americas tend on balance to favor majoritarian interests: “courts in the United States are likely to be the voice of the marginalized in the face of a hostile or indifferent political system”. Despite the wide menu of socioeconomic rights contained in most post-colonial Latin American constitutions, Landau suggests that majoritarian tendencies tend to dominate in Latin America as well.

In contrast to Gargarella and Landau, however, Tanya Kateri Hernández finds some promise for counter-majoritarian (or minority interests) in constitutional structures that contain a menu of explicit socioeconomic rights. Hernández suggests that the right to work contained in the Brazilian national charter may serve to protect more vulnerable groups in society, and specifically Afro-Brazilians, whereas the lack of such an articulated right in the United States prevents mostly Anglo, male judges from having to consider its dimensions and value.

## Functions

Another question central to the concerns animating the contributors to this volume is that of the functions of a constitution in a modern democratic

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<sup>48</sup> *Brown v. Board of Education*, 347 U.S. 483 (1954).

society. This is to ask, for example, whether a constitution is to be only, in Michael Dorf's memorable phrase, "aspirational" in character, or if it is a grounded legal tool, the ultimate authority for resolution of disputes about the limits and extents of rights and obligations of the members of modern democratic societies. The authors assembled here approach this question in different and provocative ways. Importantly, too, the juxtaposition of the chapters reveals to careful readers a robust debate about the answer to this and related questions. Jorge Esquirol, for example, challenges the orthodoxy that Latin American constitutionalism (and law) constitutes a failed project merely because Latin American constitutions are constantly being reworked and amended. Perhaps, Esquirol asks readers to consider, Latin American (or other, non-U.S.) constitutional practice needs to be evaluated on its own terms. By this logic, frequent rewriting may be a sign of success, a willingness to change with the times and not a consequence of a failure effectively to draft a document that will stand the test of time. As Esquirol notes, despite the myth that the U.S. Constitution persists because of its clarity and consistency, in fact there exist "numerous gaps, ambiguities, and contradictions within the U.S. Constitution – or other constitutions for that matter – concerning executive powers, states' rights, international treaties, and other anomalies not usually highlighted in uncritical accounts of U.S. law". Thus, Esquirol pushes us to question whether the U.S. Constitution – so often held as a model of thoughtful, succinct drafting – in fact serves the comprehensive function in defining the U.S. political and social order that it is sometimes alleged to do.

Similarly, Daniel Bonilla, in his contribution, among other things asks readers to consider why dominant narratives emerge that control the way we think about legal subjects over time and in different locations (what he calls "spaces"). These narratives, Bonilla warns, can occlude other legal traditions, practices and habits that may be useful – or, one might even posit, necessary – for the functioning of particular societies and legal cultures. In terms of function, then, Bonilla asks readers to reflect on how laws and constitutions are produced as a consequence of legal epistemologies that may not align with the histories, needs and characteristics of different societies and political orders. As a consequence, his contribution suggests, uncritically inherited legal epistemologies may function to determine legal content in less-than-ideal ways.

Applying a more historical method, Gargarella's contribution raises related concerns about constitutional function. Looking at examples of constitution-writing practice in Latin America back in the nineteenth century, Gargarella prods readers to consider the ways in which some constitutions can almost deliberately tolerate contradictions and opposing interests, so that constitutions become very conscious expressions of

political consequences. Consistency, Gargarella's piece suggests, may be an appealing criterion by which to evaluate constitutions as written instruments, but to insist upon it as the only way to read constitutional practice may leave us with an impoverished understanding of the role, of the function, constitutions play in state creation and self-articulation – not just of law, but in processes of social and political ordering.

A darker, more alarmed view of the dangers of leaving well enough alone and *not* rewriting is contained in Francisca Pou's historical and legal analysis of the Mexican constitution. Mexico has, Pou shows, one of the most stable constitutional frameworks known. The 1917 Constitution remains in force, although constantly revised and amended. Thus, as Pou Giménez demonstrates, the Mexican Constitution functions both as a symbol of historical stability in a system that simultaneously values the function of reform. "Reformism", she explains, "is a badge of Mexican constitutional life: it speaks of the deep bonds the Mexican legal system retains with the past, but it should equally convey the idea of permanent, never-ending adjustment of basic rules and institutions." But Pou also questions whether a commitment to – or a tolerance of – stability in the form of adherence to the historical document – is a net positive for a dynamic and conflictual social and legal order. That is, Pou's chapter implicitly implores readers to compare the benefits of deliberate, comprehensive revision of constitutional structures at moments of change or crisis. Whole scale revision, she suggests, may direct societies to reflect on the function constitutions can serve to articulate values and priorities.

Still yet another view of the function of constitutions is provided by Javier Couso. Couso provocatively argues that Venezuela's rejection of and withdrawal from the Inter-American Human Rights System, rather than being viewed as an impetuous, heretical move, may be thought of as a carefully considered political and legal act in service of protection of Venezuelan sovereignty and its constitutional values. While critical of the Venezuelan action, Couso further locates the decision to withdraw within a longer reactive tradition in Latin American constitutional and legal argument aimed to protect state sovereignty in the face of U.S. imperialist or neocolonial moves.

## Form

The question of form, of what shape constitutions should ideally take, is another longstanding issue addressed both explicitly and implicitly by many of the contributions assembled here. To be concerned with form is not, to be clear, merely a matter of being concerned with the cosmetic aspect of a constitution. On the contrary, as the debate in the *Federalist*

Papers mentioned above illustrates, the question of form is intricately connected to that of substance (which embraces both questions of interests and function).

Pou's analysis of Mexican constitutionalism is a case in point. As indicated above, Pou documents the fact that a notable feature of the Mexican Constitution is to respect its revolutionary roots – leaving much of the original document intact – while simultaneously committing to change with endless amendment. In this way, form follows function, producing a document that, in her telling, combines “length, detail, and other traits . . . [so as to] render the Mexican Constitution overweight and a bit oppressive as a directly enforceable charter, and makes it difficult for citizens to ‘appropriate’ it”. By contrast, Esquirol suggests that the very “malleability” of Latin American constitutions (meaning documents susceptible to frequent revision) may reflect a form that more closely reflects social and political values – revision and amendment may thus be viewed as evidence of social and legal dynamism rather than as signs of confusion and disorder – than a document written centuries ago. In this way, both authors engage critically with a question that has long bedeviled constitutional theory.

For their part, Law and Ginsburg, in their contribution, arrive at an interesting conclusion with respect to the amendments characteristic of Latin American (and other, again non-U.S.) constitutions. Specifically, Law and Ginsburg suggest that the different waves of constitution-rewriting that have swept Latin America since the nineteenth century have resulted in constitutions that “exhibit growing dissimilarity to the U.S. Constitution in both their scope and their substantive content”. Moreover, they suggest, the form and substance of Latin American constitutions is not only evermore unlike the U.S. charter, but is also distinctive as compared to other parts of the world. Like many of the other papers in this volume (Bonilla and Esquirol, notably), this conclusion opens the door for further research into how these new forms both shape and reflect the societies in which they are produced. That is, their research demonstrates the need for further examination of the ways in which constitutional forms are changing, in Latin America and elsewhere, and to question the consequences of that change.

## **Context**

Many of the articles collected here reflect the changing context in which constitutions are made and amended. With regard to the Americas, most prominently, the articles both document a waning dependence on or the utility of the U.S. model, for at least three reasons. First, as

Bonilla's chapter notes, the insularity that often characterizes U.S. legal production may not always serve a region increasingly accustomed to engage in plural and global legal debate. Second, several of the authors touch on the fact that developments in the region such as the positive constitutional treatment for indigenous and other world views (features not characteristic of U.S. constitutional practice, despite the presence of significant indigenous minorities in the United States) may in fact be leading to a new context and habit of constitutional practice. The region thus, through constitutional practice, may be seen to be demonstrating confidence in its own values and contributions – a vote in favor of acknowledging local and national social, political and, thus, legal context. Moreover, in different ways, both Couso and Fernanda Nicola address these positive changes and also trace the consequences of illiberal tendencies in U.S. political and social life so as to turn Latin American (and other) countries elsewhere in their search for new legal ideas, arguments and ways of doing. For Couso, continuing imperialist and neocolonial tendencies – one could simply call it arrogance – of U.S. legal actors, especially notable in the post 9/11 clamp-down on some civil liberties, is forcing the hand of Latin American constitutionalists to forge a distinct path in defense of national interests. Nicola, by contrast, examines the consequences of 9/11 and other international events to transform the focus of U.S. constitutional and legal work into the creation of a semi-autonomous discipline of National Security Law, rendering the United States more isolated and backward than its Latin American neighbors (and again, other countries). Third, the chapters themselves demonstrate a deep, critical trend in thinking about constitutions in the region. Thus, for instance, while Gargarella laments the failure of “internal consistency” in Latin American constitutional structures in which substantive rights are not supported by an organization of powers that allows for their ready exercise, the identification of the problem (one echoed, for example, in Pou's contribution) must constitute a positive step in the possible resolution of the conflict.

In sum, this section has endeavored to demonstrate that the chapters assembled here do far more than merely document trends in Latin American or U.S. constitutionalism. To be sure, they do that, as will be explored presently. But they also engage powerfully with longstanding and modern trends in constitutional debate and argument, including questions of what interests constitutions protect (and how), constitutional function and form, and the context in which constitutions are produced and used.

## CONSTITUTIONAL ANALYSIS IN THE AMERICAS: THE SPECIFIC AIMS OF THE BOOK AND ITS STRUCTURE

The volume also, of course, grapples specifically with questions of constitutional analysis in the Americas. In this regard, three features of the chapters, taken as a whole, merit attention. First, the volume seeks to question arguments and readings that constitute the homogenizing view of U.S. and Latin American constitutionalism, arguments and readings lacking in recognition of nuance and difference. Second, this volume also seeks to contribute to the construction of more subtle and complex interpretations of constitutionalism throughout the Americas, interpretations that can shed light on both successes and failures of the political and legal projects of countries in the Americas. Third and finally, this volume seeks to contribute to an effort to produce more rich, textured descriptions and evaluations of the relationships between U.S. and Latin American constitutionalism, as well as to the creation of more horizontal and more fluid exchanges between them.

To meet these objectives, the book is divided into three sections. Section I examines the relationship between Latin American and U.S. constitutionalism. In particular, it examines the widely held idea that Latin America is a mere space of reproduction and diffusion of U.S. constitutional production (or that of some continental European countries, like Germany or Spain), while the United States is a context-universal original legal knowledge production suitable for export the world over. Two chapters form this first section of the book. In the first, Daniel Bonilla argues that the production, exchange, and use of legal knowledge are subject to a political economy. These processes, he explains, are governed by a series of rules and principles that determine the conditions of possibility for the creation of, commerce in, and consumption of legal theory, doctrine and practices. For Bonilla, this political economy is not neutral. It constructs a specific subject of knowledge that acts within a particular space and time.

This first chapter therefore has a double objective. On the one hand, it seeks to describe and analyze the political economy model that dominates the contemporary legal imagination. In this sense, it seeks to examine the conceptual structure of what Bonilla calls the free market of legal ideas model. This is the model that typically serves to explain the prevalence of U.S. constitutionalism in Latin America. On the other hand, it seeks to describe and analyze an alternative, peripheral political economy model that would best explain the real dynamics that regulate the creation, trade, and use of legal knowledge. To reach this objective, Bonilla sheds light on the conceptual structures that form what he calls the colonial model of

legal knowledge production. In practice, this is the model that regulates key components of the relationships between Latin American and U.S. constitutionalism. His chapter thus aims to shed light on the types of subject that the models of legal knowledge production lead to, as well as the way they imagine the time and space in which these subjects are situated. Likewise, it seeks to shed light on the most precise rules and principles that determine how these models imagine the production, exchange, and use of legal knowledge.

In the second chapter, Jorge Esquirol argues that the relationship between Latin American and U.S. constitutionalism is not horizontal. Esquirol argues that the vertical nature of the relationship is illustrated particularly well in the relative importance of the Latin American constitutional courts and the Supreme Court of the United States. While the U.S. Supreme Court enjoys broad prestige in Latin America, Esquirol explains, Latin American courts have a questionable reputation in the United States (when they are visible at all). While the U.S. Court is widely cited by Latin American court and academics, the case law of Latin American courts is not known and rarely cited by U.S. law professors and courts. For Esquirol, this relationship of subordination of Latin American to U.S. constitutional law is explained by two variables that have contributed to creating a negative image of Latin American constitutional law in the United States, variables that have been instrumental in constructing an idealized image of U.S. liberal constitutionalism and a hyper-realist image of the failures of Latin American constitutionalism.

The first variable is the concept of “obstruction of justice” in international law. This concept presents Latin American justice systems as radically dysfunctional. The second variable is the law and development movement and its impact on contemporary comparative law. Esquirol argues that for the law and development movement Latin American constitutionalism has failed. This movement explains the failure by the great number of constitutions that have governed the countries of the region, because their constitutions are easily changed and because constitutional law is viewed as indistinguishable from politics in the region. Given the vertical nature of the relationship between U.S. and Latin American constitutionalism and the imbalance of power that exists between the two regions, Esquirol also questions whether the construction of a global constitutional law would be desirable for Latin America, wondering whether global constitutionalism would be a more subtle but equally effective instrument for preventing the emergence or consolidation of a truly Latin American constitutionalism.

Section II of the volume, “Latin American Constitutionalism”, provides a critical examination of Latin America’s experience with both liberal and

radical constitutionalism largely over the last twenty-five years, a period that represents the most recent wave of constitutional rewriting amidst the consolidation of democratically elected regimes. On the one hand, it analyzes the experience of countries like Colombia, Mexico and Argentina with the liberal constitutional model; on the other hand, it evaluates some dimensions of the Ecuadorian, Bolivian and Venezuelan experiences with what is commonly known as twenty-first-century socialism or radical constitutionalism. This part of the book assesses some of the costs and benefits of these two models and their future.

In the first chapter of this section, Roberto Gargarella examines the similarities and differences between U.S. and Latin American constitutional law. Gargarella indicates that, although U.S. constitutionalism has influenced Latin American constitutionalism in some circumstances, these two traditions constitute somewhat different ways of understanding constitutional law. Gargarella argues that Latin American constitutionalism has departed from U.S. constitutionalism on three significant points: it has incorporated a much broader list of rights than the U.S. Bill of Rights (which he says has the effect of allowing more substantive protection of egalitarian principles), it has favored hyper-presidential systems, and it has centralized territorial organization and the exercise of state political and legal power. Gargarella also states that these differences make the Latin American constitutional model more conservative and less consistent with respect to the exercise of power but more progressive on social, economic and cultural matters than the U.S. constitutional model.

In the section's second chapter, Javier Couso concentrates on the radical democracies of Venezuela, Ecuador and Bolivia. Couso's argument revolves around three axes. First, he argues that one of the innovative elements of Latin American constitutionalism has been its receptiveness to international human rights law and its commitment to the Inter-American Human Rights System. Second, he indicates that one of the characteristics of radical constitutionalism has been its staunch defense of the principle of national sovereignty. Finally, he states that the defense of national sovereignty has gone hand-in-hand with a constant defense of two principles of international law: the principle of self-determination of peoples and the principle of non-intervention.

Couso then argues that the defense of these three principles has ended up pitting radical constitutionalism against international human rights law. For Couso, for instance, Venezuela's denunciation of the American Convention on Human Rights is not a consequence of a circumstantial political situation, but an effect of the defense of the abovementioned three legal principles. This situation also allows for thinking that other countries of the Bolivarian block could make a similar decision in the near

future. Finally, Couso argues that the illiberal turn taken by U.S. constitutionalism, shown in the violations of due process in the Guantanamo prison, selective assassinations, and the practice of torture, has facilitated the questioning of the Inter-American Human Rights System by radical constitutionalism.

In the third text of this section, Francisca Pou provides a critical analysis of Mexican constitutionalism. For Pou, this is characterized by “reformism”, i.e., the capacity simultaneously to maintain close ties with the political/legal past and also to present itself as a system in continuous and uninterrupted transformation. The analysis of Mexican reformism advanced by Pou is both static and dynamic and is materialized in the following four steps: first, she presents the basic structure of the Mexican constitutional model; second, she provides an analysis of its key content: the standards, institutions, and substantive rules that form its backbone; third, she provides an assessment of the decision-making processes permitted and promoted by the Constitution; fourth and last, she evaluates what she calls the frequency variable, which is nothing other than weighing the effects that living under a constantly changing constitutional regime have had on Mexicans. Pou concludes that, in a context of institutional fragility and social and political exclusion, the reformism that characterizes the Mexican system has allowed profound institutional change to be perpetually controlled and prevented from above. Pou likewise concludes that the Mexican legal and political system will only be successful if there is a radical qualitative change in its institutions, rules, and principles.

In the last chapter of this section, David Landau provides an analysis of the judicialization of socioeconomic rights in Latin America. Landau argues that over the last few decades, the courts of the region have made it possible for socioeconomic rights to be judicially enforced. Nevertheless, Landau also indicates that the effect of this judicial application of socioeconomic rights has had little impact on the levels of social justice in the region. For Landau, this paradox could be explained if, as indicated by the specialized U.S. literature, it becomes evident that the courts are institutions that usually protect the positions of the social majorities and therefore tend to favor the interests of the politically powerful sectors. For Landau, this pattern of behavior has two primary components in Latin American constitutional courts: the model of individual application of socioeconomic rights and negative judicial requirements. This allows claimants, generally middle-class citizens, to realize their rights. However, this kind of decision does not attack the underlying problem preventing the solidification of socioeconomic rights for broad layers of the population. Negative judicial requirements allow for declaring the unconstitutionality of legal norms that convey public austerity policies. Nevertheless,

Landau argues, these decisions do not contribute to the realization of socioeconomic rights for the majority of the population; they only eliminate a norm that is considered unconstitutional from the legal system.

Landau finds, however, that some patterns of Latin American case law go against the arguments that are typically presented in the dominant constitutional doctrine on socioeconomic rights. On the one hand, for Landau, the Courts fill the void left by institutions that defraud the population by noncompliance with their duties with respect to socioeconomic rights. On the other hand, the Courts block unpopular measures taken by governments as a consequence of pressure from powerful national and international interests. Finally, Latin American case law on socioeconomic rights contributes to the creation of a constitutional culture that brings constitutions closer to the citizens, making law relevant in their daily life. However, Landau argues that the Latin American courts cannot easily be converted into institutional vehicles that are effective in materializing the social and economic rights of the region's citizens.

Section III of the volume, "US Constitutionalism in the 21st Century", examines some of the strengths of the U.S. constitutional model, the idea that its global influence has supposedly weakened, and some of the paths it could take in the future. In the first chapter, David Law and Tom Ginsburg provide a quantitative, comparative analysis of Latin American constitutionalism over the last 60 years, aiming to examine the following three recurring legal and political concerns: the enormous influence of U.S. constitutional law, the excessive control of power by the executive branch, and the high level of human rights violations. This analysis focuses on the content of the constitutional texts taken from the quantitative data of "big n" or big data, and it seeks to question the stereotypes of and preconceptions about the creation of constitutional norms in the region.

With respect to the first issue, Law and Ginsburg argue that Latin American constitutions have increasingly moved away from both the U.S. model and models from other regions of the world, such as Europe and Asia. With respect to the second issue, they argue that over time Latin American constitutions have decreased the formal powers granted to the executive branch and have been generous in the recognition and application of human rights. Finally, Law and Ginsburg argue that over the last two decades the distance between the rules recognizing human rights in Latin American constitutions and the social reality has become shorter. For these two authors, the differences between the constitutional promises and the daily life of common people in Latin America have decreased over the last twenty years.

In the second chapter, Fernanda Nicola questions those who affirm that

the influence of U.S. legal thought is currently in decline. For Nicola, the diffusion of legal ideas that originate in the United States remains the rule, although the content exported and the procedures for doing so have changed. This transformation of the forms and content of U.S. legal ideas spread around the world can be seen on three intersecting axes: first, rights-centered U.S. constitutionalism has given way to the exportation of legal products related to national security law. The latter consists of a set of theories and practices that justify and indicate the means for adequate development of timely military interventions, actions against terrorism, and war between nations. Second, legal education focused on training critical students, social justice, and full-time professors is being questioned in the United States by those who, after the crisis experienced by law schools, think that legal education should aim to train attorneys to pass the bar exam, advance transactions that are useful for local businesses, and be taught by part-time professors. Finally, the exportation by U.S.-educated foreign legal elites of the most conservative interpretations of the educational model dominant in the United States. Nicola concludes, then, that the influence of U.S. legal ideas remains as notable around the world as it was in the twentieth century.

In the volume's final chapter, Tanya Hernández argues that the U.S. legal system's failure to recognize the right to work has negatively impacted the case law on racial issues issued by the Supreme Court, unlike Latin America where this right has been recognized formally. For Hernández, the lack of a right to work does not allow U.S. judges to examine the specific contexts in which work spaces are immersed. In these spaces, racial prejudice and the vulnerability of workers are the rule. Hernández concentrates her critical analysis on three key labor case law rulings of the U.S. Supreme Court: *Vance v. Ball State University*,<sup>49</sup> *University of Texas Southwestern Medical Center v. Nassar*<sup>50</sup> and *Ricci v. De Stefano*.<sup>51</sup> From Hernández's perspective, these three rulings show the disconnection between the Supreme Court and the realities of the U.S. labor market in paradigmatic fashion.

In sum, the chapters seek to provide a varied and useful primer to the robust debates and struggles over constitutionalism in the Americas today – not just in the United States but also and indeed, even more so, in Latin America. We hope that your review of these chapters will prove instructive and prompt further work and discussion in the area.

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<sup>49</sup> *Vance v. Ball State University*, 133 S. Ct. 2434 (2013).

<sup>50</sup> *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517 (2013).

<sup>51</sup> *Ricci v. De Stefano*, 557 U.S. 557 (2009).

