

A Critical Review of John Henry Merryman and Rogelio Perez-Perdomo's *The Civil Law Tradition*

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John Henry Merryman and Rogelio Perez-Perdomo's *The Civil Law Tradition* sets out on an ambitious spatial and temporal journey. Its purpose is to distill the essence and evolution of the legal systems of Europe and Latin America (albeit with a disproportionate focus on the former), from the times of the Roman Empire through the present ... in 160 pages or less. Such a task is altogether impossible, hence the authors' working strategy is a pragmatic one, namely "to describe certain powerful historical events and currents of thought that have deeply influenced the growth of contemporary civil law systems and that give form and meaning to the legal rules, institutions, and processes that make up those systems" (Merryman and Perez-Perdomo 2007: 143). That they largely succeed is attested by the 1,350 citations the book has garnered – and the three revisions it has undergone – since it was first published in 1969. This success lies, I argue, in Merryman and Perez-Perdomo's ontological treatment of legal traditions, describing them as (1) historically emergent and (2) culturally embedded. "The law is rooted in the culture and history," the authors argue, "and it responds, within cultural limits, to the specific demands of a given society in a given time and place. It is, at bottom, a historically determined process by which certain social problems are perceived, formulated, and resolved" (ibid: 150).

In this review, I follow Merryman and Perez-Perdomo's fertile model by organizing my summary of their arguments into three parts – in rough order of causal precedence. First, I provide an account of the historical context that the authors see as having shaped the civil law tradition's evolution. Second, I provide an account of its 'superstructure' – the culturally-embedded ideology that accompanied historical-material change and imbued the civil law tradition with meaning. Finally, I briefly describe the institutional evolution of the civil law tradition itself. The tripartite division of analytic labor – history, superstructure, institutions – lies, I believe, at the heart of Merryman and Perez-Perdomo's ability to facilitate grasping the civil law tradition while avoiding legalistic and pedantic granularity: It is a strategy of explication via macro-level contextualization.

Part I: The Historical Context

When in 529 Byzantine Emperor Justinian I ordered the burning of legal commentaries produced by contemporary and past jurists in order to establish the pre-eminence of his *Corpus Juris*

Civilis, the civil law tradition was already a millennium old, and the common law tradition would not emerge in England for another 500 years (ibid: 3-4; 7). Justinian had good reason to burn the commentaries: he was an audacious reactionary, intent on restoring the glory of the Roman Empire and to recapture its long-ceded western territories in Italy. There was no better way to begin the Empire's renaissance than to eradicate the impoverished systems of law that existed and to resuscitate the glory of Roman law via a single, comprehensive civil code (ibid: 7). Indeed, after the fall of the Roman Empire, "[c]ruder, less sophisticated versions of the Roman civil law were applied by the invaders to the peoples of the Italian peninsula," in effect engendering "what Europeans still refer to as a "vulgarized" or "barbarized" Roman law" (ibid: 8). Given that Roman law was (and is still) "said to be the greatest contribution that Rome has made to Western civilization," it is no surprise that Justinian treated it as a phoenix that could restore his Empire's glory (ibid: 11). He hired the most prominent jurists of the time and charged them with forging the code. All other forms of inferior law and commentary were to be destroyed and banned, though enforcement of these proclamations was imperfect (ibid: 7). The *Corpus Juris Civilis*, comprised of private, Roman Civil Law as well as some elements of public law, would outlive Justinian's ambitions. He never succeeded in reconquering the Italian peninsula, but the *Corpus* nonetheless became the foundation for the *jus commune* – the civil law that formed a common legal foundation for Europe in the midst of the Balkanization of sovereign authority that overspread the continent following the collapse of the Roman Empire.

It was the "medieval renaissance," largely spurred by the rise of prosperous Italian city-states, that brought about the revival of Justinian's code. Italian universities, most prominently the University of Bologna, became European centers for the study of law, and "the law studied was the *Corpus Juris Civilis* of Justinian" (ibid: 9). Its graduates established universities throughout the rest of Europe, and hence the first pillar of the *jus commune* began to diffuse throughout the continent. Alongside it, the Roman Catholic Church's canon law, which came to claim "jurisdiction in family law and succession matters, as well as in certain types of crimes," became the "spiritual domain" of the *jus commune* (pg. 11). Finally, the customary law that organically emerged to structure economic exchange amongst merchants – the *lex mercatoria* – became the third pillar of the *jus commune* as trade activity within and amongst Italian city-states rose (ibid: 13). Wherever the *jus commune* spread, it incorporated and reflected local material conditions, but everywhere the tripartite alliance of Roman civil law, canon law, and commercial law was recognizable.

The rise of the nation state following the tumult of the American and French Revolutions in

the late 18th century brought about a legal “revolution” representing a historical critical juncture in the civil law’s development. Secular natural law – quintessentially expressed in the French Declaration of the Rights of Man and the Citizen – displaced Catholic natural law encompassed in the canon law of the *jus commune* (ibid: 16). But perhaps the greatest transformation was brought about by the emergence of the state itself, which monopolized the production of the law and began to “replace the *jus commune*, which became a subordinate or supplementary law” (ibid: 21). The French Revolution became a symbolic referent for the agents who brought about this transformation in the civil law: as the balance of power shifted in favor of an increasingly enfranchised population, the statute – enacted by a representative legislature – became the pre-eminent source of law (ibid: 23). Subservient to the statutes were regulations enacted by the state’s administrative apparatus, and last in the hierarchy of legal sources lay custom – which, because it varied from place to place, was either appropriated and codified or eradicated by the metropole in its drive to centralize and to nationalize (ibid: 24).

Two prominent models for the new, state-centric civil law emerged: the French Civil Code and the German Civil Code. Under Napoleon, ambitions similar to those that compelled Justinian to order the development of the *Corpus Juris Civilis* drove him to commission the creation of a civil code for French citizens – the *Code Napoleon* – which diffused with the Emperor’s conquests throughout much of Western Europe (ibid: 28-29). The *Code Napoleon* sought to reconstitute the civil law, *tabula rasa* – to establish a *modus operandi* reflected by a famous statement uttered by a patriotic French lawyer during the period: “I know nothing of the civil law; I know only the *Code Napoleon*” (ibid). Yet unlike the *Corpus Juris Civilis* – drafted by legal scholars and studied by legal scholars – the *Code Napoleon*’s intended consumers were the common people, and the goal was to forge “a kind of popular book that could be put on the shelf next to the family Bible or, perhaps, in place of it” (ibid).

The German Civil Code that was enacted in 1900 symbolized a different approach to statist codification. It was not an attempt at dissociation from the past, but a means to harness it – to gather the traditions of German law that had existed prior to unification, arrange them into a logically coherent whole, and to subsequently codify them. Under the influence of Karl von Savigny and the “historical school” he founded, the Germans created a civil code that was “the opposite of revolutionary. It was not intended to abolish prior law and substitute a new legal system; on the contrary, the idea was to codify those principles of German law that would emerge from careful historical study of the German legal system” (ibid: 32). Yet despite the differing approach of the

Germans, the ultimate function of their Civil Code was the same as that of the *Code Napoleon*: “the German code also served a unifying function, providing a single body of law for the recently unified nation. And like the French code, it thus supported the emergence of the monolithic nation state” (ibid: 33).

The final critical juncture for the civil law tradition’s historical development came in the aftermath of the Second World War. Before then, the civil codes –modeled after either the *Code Napoleon* or the German Civil Code – held pre-eminence. They were crafted by the legislatures and amendable by them, and hence they served as the foundations for Parliamentary sovereignty. They also comprised the “most private of private law sources” – dealing in particular with the laws of property and contracts (ibid: 158; 18). Yet the dark shadow cast by the corruption of populist forces culminating in the rise of fascism in Germany and Italy spurred a skepticism of legislative power and a drive towards constitutionalization: “In Europe the phenomenon has taken the form of new constitutions that provide for the establishment of special tribunals with the power of judicial review – e.g., the Austrian, German, and Italian constitutional “courts,” the Spanish constitutional “tribunal,” and the French Constitutional Council” (ibid: 157). The constitutions – the “most public of public law sources” – drafted in the postwar period often incorporated rigid, even unamendable, fundamental rights protections – as in the German Basic Law – to prevent a relapse to authoritarianism and to safeguard minority rights (ibid: 158; 136-137). World War II, in other words, made people aware of the need to break the legislature’s lawmaking monopoly by constitutionally transferring some of this authority from majoritarian institutions – the Parliaments – to countermajoritarian ones – the specialized constitutional courts (ibid: 140-142). Finally, the disaggregation of state sovereignty, partially a reflection of the globalization of inter-state trade, spurred several efforts to regionally integrate civil law jurisdictions – most prominently in the European Union (EU), where EU law has direct effect within domestic jurisdictions and primacy over conflicting domestic law (ibid: 158-159). Hence where the 18th and 19th century saw the civil law being harnessed by the state to entrench its sovereign authority, the late 20th century witnessed the civil law being constitutionalized to check state power and internationalized to transfer some of its competences to the supranational level.

Part II: The Superstructure

The contemporary civil law world remains within the shadow of the ideological transformations accompanying the French Revolution. The late 18th into the 19th century, as Merryman and Perez-Perdomo write, was “the Age of Reason. Rationalism was a dominant intellectual force

[...] It was optimistically assumed that existing laws and institutions could be repealed and new ones, rationally derived from unimpeachable first principles, put in place” (ibid: 17). As mentioned previously, the French revolution ushered in efforts, culminating with the *Code Napoleon*, to sharply break with the past and to forge a legal system “that would express national ideals and the unity of the nation’s culture” (ibid: 18). As a tool to overcome feudalism, the new civil law was imbued with the ideological foundations most antithetical to feudal society: “The revolution became, to use Sir Henry Maine’s famous phrase, an instrument for the transition from “status to contract.” The result was an exaggerated emphasis on private property and liberty of contract, similar in effect to the exaggerated individualism of nineteenth century England and America” (ibid). Rationalism, nationalism, and liberalism – these became the ideological foundations of state-centric (and generally positivistic) civil law following the displacement of the *jus commune*.

Yet the post-revolutionary civil law also reflected the anti-elitist ideology of the times. Before the French Revolution, judges were either members of the aristocracy or they filled positions that were bought and sold by the aristocracy (ibid: 16). Hence with the revolution, “as in many utopias, one of the objectives [...] was to make lawyers unnecessary. There was a desire for a legal system that was simple, nontechnical, and straightforward” (ibid). In other words, the ideological foundation of the *Code Napoleon* was populist. While the drafters of the German Civil Code shared qualitatively different aspirations (for one, they did not believe that ridding the world of lawyers was either possible nor desirable), Germany was the birthplace for the scholarly ideology that continues to influence research and teaching within civil law schools: “legal science” (ibid: 32; 63). Legal science posited that the new statist codes were comprised of natural data from which the legal scientist could derive abstract, fundamental principles of the civil law. Parsimony – “if the data do not fit, either the system must be modified to accommodate them, or they must be modified to fit the system – and purity – “the data, insights, and theories of the social sciences [...] even history [were] excluded as non-legal” – became the fundamental principles of legal science (ibid: 63-65).

The greatest concrete channel of influence for legal science is the civil law textbook, where “the superstructure of derived concepts and principles” is captured by its first section: the general part (ibid: 69). The general part is, in many ways, the quintessential manifestation of legal science: it captures the theoretical frame that the scholar seeks to place on the subsequent law (usually the civil code) to be discussed, symbolizing the substantial authority that scholars possess in the civil law tradition; and it is substantively comprised of a series of abstract concepts and principles cast as “general truths derived by the scientific method from the positive law” (ibid: 68). Yet despite

attempts to emulate the dispassionate, value-free physical scientists, legal scientists “were ideological captives of their era. The creative work of the legal scientists took place [...] in the intellectual climate that has since come to be called nineteenth-century European liberalism” (ibid: 65). In this sense, German legal science merely naturalized – and therefore enabled – an ideological superstructure that defined the development of the civil law tradition in the 19th century.

In the foregoing discussion of the ideological foundations of the contemporary civil law tradition, we have emphasized its excesses - particularly with respect to the utopianism of the French Revolution and the scientism of German legal science. We may term these ‘enabling ideologies’, for they comprise ideological foundations for proactive state building and social revolution. But these ideologies were also tempered by what may correlatively be termed ‘progressive ideologies of restraint.’ No example is more apt than the influence of Cesare Beccaria’s *Of Crimes and Punishments* (1764) on the development of criminal procedure. Beccaria contributed four fundamental principles to the civil law tradition: (1) *nullum crimen sine lege* (“no crime without law”); (2) *nulla poena sine lege* (“no punishment without law”); (3) the severity of the punishment should be proportional to the severity of the crime; (4) punishments should impartially apply to all, regardless of social status and wealth (ibid: 125-126). Thus where the nationalist ideologies expressed in the new civil codes served an enabling function vis-à-vis state authority, Beccaria’s fundamental principles served as countervailing forces against abuses of state power in the penal domain. Thanks to Beccaria’s influence, in the 18th century the death penalty was abolished in Tuscany, “and fundamental reforms leading to less drastic penalties for minor offenses took place throughout Europe well in advance of similar reforms in Great Britain and the United States” (ibid: 127). The influence of secular natural rights, in conjunction with the rise of 19th century liberalism, may well have augmented the influence of Beccaria’s relatively progressive and humane ideology, allowing it to become the principled foundation of criminal law.

A second ideology of constraint emerged from the French Revolution. The resulting emphasis on legislative supremacy, combined with the attempt to rid lawyers of power, engendered a vastly different ideological superstructure concerning the function and status of judicial institutions. As Merryman and Perez-Perdomo write, “[we] in the common law world know what judges are. They are culture heroes, even parental figures;” but “[c]ivil law judges are not culture heroes or parental figures, as they often are with us. Their image is that of a civil servant who performs important but essentially uncreative functions” (ibid: 34; 37). In other words, where the judge is a central symbolic referent for the superstructure of the common law, the judge – who

“becomes a kind of expert clerk” – is at best an asterisk within the ideology of post-revolutionary civil law (ibid: 36). Of course, a series of functional pressures – from the need to interpret incomplete, inconsistent, or ambiguous civil codes, to the growing emphasis on the judicial interpretation of rigid constitutions in the post-WWII period – have endowed civil law judges with *de facto* powers incongruent with their minor status within the ideology of the civil law. Hence “the important distinction between the civil law and the common law judicial processes does not lie in what courts in fact do, but in what the dominant folklore tells them to do” (ibid: 47). Nevertheless, the cultural position of the civil law judge has clearly served as a constraint and a retardation mechanism vis-à-vis judicial empowerment.

Part III: The Institutions

The historical context, along with the evolution in predominant ideologies regarding the civil law, provides an important frame for understanding the contemporary institutional frameworks comprising most civil law jurisdictions. We can begin by analyzing the three most important institutional actors in the civil law: legal academia, legislatures, and the judiciary.

The superstructure of legal science endows scholars with substantial authority: it was legal academics who constructed “the theory of the modern nation-state;” who wrote the “doctrines of legislative positivism and the separation of powers;” who crafted “the form, style, and content of condification;” and who theorized “the dominant view of the nature of the judicial function” (ibid: 56). In other words, “the civil law is a law of the professors” (ibid). Law schools, then, become manifestly more important institutions in civil law jurisdictions than in common law systems, for not only do they initiate new generations of lawyers and judges into the culture of legal science, but the scholarship they produce has *de facto* legal authority: “although legal scholarship is not a formal source of law,” Merryman and Perez-Perdomo write, “the doctrine carries immense authority,” and is frequently incorporated in judicial opinions even if it is not explicitly cited, as is common practice in Italy (ibid: 59-60).

Legislatures also hold an important function, particularly given their comparatively greater sovereignty vis-à-vis common law systems: their primary objective is to relate economic and social demands to the legislative process, producing laws that respond to people’s needs and desires” (ibid: 81). Their analytic frame for doing is the scholarship of the legal scientists; the clay to be molded via legislative action is the corpus of prior legislation and, most importantly, the civil codes themselves (ibid). Yet perhaps the most profound differences between the common and the civil law institutions manifest themselves within the judiciary. We can trace the relatively clerk-like

functions of the civil law judge to Roman times, when judges (*judex*) did no more than adjudicate cases by mechanically applying case-specific rules drafted by a more powerful government official, the *preator* (ibid: 35). As noted previously, through the first half of the 20th century civil law judges were similarly clerk-like, performing “important but essentially uncreative functions” (pg. 37). Traditionally, civil law judges also lack the power of *stare decisis* – of precedent – given the belief that “[j]udicial decisions are not law” (ibid: 23). But it is not just the cultural treatment of judges that relegates them to a clerk-like position: the institutional structure of the judiciary is also much more bureaucratized than in the common law. Being a judge entails a career in the civil service: upon graduation from law school, lawyers are hired as judges at the bottom of the judicial hierarchy, and by “some combination of demonstrated ability and seniority” they slowly ascend it (ibid: 35). Lateral appointments are rare.

Beyond legal academia, legislatures, and the judiciary, we may also look to the legal professions as institutions in and of themselves, and here too the tableau is quite different from the common law world. Civil lawyers are not generalists; rather, they are specialists, and once they decide upon a career path during their undergraduate legal education it becomes exceptionally difficult to switch tracks (ibid: 102). Broadly, there are six career paths for the law school graduate: (1) becoming a judge; (2) becoming an advocate (fairly equivalent to the practicing common lawyer); (3) becoming a notary; (4) becoming a public prosecutor; (5) becoming a government lawyer; (6) becoming a legal scholar. The judicial track and legal academia have already been discussed, so let us begin with the advocate. The advocate is “the closest thing one finds in the civil law to the attorney-at-law in the United States” – they are members of a bar association who advise clients and represent them in court (ibid: 105-106). The notary drafts wills and other legal instruments, officiates documents, and act as a quasi-public records office. Given the fact that civil trials rarely involve oral proceedings as in the common law world (though this has been changing recently) and are instead conducted via written communication between the judge, lawyers, and parties, the notary becomes a person of “considerable importance” (ibid: 113; 106). Public prosecutors act as prosecutors in criminal actions, and they also represent the public interest in disputes between private parties (ibid: 104). Because they are expected to act as neutral arbiters, public prosecutors are considered to be quasi-judicial entities – indeed, in Italy the public prosecutor’s office is part of the judiciary (ibid: 105). Finally, government lawyers can be appointed to state agencies in a highly “bureaucratized and regularized” process, and subsequently they will be expected to identify more so with the agency than with the legal profession (ibid: 105).

Institutions do not simply comprise state organs and professions; more broadly, they comprise rules that structure individual behavior. As such, the rules of civil and criminal procedure become critical objects of social inquiry. Civil procedure usually involves three phases: (1) a preliminary stage, where the pleadings are submitted to a hearing judge; (2) an evidence-gathering stage, where the hearing judge gathers evidence submitted by the parties and their counsel and compiles a written record; and (3) a decision-making stage, where a second judge – the presiding judge – obtains the record from the hearing judge, hears the arguments of the counsel, and delivers a decision (ibid: 112). The process is protracted – often comprising several months of interspersed meetings – and does not culminate in a cathartic trial: “what common lawyers think of as a trial in civil proceedings does not exist in the civil law world” (ibid: 113). Moving to criminal procedure, the civil law tradition is frequently characterized as embodying the “inquisitorial” method originating from canonical procedure, and in the broadest of brushstrokes this is a fairly accurate characterization (ibid: 128). Here, it is public officials, not private parties, who take on the role of the accuser, and the judge is converted from his neutral role as referee into an “active inquisitor who is free to seek evidence and to control the nature and objectives of the inquiry” (ibid: 128). The criminal proceeding unfolds in three phases: (1) the investigative phase (usually under the direction of the public prosecutor’s office); (2) the examining phase (which is conducted solely in writing and is directed by the examining judge); (3) the trial (which occurs if the examining judge concludes that a crime was committed by the accused, and fails to take place otherwise) (ibid: 130). At the trial stage, cross-examination is usually prohibited, the judge asks all the questions, and those taking the bench need not swear an oath or answer said questions (ibid: 131). Overall, this procedure is deemed by many to be more humane than the stressful cross-examinations under oath that are characteristic of common law criminal trials (ibid: 131).

Finally, we may return to judicial institutions and ponder their organization as a final point of comparison with the common law tradition. The common law judiciary is organized as a single pyramid, where “every court is at least potentially subject to scrutiny by one supreme court” (ibid: 86). In contrast, the civil law judiciary is usually split into several hierarchies with mutually exclusive jurisdictions: (1) the ordinary courts; (2) administrative courts; (3) a single constitutional court or council (ibid: 86). The ordinary courts – the central institutions during the reign of the *jus commune* – are staffed by regular judges and “hear and decide the great range of civil and criminal litigation” (ibid). At the apex of the hierarchy of ordinary courts is usually a Court of Cassation, which is a final court of appeal that “provides authoritative answers to questions of interpretation of

statutes referred to it by the ordinary judges,” usually referring the case back to the lower court for final adjudication (ibid: 87). The administrative courts are “entirely separate” from the ordinary courts and exercise independent jurisdiction over administrative acts enacted by the legislature (ibid: 88-89). At their apex usually lies a Council of State, which traditionally was a political body but eventually came to exercise fully judicial functions as a court of final appeal (ibid: 89). Finally, in order to limit the judicial review powers (vis-à-vis legislative acts) of the ordinary and administrative court system, most civil law countries created Kelsenian constitutional courts that monopolized the power of *erga omnes* constitutional review (ibid: 134-135). In some countries such as France, the constitutional court traditionally possesses the power of *ex ante* constitutional review: before laws are promulgated by the legislature, they can be submitted to the court for review, but following their promulgation the court lacks the authority to assess their constitutionality (ibid: 138).¹ In Germany, the Federal Constitutional Court possesses *ex-post* constitutional review powers, and the legislature, the state governments, as well as private parties can all petition the court to assess the compliance of a given statute with the Basic Law (ibid: 140-142). As mentioned previously, the general trend towards the judicialization and constitutionalization of governance has undermined the monopoly of constitutional review held by civil law constitutional courts, particularly in the European Union where lower courts have begun to actively adjudicative conflicts between domestic and European law (ibid: 158-159).

A Critical Appraisal

It is a rather facile criticism to direct at a 160-page book of introductory synthesis that its efforts are superficial, and it would be fairly inaccurate with respect to Merryman and Perez-Perdomo’s contribution, which covers a remarkable amount of conceptual and empirical ground. Nevertheless, it would have been particularly interesting if the authors had devoted a couple of chapters to discussing the underlying mechanisms that spurred the civil law tradition’s evolution. My attempt at dissociating their work into history, ideology, and institutions comprises an effort to derive from their work such a general causal narrative: as I read *The Civil Law Tradition*, macro-historical material transformations spur ideological change, and these two factors act in conjunction to produce the institutional configurations that define civil law systems today. Yet this mechanism is latent within Merryman and Perez-Perdomo’s work, and in any case its microfoundations are opaque. Without a clearer understanding of where legal institutions (and the forces that reproduce

¹ Note, however, that France has recently passed a law endowing the Constitutional Council with the power of *ex-post* constitutional review.

and change them) come from, it becomes difficult to fully comprehend the evolution and contemporary configurations of the civil law tradition.

My two remaining critiques are more quibbling than fundamental challenges. First, and as may well show from the foregoing summary, the authorial addition of Perez-Perdomo to the third edition of *The Civil Law Tradition* has not altered the book's nearly exclusive European focus. While this need not be a major concern, it does curtail the ability of the authors to claim that their work comprehensively surveys 'the civil law tradition' as opposed to 'the civil law tradition as manifested in European jurisdictions.' Second, I wonder if, particularly with the third revision of the book, Merryman and Perez-Perdomo could not have provided a more extensive treatment of contemporary transformations in the civil law tradition. One topic, for example, that has come to the forefront of comparative legal scholarship is that of whether the civil and common law traditions are converging; tellingly, the subject receives its own chapter in the recent *Oxford Handbook of Law and Politics* (the chapter is titled: "Civil Law and Common Law: Toward Convergence?").² Another is the judicialization of governance that seems to have diffused throughout the world regardless of common vs. civil law distinctions (see Shapiro and Stone Sweet 2002; Ginsburg 2003; Hirschl 2004).³ Addressing these issues may have breathed some freshness into a work that could potentially (if mostly incorrectly) be dismissed as somewhat out of date.

²Mattei, Ugo, and Luca Pes. 2008. "Civil Law and Common Law: Toward Convergence?" In Whittington, Kelemen, and Caldeira, eds., *The Oxford Handbook of Law and Politics*. New York, NY: Oxford University Press.

³ Shapiro, Martin, and Alec Stone Sweet. 2002. *On Law, Politics, and Judicialization*. New York, NY: Oxford University Press; Ginsburg, Tom. 2003. *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*. Cambridge: Cambridge University Press; Hirschl, Ran. 2004. *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*. Cambridge, MA: Harvard University Press.