

BOOK ANNOTATIONS

Global Genes, Local Concerns: Legal, Ethical, and Scientific Challenges in International Biobanking. Edited by Timo Minssen, Janne Rothmar Herrman, & Jens Schovsbo. Northampton, MA: Edward Elgar Publishing, 2019. Pp. xv, 282. \$31.20 (ebook)

REVIEWED BY CARLY CHA

Biobanking is the practice of collecting, storing, and sharing biological materials and associated data for present and future scientific research. Today, there is little to no standardization of biobanking practices or regulatory bodies to ensure the materials and data are treated across the industry in an ethical manner. Scientists, ethicists and legal scholars alike lament this deficiency and champion effective governance of biobanks. Without industry-wide standards, issues surrounding patient privacy and autonomous decision-making, especially in lower-income countries from which data or genetic materials are sampled, remain unresolved. *Global Genes, Local Concerns: Legal, Ethical, and Scientific Challenges in International Biobanking* delves into this lack of uniformity and examines the difficulty in establishing guidelines for cross-national biobanking that meet each jurisdiction's legal, scientific, and cultural standards. In doing so, *Global Genes, Local Concerns* takes a much-needed interdisciplinary approach, compiling 14 distinct essays written by a wide range of researchers, healthcare company insiders, and scholars in ethics and law. The authors set forth their perspective regarding the pertinent topics of patient privacy, patient consent, technological advancement, and intellectual property. The essays, each compelling in their own right, should be viewed individually and collectively as a starting point for further discussion and reform of the international bio-banking industry. Overall, *Global Genes, Local Concerns* brings together critical expertise from across the industry to demonstrate why biobanking would benefit from standardization and cooperation to create a more efficient system that respects the rights of individuals.

Part I of *Global Genes, Local Concerns* provides a broad overview of the bio-banking research infrastructure, the so-called big data collection by biobanks, and ethics of patient consent across differing jurisdictions. The first essay is authored by scientists intimately involved in sample collection from research participants. They detail the issues that arise around patient understanding and the transfer of information, which they have termed informational flow. In order to understand their concerns, it is first necessary to explain the basic schematic. The authors classify three distinct types of informational flows: flows, non-flows, and overflows. Flows are the basic exchange of information between the research participant and the researcher. Non-flows are just the opposite—they are the absence of information shared between participant and researcher. Overflows are transfers of unintended information and unwarranted hopes between researcher and participant. That is to say, researchers can inadvertently communicate reassurance, false expectations, or even misplaced causes for concern—harming both the individual participants and the community at large.

The authors state that when there is an overflow, participants use pieces of information they pick up during the research activity to “symbolically make sense of their world.” For example, in Denmark, some research participants in a meta-study explained that a questionnaire they were asked to fill out as part of an earlier genetic study led them to associate their genetic disorder with a range of personal character traits. This, in turn, made the participants feel closer to family members with the same chromosomal arrangement. One specific participant took it a step further and decided to opt out of donating his organs despite actually supporting organ donation because he feared his chromosomal rearrangement would somehow cause his organs to harm others or otherwise be rejected. The authors also admonish that these informational overflows can “set in motion narratives about health and illness that are not founded on science, but on local interpretations by people looking for explanations.” The authors describe an instance where a researcher in Pakistan introduced scientific explanations for a genetic illness in efforts to collect genetic samples from the local Pakistani population. Unfortunately, the identification of the genetic illness led to stigmatization within the community, leading others in the community to avoid marital

relations with the research participants. In these cases, overflow of information, regardless of the researcher's intentions, led to an altering of the participants' lives in neutral to negative ways.

While the authors of this essay introduce a compelling problem, they do not present immediate solutions to stop negative overflows of information during the data collection process. That being said, they raise a fruitful discussion with a powerful overarching message: "the accumulation of samples and data cannot be limited to the compiled material, knowledge, or machinery typically associated with 'data sharing', and the social skills on which flows of genetic material depend should not pass unnoticed." In short, data sharing and big data in cross-national biobanking cannot be reduced to infrastructure but rather must be built on relationships between people. Unfortunately, the authors point to the fact that their proposals to document the social mechanisms of data collection are severely under-funded, noting that an immediate infusion of funding would be beneficial. This leaves the reader with the understanding that increasing funding in support of a more humanistic mode of data collection would propel players in the biobanking industry to collect, store, and use human genetic material in a less harmful and more ethical manner.

Part II of *Global Genes, Local Concerns* looks at an entirely different set of issues surrounding biobanks: their ability to assist in translational medicine. Because this presents a significant shift from the earlier discussions of participant knowledge and consent, the reader would have benefited from an introduction of translational medicine before diving in to the essays. In fact, neither the individual authors of this section nor the editors describe what translational medicine is, which leaves the unknowing reader in the dark. So as not to commit the same mistake in this annotation, the basic definition of translational medicine is the utilization of scientific knowledge derived from genetic research to develop new medical procedures, therapies, and cures. Essay number four, authored by two employees of a bioscience company, explores the concept of translational medicine within the framework of bioscience companies. They highlight the importance of good governance when using human biomaterials within the bioscience industry as a welcome start to improving the industry, which so often neglects the people behind the biomaterials.

The authors pose the question of how any user of human biomaterials, whether it be a for-profit user, non-profit user, or public institutional user, can meaningfully demonstrate a legitimate and responsible use of the donated biosample. The authors discuss the tendency among some users, namely for-profit entities, to treat human biomaterials as a commodity to be bought and sold in cross-national transactions. The authors respond that the industry as a whole must respect the donors behind the human biomaterials—those people who have fundamental rights, hopes, fears, and intentions, and who have chosen to donate their genetic material for the betterment of scientific knowledge. Although this may seem a daunting task, the authors detail many solutions to ensure the legitimacy and responsible use of human biomaterials. The most important of these solutions were: (1) embedding responsibility and commitment at the level of top management, and (2) internally monitoring, measuring, and reporting the source and use of human biomaterials. Lastly, the authors emphasize the need for all industry players—not only bioscience companies, but also suppliers, business partners, and collaborators—to comply with bioethics norms as a means of upholding the privacy and respect of the individual behind the biomaterial. Unfortunately, they do not propose any specific ways to facilitate these goals. Thus, the essay would have benefited from a case study of a bioscience company that implemented the authors' proposed solutions to highlight their benefits and potential difficulties. The solutions may sound nice, but it is tricky to assess how effective they might actually be.

Part III of *Global Genes, Local Concerns* looks at the relationship between biobanks, human rights, and patient involvement. Essay number ten, authored by scholars from the Health Law Institute, specifically addresses the issue of consent and ownership. The essay points out that there is an unclear legal standard of ownership of human biomaterials with an equally unclear standard for the interrelated concept of consent, two major areas of concern in biobanking. The authors discuss an emerging idea in the field, referred to as biorights, to establish the patient's agency in the handling of his or her own biomaterial. Biorights expands on traditionally limited roles that research participants play in biobanking by granting the research participant-donor an "ongoing right to control their re-

search samples, to benefit directly from the research, and or to be financially compensated for their contribution.”

Interestingly and disappointingly, the authors strike down the notion of biorights as an unproductive driver of policy within the biobanking space. The authors provide deliberate and specific counterarguments to why biorights may be an inflated sentiment not worthy of further analysis. As an alternative idea to biorights, the authors argue for a far narrower consent model in which informed consent is prioritized over ownership. Under this model, participant-donors would have access to information regarding the use, collection, and transfer of their own biomaterial. This could be accomplished by facilitating constant contact between researchers and participants as well as regular updates. The authors do concede that the argument against narrow consent models, namely that they are inefficient and cost-prohibitive, should be taken into account. However, to be clear, the authors’ discussions of consent models in biobanking are to ensure that biobanks continue to operate, as “results of litigation can be devastating” for the life of a biobank. Nevertheless, the authors’ proposals, if not as radical as might be desired, do provide a meaningful starting point to refine consent models that fit the dynamic nature of biobanks.

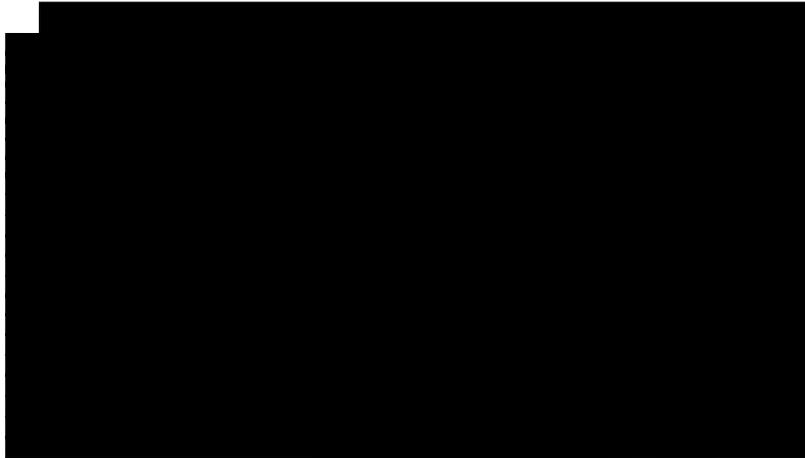
Part IV of *Global Genes, Local Concerns* looks at the tangled web of players within the biobanking field. Essay number thirteen, authored by two university professors, underscores the importance of partnerships between academic laboratories, the biobanking industry, and health care institutions. The authors address the key issue of how biobank users—namely researchers—and policymakers can develop common standards surrounding sample quality and valid result reproduction. Because a single biobank is often insufficient to conduct research, a biobank network can step in to facilitate the research by allowing the researcher to identify which biobanks have the relevant samples needed for the study. The authors are persuasive in their claims that biobank networks can serve as a strong foundation for research and technological improvement as well as a basis of future innovations. They write that biobank networks play “a crucial role in maintaining the social and technical norms which allow for tissue economies.” However, the essay itself serves merely the single function of underscoring the importance of biobank networks. What is missing from

the analysis is a discussion of the kinds of “new governance structures,” such as the necessary ethical and legal norms, that the authors briefly mention.

Overall, *Global Genes, Local Concerns* successfully assembles voices from many quadrants of the field, shedding light on complex issues in cross-national biobanking from an eclectic selection of perspectives. The book successfully engages the reader on a very interesting topic and highlights the different angles from which the sticky issues of patient consent, patient privacy, and ethical use may be examined. However, the editors stuck to the safe route of primarily promoting only standardization and uniformity in legal and ethical norms for the industry. While pushing for standardization and uniformity are certainly commendable goals, the editors fail to provide a coherent message as to why. Their waffling between the rationales of creating a more efficient system to quicken technological innovation and upholding the rights of those participating and providing the biomaterials is insufficient. We must not forget those who form the foundation the system needs to exist in the first place—the individual patient-donors.

Forms of Pluralism and Democratic Constitutionalism. Edited by Andrew Arato, Jean L. Cohen, and Astrid von Busekist. New York, NY: Columbia University Press, 2018. Pp. vii, 377. \$35 (paperback).

This annotation was heavily edited by the JILP editorial staff and the previously listed author did not approve the printed version.



The following pages 981-985 have been omitted from the online version of the journal.
The remaining text has been redacted.



Conversations on Justice from National, International, and Global Perspectives: Dialogues with Leading Thinkers. Edited by Jean-Marc Coicaud and Lynette E. Sieger. Cambridge, United Kingdom; New York, Cambridge University Press, 2018. Pp. CDVIII, 408. \$110 (hardcover).

REVIEWED BY JINGFEI LU

Conversation on Justice from National, International and Global Perspectives: Dialogues with Leading Thinkers takes a unique format—a compilation of one-on-one dialogues with leading theorists and policy practitioners in global affairs. Jean-Marc Coicaud, who hosted the dialogues and co-compiled the book with Lynette E. Sieger, notes that the book is also unique in its interdisciplinarity, as it features scholars of law, philosophy,

and political science. Within this interdisciplinarity, the book covers a variety of topics, including the introduction of new conceptual frameworks, the current status of development, and various sub-categories of global justice. The thirteen dialogues in the book are organized by topic into four parts: “Global Knowledge/Global Thought,” “From Thinking Globally to Global Ethics,” “International Law and Global Justice,” and “World Order and Global Policy.”

Part I, “Global Knowledge/Global Thought,” explores the relationship between power and knowledge. Important topics include the need and method to communicate knowledge from non-hegemonic powers to readers around the world, as well as the approach to balancing non-hegemonic knowledge with knowledge from traditionally dominant powers in the global discourse. Three interviewees of diverse educational background and intellectual life contribute to this part: Boaventura de Sousa Santos, a Portuguese legal scholar at the University of Coimbra whose work was heavily influenced by the theories of Karl Marx; Wang Hui, professor of literature and history at Tsinghua University; and Sudanese legal scholar Abdullahi Ahmed An-Na’im, now working at the Emory University School of Law. Dr. de Sousa Santos has an in-depth discussion with Dr. Coicaud about the current democracy problems existing at the local, national, and international levels. Dr. de Sousa Santos believes a thorough study of the knowledge and experience from non-hegemonic powers is indispensable to finding innovative solutions to those challenges. Dr. Wang Hui starts his interview by introducing the intellectual discourse in China. He proposes that Chinese intellectuals do not think China intends to be nor will be a leader. Instead, Chinese intellectuals have been working to get Western Society to study Chinese thoughts and initiatives and recognize them as contributions to global justice. Dr. An-Na’im discusses how to reconcile the local particularities of Islam with universal values. He insists that Muslim society can benefit from learning the experiences of other societies, but he also believes that Muslim people ultimately should recognize their own responsibility for building their own democracy and rule of law.

Part II, “From Thinking Globally to Global Ethics,” focuses on different notions of justice and the various ways to pursue them at the national, international, and global levels.

Four scholars contribute to this part of the book. David Miller, a Professor of Social and Political Theory at Nuffield College, Oxford, believes in a “weaker” form of Cosmopolitanism. Under this notion, while people still undertake moral obligations for people of different nationalities, the obligations to non-nationals and nationals can vary. Dr. Miller also emphasizes the importance of developing the sense of responsibility of people of less developed nations, while acknowledging their need for help. Neera Chandhoke, an Indian political science scholar, echoes Dr. Miller’s view. She opines that global justice theories should recognize that nationals in underdeveloped nations bear their own responsibilities in eliminating poverty. Avishai Margalit, Schulman Professor Emeritus of Philosophy at the Hebrew University of Jerusalem, articulates a theory centering on a nation’s obligation to keep a “decent” society and advocate for the creation and the cultivation of “shared humanity” based on memory shared by the whole world. Thomas W. Pogge, a German philosopher at Yale University, has yet another basis for this “shared humanity” concept; he proposes cultivating a strong sense of moral community at the global level based on agreement on the core notions of a reasonable conception of global justice.

Part III, “International Law and Justice,” and Part IV, “World Order and Global Policy,” discuss global justice from a particular practical perspective. These two parts feature contributions from six scholars. Mireille Delmas-Marty, from the Collège de France, suggests that international law can be described as adopting a model of legal pluralist universalism. This model should also guide how international law develops. Based on this model, international law should recognize a new conception of sovereignty more geared toward solidarity. The key agenda of Onuma Yasuaki, at the University of Tokyo, is having international law be more mindful of non-Western traditions. Similarly, New York University School of Law Professor José Alvarez advocates for a more balanced representation of less powerful countries and their thinking in international organizations. Charles A. Kupchan, professor of international relations at Georgetown University, complements the book with a political theory perspective. His work establishes a comprehensive framework in understanding peace and what factors make or break it. Following Dr. Kupchan, A. Michael Spence, an economist from New York University, analyzes various fac-

tors influencing the global economy. Finally, David Held from Durham University emphasizes the importance of establishing cosmopolitan principles in pursuing effective global governance.

Dr. Coicaud sets three major goals for the book: reaching lay readers, facilitating the development of new and denationalized research agendas, and building a truly global discourse. He deliberately selects the interview format to present the substance of the book, and the format does indeed help the book to accomplish these goals well. Dr. Coicaud takes the perspective of a reader in the interviews. As he develops rapport with the interviewees, his questions aim to clarify the interviewees' statements and push back on their theories. As a result, the interviewees are able to contextualize their abstract theories by explaining their intellectual histories and responding directly to the doubts and criticisms Dr. Coicaud and other readers might have towards the interviewees' views. In this way, the book helps the interviewees better communicate with readers and make their perspectives more well-rounded.

With a diversity of themes, the book presents a wealth of knowledge from countries that are quieter in global academic discourse and schools of thought that challenge traditional wisdom. These materials advance the book's goal in inspiring new research agendas and developing a global conversation on global justice. For instance, Dr. An-Na'im argues that several democratic principles can be extracted from Sharia. Based on this knowledge, Dr. An-Na'im suggests that it is not futile to research how to reconcile the universal democracy principle with the local particularity of Muslim nations. Dr. Chandhoke also reminds us that India has much more experience than the West in managing the inclusion of religious voices in a democratic public sphere. Moreover, Dr. Kupchan challenges the traditional democratic peace theory as he finds that all regimes are capable of restraining themselves and embracing peace. He considers that his finding will lead people to rethink the legitimacy of including coerced democracy in foreign policy.

The diversity of the book's contributors helps show the existing consensus and focal points of scholars and practitioners on global justice, clarifying the direction of future actions. In the concluding chapter of the book, the two editors identify four common issues: 1) the need for greater inclusiveness

within and among nations and for addressing weakening democracy; 2) the need to address the disparity between the rich and the poor; 3) the need to improve the effectiveness of international organizations; and 4) the need to identify ways to make politics meaningful in the current global climate.

New research agendas can also stem from the disagreement between the scholars as revealed by the book. For instance, although the scholars generally agree that non-Western knowledge and perspectives are indispensable in international legal scholarship and global policymaking, views diverge on whether the status quo is satisfactory and where the line should be drawn between universality and diversity. Dr. Chandhoke, for instance, argues that Western liberal thinkers tend to develop a neat and sterile theory at the expense of ignoring cases from the Global South. Similarly, Dr. Yasuaki asserts that the current global justice discourse should not just notice, but should evaluate ideas coming from non-Western human traditions, such as Confucianism, Hinduism, or Islam, on an equal basis with ideas originating in Christianity. While Dr. Yasuaki believes in human rights, he claims that the concept originated in Western Europe, and he thinks ideas better than human rights can be discovered by enlarging the public discourse. In contrast, Professor Alvarez has a more positive view of the status quo regarding the balance of influence of Western and non-Western ideas. He notes that while the international organizations should be more representative of non-Western countries, Western terminologies and ideas are not that dominant. For instance, people are beginning to consider international organizations as “law-makers.” This idea is “outside the European-American legal positivist mindset that says all international rules have to take the form of the legal sources enumerated in Article 38 of the Statute of the ICJ.” In addition, Dr. Held proposes, in a relatively affirmative tone, that eight cosmopolitan principles have already been established and should be promoted globally. These principles include equal worth and dignity, active agency, personal responsibility and accountability, and collective decision-making about public matters through the voting procedure.

Admittedly, the differences between the scholars might not be substantive, but rather result from different assumptions behind the concepts the scholars use. If this is true, the book’s dialogue format is particularly helpful in the sense that

it exposes the assumption behind the scholars' statements. For instance, some non-Western scholars express their unsolicited disapproval of recognizing democracy as a universal principle. Dr. Coicaud, as a diligent interviewer, naturally requests more explanation for this disapproval. Through the scholars' explanations, readers can understand that the scholars actually regard political representation as imperative, but that they understand democracy to be something narrower than political representation. Such an interactive nature helps the book avoid attributing the disagreements between the scholars as something ideological and instead helps spur respectful and meaningful discussions.

While scholars and practitioners searching for a book inspiring new research or policy agendas against the background of gridlock in global governance will find this book instructive, readers wanting to see a comprehensive analysis and specific solutions might find the book inadequate. Due to its limited space and the breadth of the subject matter, the book's depth is inevitably sacrificed. The book has notable weaknesses in the following aspects: First, each interview has a different focus, and Dr. Coicaud does not ask many pre-formulated questions across the different interviews. Therefore, compared to academic journal articles or books, which dig deep into a delicately confined topic, this book might not possess enough material to deepen one's understanding of a particular topic. Whether the book can change the view of those non-specialists is also questionable, as an interview is not an inquisition or academic critique. Therefore, although Dr. Coicaud is careful to ask questions that raise possible counter-arguments or facts, he does not always push the interviewees to give a well-tailored or flawless response. For instance, when Dr. Coicaud asks Dr. Held whether the eight "cosmopolitan principles" with a core on democracy and human rights are a Western message, Dr. Held only comments that the fact that "certain principles have their intellectual origins in the West says nothing about their intellectual validity in general." Dr. Held then quotes only Western scholars to show that all his principles are universally supported. Dr. Held's view is directly contradicted by Dr. Yasuaki, who does not regard human rights as an indispensable concept in the global justice discourse. Such a lack of interaction between scholars holding different views arguably holds

the book back from persuading the readers who disagree with certain scholars to reconsider their positions.

Of course, as Dr. Coicaud himself suggests, the book intends to propose questions to solve in the future; it is not meant to solve the questions around complex concepts such as “justice.” The book accomplishes the goals Dr. Coicaud set for it. It is now for scholars, perhaps motivated by the book, to establish a truly full-fledged platform for deep and constructive conversations on those questions.

Euroconstitutionalism and Its Discontents. By Oliver Gerstenberg. New York, NY: Oxford University Press, 2018. Pp. xix, 164. \$85 (hardcover).

REVIEWED BY NORA NIAZIAN

Oliver Gerstenberg’s exploration of the jurisprudence of European international courts in *Euroconstitutionalism and Its Discontents* aims to defend Europe’s supranational institutions from traditional self-determination and rule of law critiques. He focuses primarily on the European Union’s Court of Justice (CJEU)—an “essentially economic court” which interprets and applies E.U. law, treaties, and directives—and the Council of Europe’s European Court of Human Rights (ECtHR), which protects the rights guaranteed in the European Convention on Human Rights (ECHR). Gerstenberg’s analysis is rigorous and thorough, providing a window into the theoretical and practical debates surrounding the role of the two courts. However, proponents of an expanded recognition of both negative fundamental rights and positive socioeconomic rights may find his defense of these courts too modest.

In the first chapter, Gerstenberg offers an appreciated taxonomy of judicial review. Conceptions of judicial review can be divided into political liberalism, which features strong-form review; political constitutionalism, which features weak-form review; spherical justice; and the interrelated concepts of democratic constitutionalism and democratic experimentalism. In his analysis of these conceptions, Gerstenberg defends democratic experimentalism, contending it is the properly applied *modus operandi* of the European courts. In the second and third chapters, Gerstenberg explores the jurisprudence of the

CJEU and the ECtHR, refuting the major critiques levied against them.

In the first chapter, Gerstenberg initially discusses democratic experimentalism and the leading criticisms against it. Democratic experimentalism, generally speaking, envisions a symbiotic system in which national and supranational courts work in tandem to develop and refine constitutional norms, seeking to simultaneously preserve national autonomy and eliminate undemocratic laws. Gerstenberg explains that opposition to democratic experimentalism takes two distinct forms: the self-determination objection and the rule of law objection. The former argues that it is the citizens themselves and not judges who “ought to decide those fundamental, but morally controversial” issues that divide society. Otherwise, judicial elites may be “unlikely to give a fair shake to socioeconomic rights,” meaning these could “forever remain *under-constitutionalized*.” Proponents of this objection assert that the broadening of society’s conception of rights from those that are fundamental and established, like freedom of speech, to the more radical socioeconomic rights is more efficiently and effectively done through democratic channels like the legislature than through the courts, let alone supranational courts.

Critics concerned with the rule of law attack democratic experimentalism from a legalistic perspective, arguing that the European courts effectively relegate national constitutions to the procedurally less democratic European system. They argue that democratic experimentalism, despite its purported fealty to democratic values, does not protect the sanctity of the law in democratic societies. According to this theory, citizens should engage as equals in a policy debate in lieu of allowing “transient preferences or opinions of contemporary judges” to replace law with matters of policy. Giving judges this power undermines the supremacy of law and thus relegates even the most fundamental rights-based protections to the sphere of mere politics.

Gerstenberg, in response, argues that these criticisms miss the mark. He contends that democratic experimentalism, as practiced by the European courts, strengthens national democratic institutions and processes. Gerstenberg emphasizes the “forum-creative and agenda-setting” role of democratic experimentalist courts, of which a key feature is “relentless proceduralism.” Gerstenberg posits that courts applying this

style of review can “play a benign proceduralizing role” by participating in the legal (and often also political) debates over constitutional values via their deliberative processes. This forum-creative role emphasizes the participation of stakeholders, including national courts and interested, often marginalized, parties, such as the citizens of the respective nations. Rather than ruling on substance, he claims that the European courts rely on an emerging consensus to make their decisions. They largely postpone substantive answers to contested questions in favor of more minimal, case-by-case adjudications that track the developing consensus. Thus, the European courts act as mere referees, balancing regional European perspectives with analysis specific to the nations involved.

According to Gerstenberg, the European courts wait for a consensus in international jurisprudence and across the domestic sphere of various states to begin to crystallize; only then do they venture to announce a substantive understanding of European nations’ obligations with respect to emergent and increasingly accepted principles. He argues that until this point, the court “*deepens* (rather than forecloses) *democracy* by multiplying the sites of contextual deliberation.” The decisions the court offers are thus contributions to ongoing debates.

However, to the extent that societal conceptions of certain rights do change, Gerstenberg admits that European courts sometimes act as pacemakers in this progression, rather than mere participants. This role is necessary to ensure that the most vulnerable parties are not left at the mercy of these debates, suffering an indefinite denial of the “substance of their constitutional rights.” Gerstenberg contends, however, that even when the courts act as pacemakers, they do so in a measured fashion by engaging in “context-sensitive governance” that can “provide forms of reasonable accommodation but keep debate open.” This is perhaps Gerstenberg’s strongest defense of the institutions—even where the courts seem to overreach, their rulings are necessarily narrow in application, specifically regarding the conduct and constitutions of a particular national government.

One critique of Gerstenberg’s defenses of the European courts is that he understates the societal and constitutional influence these courts wield. Although a more rigorous analysis is necessary, it seems these courts act as the deciding institution in matters of widespread moral and societal concern

more often than is suggested. Such monumental rulings seem to conflict with Gerstenberg's argument that the European courts act as consolidators of ongoing debates rather than unilateral imposers of policy preferences.

Gerstenberg responds, though, that the particularity and narrowness of the European courts' rulings save them from the self-determination objections levied against them. Key evidence of this narrowness is the margin of appreciation that they afford to national courts and governments. Gerstenberg emphasizes that both the CJEU and the ECtHR allow a relative imposition of obligations and permissions based on national contexts. In one CJEU case, German authorities were permitted to ban a game involving simulated homicide due to the special emphasis on human dignity in the German constitution. Gerstenberg notes, however, that such an ability may not extend to all E.U. member states, as it was applied within the specific context of German constitutional protections. This example is particularly beneficial to Gerstenberg's argument that the courts engage in dialogues with the governments of member states, acting as a participant in debates about the extent of protection European principles require.

Where appropriate, such as when questions are insufficiently clear to warrant imposition of a subjective decision by an international entity, the European courts defer to member state courts, which necessarily have more democratic authority. Even this simple grant of margin of appreciation, though, is subject to conditions. The ECtHR will peek into the deliberative process of the national courts to determine whether or how much deference is owed. In *Mork v. Germany*, a decision upholding a German Federal Constitutional Court ruling on preventative detention, the ECtHR welcomed the national court's approach because it gave proper weight to the ECtHR's jurisprudence and, in so doing, demonstrated a commitment to the protection of rights on the European-wide level. Gerstenberg claims this is evidence that the "applied meaning of Convention rights is not dictatorially imposed 'from above' by the ECtHR but an ongoing interim result of a collaborative process between the ECtHR and national constitutional courts," which, in his words, enhances the rule of law.

An obvious objection to this is that the ECtHR's willingness to extend a wide margin of appreciation to the German national court was dependent on its finding that the Federal

Constitutional Court's jurisprudence was consistent with the type of review the ECtHR would itself conduct. Indeed, the ECtHR has explicitly claimed that where the national courts undertake the appropriate balancing exercise for a particular issue, the Court has reason to defer to the substantive decision reached by the national courts. While this is certainly more democratic and respectful of the authority of national courts than substantive rulings that ignore the merits of the national courts' deliberative processes, it remains a limited category. The ECtHR will only defer ruling on a substantive issue when the national court applies analysis the ECtHR itself has already approved. Similarly, when the CJEU determines whether to rule in favor of a policy-based objection to a state on a matter of E.U. law, Gerstenberg notes that the burden of proof remains on national governments to show that their measures qualify for public policy exemptions.

A factor further weakening Gerstenberg's argument is his citation to examples of international courts imposing their interpretations on contested issues. Regarding the refusal of the U.K. government to issue a new National Insurance number to a transgender individual, Gerstenberg argues that the ECtHR "exerted an *agenda-setting* role" in determining that the issue was one of human dignity and human freedom and thus beyond the domestic margin of appreciation. The ECtHR acted as a pacemaker for U.K. law after citing "a continuing national trend" in favor of expanded social acceptance of transgender individuals. Additionally, in response to fears that the CJEU's role in protecting the European market would undermine socioeconomic rights, Gerstenberg noted "the Court's transformative role in updating and modernizing national labour law by increasing the standard of social protection afforded to employees *beyond the level hitherto envisaged by domestic law.*"

However, Gerstenberg does not seem to believe these examples conflict with his theory that democratic experimentalism features deferral of decisions on substantive issues. He grounds this apparent inconsistency in the conception that supranational courts may rely on emerging consensus in instances where a clear consensus does not exist. However, Gerstenberg's analysis stops short of defending the actual authority of the courts to impose principles consistent with the protection of human rights as enshrined in E.U. law and the ECHR. This is where his defense of the courts may disappoint

proponents of an expansion of rights in Europe, whether or not such an expansion is the product of some minimum degree of consensus.

Gerstenberg thus walks a fine line in attempting to defend the European courts as institutions that uphold democratic principles while also respecting domestic legal norms and opinions. How can these court simultaneously defend and amplify democratic norms while issuing *diktats* from above? Gerstenberg seeks to reconcile this contradiction by claiming that the “proceduralization” of the courts, particularly the involvement of multiple stakeholders in the courts’ deliberative process, ensures the courts do not issue decisions that are publicly unsupported. Moreover, according to Gerstenberg, the European courts’ stated focus on recognizing and expanding social rights also adheres to the popular will emanating from below. Gerstenberg also emphasizes the potentially wide margin of appreciation afforded to domestic courts as well as the tendency of context-specific application of European legal principles. However, as noted above, the application of the margin of appreciation is itself at the discretion of the courts, and it can be considered antithetical to rule of law in the same way that decisions on substantive issues can be.

The result ultimately is that neither of Gerstenberg’s defenses seem consistent with his own claim that the ECtHR and the CJEU should enforce an institutionalized “progressive clarification” of the meaning of open-ended, fundamental constitutional commitments. By enforcing what such commitments *should* come to mean, the courts must necessarily be operating beyond immediate political consensus. This is appropriate for those who see it as the role of the courts to expand rights wherever they may be reasonably extended—according, of course, to the valid and well-reasoned interpretation of law and legal principles—without waiting for some broader consensus to emerge. For people of this mind, it is proper for the court to resolve issues not satisfactorily settled in the national context.

However, Gerstenberg conceptualizes these progressive decisions differently. With respect to instances of intervention by the CJEU, Gerstenberg claims that the “Court exerted its role not so much by pushing Member States in directions they may not wish to go, but rather by setting the stage for, and instigating, a process of gradual interpretive clarification.”

This is a strained distinction, though. That similar types of interventions by the CJEU have subsequently “triggered legislative innovation” by national governments is as much evidence for Gerstenberg’s claim that the CJEU merely plays a role in the dialogue regarding issues of import as it is for the critique that the CJEU engages in a dialogue with national governments that both excludes citizens from key decisions and imposes the Court’s decisions on national law. Gerstenberg seems to be playing into critics’ hands by allowing them to frame the debate. Gerstenberg may have done well to more forcefully establish the necessity of the European courts and defend their existence as a means to more faithfully apply European democratic principles in the face of intransigent, undemocratic national government efforts. From that understanding, Gerstenberg’s attempts to address critics on their own terms would have sounded less strained and carried more sway.

A Comparative Guide to the Asian Infrastructure Investment Bank.
By Natalie Lichtenstein. New York, NY: Oxford University Press, 2018. Pp. xxvii, 250. \$125.00 (hardcover).

REVIEWED BY KARL PIELMEIER

In October 2013, one month after unveiling plans for an ambitious trans-continental Belt and Road Initiative, Chinese President Xi Jinping made another announcement that would similarly echo around the globe and pique the curiosity of the development finance world: He proposed the establishment of “an Asian infrastructure investment bank to promote interconnectivity and economic integration in the region.” Three years later, the Asian Infrastructure Investment Bank (AIIB) was declared open for business.

How, exactly, did this day come about? Why set up the AIIB at all, when the world was already seemingly replete with multilateral development banks (MDBs), including the International Bank for Reconstruction and Development (IBRD, or World Bank) and the Asian Development Bank (AsDB)? What does the AIIB do as an international organization? Who can join as members? How does it operate and how is it governed?

These questions are at the heart of Natalie Lichtenstein’s 2018 monograph, *A Comparative Guide to the Asian Infrastructure*

Investment Bank. Lichtenstein, a longtime World Bank professional who served as AIIB's Inaugural General Counsel during the bank's negotiations, explains the history and formation of the AIIB in her book. She analyzes the institution's legal structures through a comparative lens, looking at the context and content of AIIB's Charter in relation to those of other MDBs. Her analysis reveals that the organizational structure of the AIIB looks similar to those of its development bank counterparts. And, as Lichtenstein would likely argue, this similarity was the result of very careful design.

The book is divided into ten chapters, with each chapter subdivided into sections for easy reference. At times, this design makes the book feel like a treatise. There are also two appendices: *Articles of Agreement of the Asian Infrastructure Investment Bank* (June 29, 2015), and *Report on the Articles of Agreement of the Asian Infrastructure Investment Bank, Chief Negotiators for Establishing the Asian Infrastructure, Singapore* (May 22, 2015). As a practical matter, readers may benefit from closely reading the appendices first, as the book is largely a close read that highlights these appendices' core provisions.

Chapter 1, "Beginnings," covers a short prehistory of the AIIB Charter, spanning President Xi Jinping's 2013 proposal, the bank's establishment process, and various drafting considerations. Here, we see that the AIIB Charter significantly overlaps with those of other MDBs. Lichtenstein explains these intersections, indicating that using preexisting MDB Charters as a legal base facilitated a faster startup for the AIIB and enhanced its reputability as a financial institution, while still leaving room for flexibility in the bank's specialized infrastructural focus.

Chapter 2, "Highlights," surveys the key features of the AIIB Charter, which are each expounded in greater detail and specificity in Chapters 3 through 9. Chapter 2 lays out the AIIB's dual purpose and functions and reviews the institution's membership, capital structure, and governance. For the layperson, this chapter more than suffices as a healthy overview of the AIIB; it explains the oft-familiar legal architecture of the bank, while highlighting some of its novel features. Beginning the book's deep dives, Chapter 3, "Mandate," explores the AIIB's twofold purpose and functions. According to the AIIB Charter, the Bank seeks to "foster sustainable economic development, create wealth and improve infrastructure con-

nectivity in Asia by investing in infrastructure and other productive sectors.” It also seeks to “promote regional cooperation and partnership in addressing development challenges by working in close collaboration with other multilateral and bilateral development institutions.” Overall, the AIIB has three specific functions, “investment promotion, development finance, [and] supplementing private investment,” and a fourth catch-all function for “other activities and services.”

Chapter 4, “Investment Operations,” demonstrates the great deal of flexibility the AIIB maintains in operational practice. The bank can offer sovereign and non-sovereign financing in the forms of loans, guarantees, equity investments, technical assistance, special operations, and more. Though the institution focuses on investment in infrastructural sectors, the AIIB is also explicitly authorized to invest in “other productive sectors” as appropriate. Even the bank’s aims to foster development, create wealth, and improve infrastructure connectivity in Asia are construed flexibly, as the Charter does not actually require investments to be located within territorial Asia.

The bank’s members and membership criteria are discussed in Chapter 5, “Membership.” Generally, the AIIB is open to members of the World Bank or the AsDB. The chapter also indicates the distinction between regional and non-regional members and highlights the special benefits of the AIIB’s Founding Members—namely, additional votes and rotational privileges on the institution’s Board of Directors.

Chapter 6, “Capital and Finance,” focuses on the foundation of the bank’s financial resources. The original authorized capital stock of the AIIB was \$100 billion, consisting of \$20 billion in paid-in capital and \$80 billion of callable capital from members, though the author notes that no MDB referenced in her book has ever called in its callable capital. The institution’s unit of account is the US dollar and there is a seventy-five percent regional shareholding requirement, similar to other MDBs.

Chapter 7, “Governance,” details the governing backbone of the AIIB. Again, similar to other MDBs, the bank’s governance structures consist of a Board of Directors, a Board of Governors, and a President. Two points warrant mentioning: First, the AIIB’s Board of Directors is a *non-resident* Board, unlike those of its institutional counterparts. Second, decisions neces-

sitating Special Majority Votes require a seventy-five percent majority, meaning that China, holding twenty-six percent of voting power, retains a de facto veto. This is similar to the United States' veto within the World Bank.

The context and considerations of the transitional arrangements leading to the AIIB's launch are described in Chapter 8, "Transitions." This chapter might prove handy for historians, or those seeking to build a bank. For this reader, however, such transitional policy materials, detailing policies of the institution's fledgling stages, felt unnecessary in 2020, when the AIIB is securely established and approved membership has already surpassed the 100-member mark.

Chapter 9, "Institutional Matters," seems apt for scholars of international organizations. It highlights various provisions of the AIIB Charter in relation to its status as a multilateral treaty. In addition, the chapter highlights the AIIB's privileges and immunities, as well as the institution's juridical personality.

Chapter 10, "Reflections," looks at various themes from MDB history to consider the future trajectory of the AIIB. The author's tone is cautious, and the chapter thoughtfully considers the contested paths of various financial institutions.

Much like the AIIB itself, Lichtenstein is careful in her reflections to avoid meddling too far into politics. However, this caution feels like a missed opportunity at times, especially since the AIIB—the structures of which are so carefully synthesized in Lichtenstein's book—would fit so well into a compelling geopolitical narrative. This is, after all, the same AIIB whose creation was vehemently opposed by the United States and Japan. (Imagine the chagrin of these world powers upon learning their European allies were chomping at the bit for membership.) It is the same institution an Obama administration official, speaking under conditions of anonymity, indicated would "undercut standards" in development finance and set up a "race to the bottom" in infrastructural investment. It is the same bank that has been called "a paradigm shift vis-à-vis global economic governance," the "talk of the town in international relations circles," and even a "new World Bank," by XYZ. And it is the same organization that caused former U.S. Treasury Secretary Hank Paulson to express deep regret at the

country's decision not to sign on as a member during the bank's creation.

Then again, Lichtenstein's book triumphs in the way it steers clear of unnecessary polemics; the author keeps her distance from the geopolitical buzz surrounding her subject matter. The end result is a well-researched, handy, and practical guide comparing the AIIB Charter text with the charters of other MDBs. This approach breaks down claims of AIIB exceptionalism. The book shows that the AIIB is overwhelmingly similar to its sister institutions while diligently underscoring when and how the AIIB differs from other MDBs. Furthermore, it is successful in explaining why such differences might matter.

It is telling that Lichtenstein was inspired by Ibrahim F.I. Shihata's *The European Bank for Reconstruction and Development: A Comparative Analysis of the Constituent Instrument*. Her book, like Shihata's useful, even-handed monograph, will surely stand the test of time. Whether the AIIB will do the same is an entirely different question, one that Lichtenstein leaves for the pundits, or for "another book" entirely.

Authoritarian Constitutionalism: Comparative Analysis and Critique.

Edited by Helena Alviar García & Günter Frankenberg.
Northampton, MA: Edward Elgar Publishing Limited,
2019. Pp. xii, 364. \$97.66 (binding).

REVIEWED BY ADAM TANNE

Authoritarian Constitutionalism: Comparative Analysis and Critique is a collection of fifteen essays exploring the intricacies of constitutional authoritarianism. The work's editors, Helena Alviar García and Günter Frankenberg, tackle one of the most prescient questions of our time: How do we understand the philosophical underpinnings, internal mechanisms, and real-world effects of authoritarian constitutionalism? In the face of such complex and important topics, it is unsurprising that authoritarian constitutionalism proves to be a difficult concept to define using uniform terminology or fit into a neat narrative. The collection is most effective when it highlights how individual aspects of this phenomenon function within different political systems, thereby prompting the reader to re-examine is-

sues surrounding political structure and governmental legitimacy.

As a starting point, García and Frankenberg explain that the fundamental difference between authoritarianism and democratic rule is the source from which the systems derive their ultimate legitimacy. In an authoritarian regime, obedience and governmental legitimacy are maintained through the granting of protection and distribution of spoils, rather than through the democratic consent of the governed. Consequently, under such a system, “rulers determine the beginning, end, and agenda of societal discourses on the public good and other matters of general interest.” And, troublingly, these repressive regimes have a growing grip on the political world: According to Frankenberg, there are now more authoritarian than democratic constitutions in existence. Authoritarian constitutionalism seems like an oxymoron, since classical constitutionalist thinking would likely dismiss a document that does not effectively check authoritative power as mere political window-dressing. However, this view prematurely ends the investigation of how authoritarian regimes function and interact with constitutional philosophy. The collection thus rightly concludes that authoritarian constitutionalism, as a complex system, must be understood on its own terms, rather than academically siloed as a mere perversion of liberal democracy. Challenging the reductionist view of authoritarianism as simply the opposite of liberal democracy seems to be a goal of many of the authors, as such a view creates an artificial black and white distinction between authoritarian and liberal constitutionalism and, as such, refuses to accept that there are aspects of the former embedded in the latter.

However, if a casual reader uninitiated in the world of political philosophy is looking to this collection for a neatly defined concept of authoritarian constitutionalism or a succinct guide to understanding the reason for its current rise, they will be disappointed. First, as Frankenberg explains, “collective singulars [like authoritarian constitutionalism] resist definition.” The central difficulty facing the text, then, is one of definitions: If authoritarianism is not a mere inversion of liberalism, what is it? Frankenberg explains in the first chapter that the challenge of studying authoritarianism is that it does not function as a uniform, cohesive system. Rather, a main underpinning of the collection is that authoritarianism is better un-

derstood as a “pathology,” a “cooccurrence of diverse, distinctive symptoms,” and a “chameleon” that “changes its appearance from one context to the other.” Such a description is reminiscent of Umberto Eco’s characterization of fascism as a flexible, yet pattern-filled, collection of behaviors, which Eco likened to “Wittgenstein’s notion of a game” in his essay *Ur-Fascism*. However, while Eco’s piece culminates in a fourteen-point list that seeks to succinctly explain the “pathology” of such a political philosophy, Frankenberg’s recognition of authoritarianism’s diverse expression serves as a jumping-off point for a broad range of academic foci.

This complexity is exacerbated by the fact that the work’s analysis of authoritarian constitutionalism takes place not only within different historical and political contexts, but also in different cultural and regional settings as well. The topics covered in the collection range from recent upheaval in the Middle East to the way constitutionalism was shaped by the apartheid experience in South Africa. Because of the wide scope, it often feels as if the authors are speaking past each other, and it is difficult for readers to situate themselves within a shifting set of terminology. For example, in Chapter 6, Roberto Gargarella makes the conscious decision “to take authoritarianism and conservative constitutionalism basically as synonyms.” To support this proposition, he points to the *Macmillan Encyclopedia of the Social Sciences*, which explains conservatism to be inherently “skeptical about the efficacy of popular government.” As such, Gargarella argues, conservatism in its strongest forms is closely tied to authoritarianism. He presents a compelling argument that conservatives and authoritarians both have deep mistrust of popular movements, which helps support his thesis that the flawed elitist structures of Latin American constitutions allow for a “recurrent reemergence and occasional reinvigoration of conservative impulses.” However, the conflation of the terms does not help define the contours of a general nor universally agreed upon idea of what authoritarianism is, since the term “conservatism” takes on a new meaning a few chapters later in the essay written by Duncan Kennedy.

Kennedy’s essay comprises Chapter 8, and it contends that it is “crucial” to *distinguish* conservative republicanism from authoritarianism “because [conservative republicanism] understands itself to be [authoritarianism’s] historic enemy.” For Kennedy, authoritarianism is genealogically tied to Catho-

lic monarchism and fascism, and, relatedly, authority in this system is derived from God or the personal charisma of the leader. In contrast, even in conservative republicanism, ultimate authority is derived from the consent of the governed “validated in democratic procedures.” What makes republicanism “conservative” in Kennedy’s view is the placement of the family within the societal structure and the way the government conceptualizes the market. These principles do not speak to the elitism and distrust of popular movements that Garagarella used in his concerted conflation of conservatism and authoritarianism. Consequently, the lack of a consistent vocabulary at best confuses those who are not well versed in the world of constitutional philosophy and at worst makes it seem as though the work of one author undermines another’s.

While authoritarian constitutionalism defies concise definition, the essays addressing case studies of this phenomenon in action provide the book’s strongest arguments. These analyses are particularly interesting since they highlight the lack of a clear divide between liberal and authoritarian constitutionalism. By holding up a mirror to our understanding of liberal democracy, many of the pieces present a constitutional criticism that argues that a central shortcoming of liberalism is its emphasis on individual private property rights and “negative freedom” (i.e. freedom from governmental inference) over the guarantee of “positive” social and economic rights. Such an idea reflects the difference between *controlling* the state versus *limiting* the state, which Jeremy Waldron articulates in his article *Constitutionalism: A Skeptical View*. Waldron explains that while controlled government can still address the need for positive freedom because the people may control how positive programs are enacted, a restrained government, typified in the concept of limited government, is prohibited from pursuing certain ends that are deemed “per se illegitimate.” To some authors in the collection, this policing of legitimate policy options is an act of authoritarianism embedded within liberal democracy.

In Chapter 2, *Neoliberalism as a Form of Authoritarian Constitutionalism*, García picks up and extends this concept to argue that when restrained constitutions limit the panoply of policy choices available to the political community, this is a form of authoritarianism. She points to practices in Colombia, such as constitutionally requiring judges to consider budgetary restric-

tions when adjudicating issues that may impact public finances, as enshrining neoliberal austerity within the constitution. The argument posits that neoliberalism, once it is elevated to a status beyond debate, becomes authoritarianism. She further argues that recent developments in Colombia that limit indigenous communities' ability to veto mining and oil exploration projects through the grassroots democracy process of prior consultation is another form of making neoliberal policy, specifically privatization, immune from legitimate debate. Perhaps this argument is strongest in the developing world, since the subtle adoption of the Washington Consensus into a constitutional framework would greatly constrain the policy choices available to future leaders. However, all constitutional provisions limit choice by nature; would García have the same critique of the U.S. Constitution's takings jurisprudence under the Fifth Amendment? Would such an impediment on economic redistribution without just compensation, a pillar of liberal property rights, constitute an "authoritarian" feature of the American constitution? The elimination of private property is illegitimate as a policy choice. Would she consider that to be authoritarian?

Dennis M. Davis, in Chapter 3, *Authoritarian Constitutionalism: The South African Experience*, uses García's restrained constitutionalism concept in a more nuanced manner. Once again, by rejecting the idea that authoritarianism and liberal democracy are entirely distinct, Davis provides interesting insight into South Africa's institutional arrangements. Davis, like García, begins by focusing the reader's attention on the limiting aspects of liberal democracy, explaining that the very act of "closing constitutional debate" inherently closes "off the possibility of alternative forms of politics." While Davis notes that this limiting of choices in a liberal constitution defies the neat divide between liberalism and authoritarianism, he does not go so far as to equate the end of debate with making South Africa's constitution authoritarian. Rather, he simply uses this new framework to focus his inquiry on the narrower questions of how South Africa's governance structure was developed and how it interacts with the imagined political community that makes up the state. This type of analysis is what the collection does best—using challenges to the traditional divide of liberalism versus authoritarianism to give a new perspective on institutional workings.

Similarly, in Chapter 4, *Infrastructure Power and its Possibilities for the Constitutional Evolution of Authoritarian Political Systems: Lessons from China*, Michael W. Dowdle shows how an oversimplification of the divide between authoritarianism and liberal democracy obscures our understanding of how power functions within systems that do not comport with traditional constitutionalism's focus on issues such as separation of powers, rule of law, or judicial review. He calls this traditional understanding of constitutionalism the "structural-liberal" conception and argues that if we think of constitutional constraints as functional only when they align with the "structural-liberal" separation of powers in liberal democracy, academics will not be able to explain the rise of constitutionalism in China, nor the persistence of limited aspects of that rise following a crackdown. As an alternate view, Dowdle points to the power of professional bureaucratic routine to explain how features of constitutional constraint, like notice and comment rulemaking, remain alive in China. Dowdle likens the creation of such a professional bureaucracy to a "machine that would go of itself": a system with a self-executing set of norms without top-down or formal institutional enforcement. This routinized bureaucracy, in theory, creates the regularity of a constrained political system. Dowdle proves that if constitutional scholars were to simply dismiss China's constitutional framework as a sham disguising tyrannical power, they would lose the value of his alternative explanation of how citizens come to have expectations of their government and how meeting those expectations contributes to legitimizing a system.

Authoritarian Constitutionalism: Comparative Analysis and Critique tackles incredibly difficult questions in a broad range of settings. The collection of essays is unable to create an elegant understanding of authoritarian constitutionalism as a cohesive system, but perhaps that is an impossible task, as implicitly argued in the opening chapter. The work's most interesting conclusions, then, are drawn in the articles that reflect on the liberal-constitutional world and force scholars to attack questions of structure, community, and legitimacy through a fresh lens.

Islamic International Law: Historical Foundations and Al-Shaybani's Siyar. By Khaled Ramadan Bashir. Cheltenham, MA: Edward Elgar Publishing, 2018. Pp. cclxxviii, 278. \$150 (hardback).

REVIEWED BY AHMED YACOUT SALEH

In *Islamic International Law: Historical Foundations and Al-Shaybani's Siyar*, Khaled Ramadan Bashir makes a case for the continued relevance of Islamic international law principles to international legal history. Immediately, it is important to note that *Siyar*, a word Bashir generally uses to refer to rules of international law derived from Islamic legal sources like the *Qur'an*, has not officially appeared in any state's legal code since the collapse of the Ottoman Empire after World War I. This linguistic reality cuts against Bashir's argument that the *Siyar* should be used as a source of regional customary international law today. Bashir begins to tackle this critique towards the end of his work, but he fails to offer a convincing response, especially given how important this argument is to the work as a whole. Nevertheless, although Bashir's chosen syntax is missing from about a century of mainstream jurisprudence and his contentions are sometimes lost among long polemics and technical discussions of historical research methodology, ultimately his arguments make a compelling case for the study of the *Siyar* and their reintroduction to international legal thought.

Bashir dedicates the first two chapters to an impressive assault on what he calls the Euro-American bias of contemporary international law institutions and on early Western-educated Muslim detractors of the *Siyar*. In the first chapter, Bashir explains that international law continues to be plagued by its colonial past. He then introduces his goal of untethering international law from its European center in order to pave the way for a more inclusive international legal system. The second chapter proposes a comparative historical approach to the study of the *Siyar* to remedy the misconceptions about Islamic jurisprudence that have caused some to see the *Siyar* as inherently in conflict with modern international law. Bashir is mainly concerned with discrediting the argument that the *Siyar* necessarily conceive of a world where Muslim states are perpetually at war with non-Muslim states and that it therefore

forms a theocratic-imperial law system rather than a comprehensive form of international law. Bashir also rebuffs the claim that the *Siyar*'s normative positions are derived from religious doctrines that cannot be reconciled with today's secular public international law.

Bashir then introduces eighth-century jurist Muhammad al-Shaybani, considered the father of Islamic international law, as a means of integrating Islamic with global international law. By situating al-Shaybani's writings with other historical international law scholars, including Saint Augustine and Hugo Grotius, Bashir attempts to introduce Islamic international law theory to an English-speaking audience, emphasize its influence on later European writers, and highlight useful concepts in al-Shaybani's writings that can help fill gaps in modern international law. Importantly, al-Shaybani's work was not frozen in time; understandings of the scholar's writings continued to develop and evolve, particularly because they were taught as the basis of international law at Ottoman universities in the early twentieth century. While al-Shaybani was not the only Muslim scholar to write on international law, his principles dominated the Islamic international legal tradition for over a millennium. With this in mind, Bashir dedicates his third, fourth, and fifth chapters to comparing the Islamic laws of war, rules on the consequences of war, and laws of peace as they were conceived of by al-Shaybani with their European historical counterparts.

Bashir's main argument is that international law draws almost exclusively on the Western historical experience, disadvantaging the global community and calling into question the true internationality of international law. For example, Bashir notes the complete absence of non-European sources influencing the "general principles of law as followed by civilized nations," mentioned as a source of law in Article 38(1)(c) of the Statute of the International Court of Justice. By excluding non-Western thought, the principles espoused by the court become solely European principles disguised as universal laws. This argument is not in itself new; critics of the modern international legal order have been attacking Article 38(1)(c) for decades. However, Bashir's work adds to the existing literature by offering an in-depth commentary of the *Siyar* as a source of international law. Legal historians, the author states, have treated "international law as though it was born and bred in

Europe and Europe alone, neglecting other contributions.” Bashir’s mission, therefore, is to expose international law to other modes of thought and to introduce Western international lawyers to Islamic international law.

One weakness belying Bashir’s argument is that the link between the *Siyar* and modern international law is never established. This seems especially important when the *Siyar* and international law do not even consider the same subjects. While public international law takes states as its subjects, the *Siyar*’s subjects are heads of states and private citizens. The *Siyar*, as Bashir notes, also predominantly deal with laws regulating warfare and the treaty-making powers of the Muslim ruler, rather than the regulation of a community of states. When the *Siyar* were created, only a single Muslim sovereignty existed, the Umayyad Empire. Al-Shaybani thus mostly proposes rules regulating the Umayyad Caliph’s foreign relations and domestic powers, not a system of rules governing the actions of sovereigns within a community of empires. The conflation of *Siyar* to international law is at best anachronistic.

Bashir anticipates this critique, stating that “if we were to deny *Siyar* as Islamic international law because of its nature and subjects, we would be weighing *Siyar* with one scale while using another for the European ‘international’ law.” In other words, if we were to use the same metric to examine early European international law, defined by the nature and subjects of “the law of Christian European nations,” it too would not properly qualify as international law. Through his comparative historical analysis, Bashir finds that conventional international legal histories owe some of their forcefulness to the very same kind of anachronism. European founders of international law, like Grotius and Vitoria, were preoccupied with private law matters and yet have become symbolic representatives and fathers of modern public international law. Bashir shows that even within the so-called Western legal tradition, there is a wide variation in the subjects and scope of the law of nations. In fact, as Bashir repeatedly notes, the subjects taken up by Grotius and Vitoria largely correspond to those addressed by al-Shaybani. Furthermore, Bashir points out that where al-Shaybani proceeds from Islamic sources, Vitoria and Grotius derived their normative doctrines from Christian thought. While premodern Christian legal thought has been reconciled with and integrated into secular modern international law, a

similar effort has not been made for Islamic thought. Bashir is at his best when he then proceeds to make the argument that international law, by excluding non-European thought similarly based on religion, continues to be part of a larger colonial project.

Bashir goes on to claim that al-Shaybani had a large influence on European international law, but that international legal histories have unfairly written him out. He first establishes that al-Shaybani had no access to prior Western thought on international law and thus could not himself have been influenced by European thought. Bashir then posits that al-Shaybani's work, which was translated into Western languages, influenced Western thought on the law of nations. As evidence, Bashir leaves the reader with an enticing, albeit unexplored, connection between al-Shaybani and Hugo Grotius when he recounts that Grotius' tenure at Leiden University coincided with the university's acquisition of a large collection of Arabic and Persian legal work. According to Bashir, Grotius knew Arabic and "demonstrated quite a substantial knowledge of both *Siyar* and the style of *Siyar* writers." The thought is intriguing; if Grotius integrated the *Siyar* into his own works and his works influenced international law, then the exclusion of the *Siyar* from international law today makes even less sense. However, this claim is insufficiently evidenced, a theme that unfortunately pervades the book.

Having argued that the *Siyar* and the values they embody are as valid a source of international law as premodern Western international legal thought, Bashir delves into the history of international legal thought. Bashir looks at concepts in the works of Saint Augustine, Gratian, Aquinas, Vitoria, and Grotius, comparing their treatment of international law to that of al-Shaybani. In the process, Bashir reveals both an incredible degree of variance in how international law is conceived in the Western tradition and a remarkable degree of similarity between European thought and that of al-Shaybani. Bashir's most exciting observations, however, concern the points where Western thought and the *Siyar* diverge. Whereas the similarities between the *Siyar* and Western legal thought give credence to Bashir's argument that the *Siyar* ought to be considered a part of international legal history, their differences expose the problems in Bashir's proposal.

Bashir compares principles foundational to international law such as reciprocity, international arbitration, diplomatic immunity, war crimes, legal warfare, human rights, and *pacta sunt servanda*, to those found in the *Siyar*. In the process, he is able to identify principles in the *Siyar* that push against understandings of customary norms as based on European thought. Bashir even argues that the *Siyar* could constitute customary international law, but this is the author's weakest position. First, if the *Siyar* were implemented today, its interaction with existing international law would produce inconsistent results, if not outright conflicts. However, more fundamentally, Bashir does not convincingly demonstrate that the *Siyar* constitute a recognized stratum of international law, even in the Islamic world. Even assuming the *Siyar* could have been considered a form of regional customary law in the Islamic world at some point, that custom was eclipsed by European customary international law and has not been followed in over a century. Bashir concedes this point, but quickly pushes it aside by arguing that the *Siyar* were replaced by European customary norms either by force or coercion. While this is an interesting thought, Bashir does not elaborate on the coercion point. Instead, he concludes his argument with what he deems to be the decisive fact that over a billion Muslims around the world would welcome the approach to international law described in the *Siyar*, and therefore they should be considered at least a regional custom. Apart from a single survey of independent jurists conducted after the invasion of Iraq in 2003, however, Bashir does not provide evidence that the *Siyar* influences legal thought in the Muslim world today.

Overall, while Bashir's attempts to create a historical narrative that connects the *Siyar* to Western thought are often shaky, his discussion of the *Siyar* lays a solid foundation for a historical approach to the decolonization of international law. "What the world might need most," Bashir argues, is to be freed of colonial international law disguised as "Western freedom." Bashir's comparisons between the *Siyar* and the Western approach to international law reveal their compatibility. More importantly, his best arguments support the idea that the current international legal order continues to operate with a "Euro-American bias" to the detriment of non-European states. With that said, Bashir's argument that the *Siyar* constitute a form of customary international law is rushed and un-

convincing. Although the book is successful in many respects, Bashir fails to show the relevance of the *Siyar* as its own force in international law today.

Boundaries of the International: Law and Empire. By Jennifer Pitts. Cambridge, MA: Harvard University Press, 2018. Pp. 293. \$46.50 (hardcover).

REVIEWED BY CELINE YAN WANG

“[T]he world legal and political order is best characterized as an imperial order of some kind or another.”

James Tully, *On Law, Democracy and Imperialism*

In recent years there has been a revival of interest in the critical history of international law under the wave of new imperialism. This imperial turn in international legal scholarship explores the historical trajectory of international law and the theoretical development of legal structures. Critically engaging with the origins of the international legal order, imperial historical scholars reveal both the emancipatory and dominating character of international law in its complicity with colonial and hegemonic practices in global politics. Jennifer Pitts’ *Boundaries of the International: Law and Empire* rates among the more original contributions to the development of this growing body of literature.

Boundaries of the International is a study of the discourse of the law of nations and international law during the eighteenth and nineteenth centuries, an intriguing and eventful era long neglected by international legal scholars. The book traces the origins and scope of international law by examining the relations between the imperial powers of Western Europe and extra-European states and societies alongside the expansion and consolidation of Western Europe’s global empires. In doing so, *Boundaries of the International* provides remarkable insights into the deep entanglement of international law with European imperial expansion and international law’s pervasive identity as “an emancipatory project with an essentially European genealogy.”

Central to the book is Pitts’ criticism of the “conventional narrative” first developed in the eighteenth century. According to this traditional view, international law emerged from

the egalitarian relations among free and equal sovereign European states. Challenging this narrative, Pitts criticizes Western particularism in the guise of universalism. She contends that international law is a product of the history of European imperial expansion and interactions with extra-European peoples and powers. As European states drew the boundaries of the international, they developed local laws and standards of governance and statehood to control emerging relationships with non-Europeans. European states later universalized those laws and their underlying values, creating a not-so-international international law.

Trained as a political scientist specializing in imperial political thought, Pitts does not attempt to delineate the scope of the historic practice of international law from the perspective of a legal scholar or practitioner. Instead, she examines the evolution of international law through historical, legal, political, philosophical, and anthropological lenses. Pitts focuses firmly on reflections and debates on the scope of international law by eighteenth- and nineteenth-century intellectual historians and political thinkers of Britain and France—two prominent imperial powers of the period. Pitts explores the rich scholarship of legal authorities from Emer de Vattel, Henry Wheaton, John Westlake, William Scott, and Travers Twiss; political and philosophical thinkers including Montesquieu, Edmund Burke, Jeremy Bentham, John Stuart Mill, and Francis Newman; and historians such as Paul Rycaut and Abraham Hyacinthe Anquetil-Duperron.

The book begins with Pitts' argument that the law of nations is Europe's "distinctively successful solution to universal problems of order." It entails "a combination of particularism and universalism that was especially pernicious as a source of justifications for and obfuscations of European imperial domination." To Pitts, the law of nations displayed a parochial universalism deeply bound up with its imperial features. European powers saw their own local principles as universally obligating and put themselves in a position to judge others. To prove this point, Pitts turns to the Enlightenment Swiss jurist Emer de Vattel and his 1758 treatise, *Droit de gens*, which remains a founding text of international law. A Neuchâtel native who was personally involved in the Seven Years' War, Vattel has long been read as an exemplar of natural-law universalism. He routinely describes the law of nations as a universal system

rooted in the values of equality and reciprocity that apply “to the world, to mankind, to the universal society of nations.” However, despite his seemingly universal language, Pitts suggests that Vattel’s legal universality was nonetheless a product of parochial universalism, largely situated in the specificities of European norms and practice, while Asian states, from the Ottoman Empire to India, Japan, and Siam, were excluded and left to struggle under the rule of, in the language of Montesquieu, lawless “oriental despots.”

Pitts claims that Vattel’s depiction of nations as equal, free, and independent moral communities, and of the international arena as an egalitarian society of such persons, produced a deceptive “picture of the international realm that was to serve an important ideological function in the context of European imperial expansion.” Later European legal scholars interpreted this conceptual framework of international order to mean that states must meet certain normative standards to qualify as legitimate members of the international community. In this way, Vattel’s idea of the self-perfecting community was deployed as a criterion by which to judge extra-European states and societies in the name of civilization and progress, even though Vattel himself would oppose such a judgment on another state’s internal constitution or governance. States would be deemed illegitimate and unworthy of the respect or the rights owed to legitimate states if they were held not to fit this European standard. Ultimately, as Pitts contends, such Eurocentric international law discourse largely obscured the imperial nature of European states and effaced the hierarchical features that characterized the world system in Vattel’s day and persist to the present.

Pitts continues to roughly chronologically trace the development of this legal discussion through the early nineteenth century, which is widely seen as a watershed moment in the history of international law. The rise of positivism, a historicist critique articulated by, among others, Robert Ward, James Mackintosh, and Henry Wheaton, challenged Vattel’s theories of the law of nations based on naturalism. Positivist scholars advanced the view that the only relevant source for international law was state practice. *Droit des gens* was quickly replaced by Henry Wheaton’s *Elements of International Law* as the standard reference work as major European imperial states continued to expand their global power. The second half of the

nineteenth century ultimately witnessed the outright rejection of naturalism and rise of Eurocentrism, where Victorian jurists began to espouse the view that the “European law of nations was a global legal system in embryo, that other nations were lawless insofar as they failed to participate in the European system, and that a key task of European jurists was to construct a process by which those others might be granted admission to the European-global legal community.” Exemplifying this position, Travers Twiss asserted that as controlling leaders in the international legal system, Europeans unilaterally represented the interests of humanity, and that extra-European states could gain recognition only by accepting European law and leadership.

Nevertheless, although positivism was a provocative moment dominant in the Victorian era debate, dissident voices presented a series of powerful arguments against such legal exclusion through their demands for a more truly reciprocal international legal order. A key figure that Pitts identifies in challenging “European egocentricity” in international law is the long-forgotten Polish-British international lawyer C. H. Alexandrowicz, whose historical scholarship emerged in the 1950s and 1960s. In advocating for principles of self-determination and the universality of the law of nations, Alexandrowicz sought to recover greater inclusiveness in international law. This echoed the efforts of postcolonial and Third World states, which called for a New International Economic Order (NIEO) in the U.N. General Assembly and demanded the use of *jus cogens* as a means to finally replace the exclusive nature of international law with a genuinely inclusive and participatory order during and after the Vienna Convention on the Law of Treaties negotiations.

While *Boundaries of the International* explores the copious and diverse works of intellectual historians and legal scholars, it is a pity that the book largely restricts its discussion of the arguments about the ambit of international law to those articulated by British and French writers. This selection downplays, if not ignores, the major roles that Swiss, German, and Russian thinkers played in contributing to these debates. Nevertheless, while examining the most visible scholars of the selected periods, Pitts does not forget to include supporting figures and secondary legal literature along the way. Another incompletely realized ambition of this book is its historical survey of Eu-

rope's legal relations with extra-European states and societies. Pitts focuses on Asian peoples and empires to the exclusion of other continents, such as Africa and America. Colonial and imperial relations are extremely complex and cannot be fully grasped from the Asian dimension alone. Furthermore, even in discussing Asian states, Pitts exclusively limits the body of narratives on Europe's intricate legal relations with the Ottoman Empire, which is hardly representative of other Asian societies. Even so, the book does include refreshing highlights in Pitts's original and insightful inclusion of the arguments of Lin Zexu of China and Hamdan Khoja of Algiers, who invoked Vattel's universalist ethos to critique Western imperialists as violators of their own ideals.

Given the inescapably political character of international law and its importance in shaping the institutional infrastructure of the current world order, Pitts's work on the history of international law has immediate relevance to the modern world. As Pitts proves, a study of the origins and scope of international law provides valuable resources for critical scrutiny of the political, economic, and legal inequalities that continue to afflict global affairs today. Specifically, as Pitts demonstrates, the constellation of beliefs throughout international legal debates in the seventeenth, eighteenth, and nineteenth centuries left a "marked legacy" visible in the unequal structures of today's international order. Within a capitalist world system, European metropolises and extra-European societies "developed interdependently through a profoundly asymmetrical process, with international law playing an important role as a powerful political discourse in justifying and stabilizing inequalities of wealth and military power." During most of the twentieth century, European powers dictated international norms based on their own values and interests, all under the veil of legal inclusion. This contributed to the conquest of territory, the seizure of other powers' ships, the imposition of unequal or discriminatory trade regimes, and the constriction of the legal rights and standing of non-European states. Postcolonial states were never incorporated as equal members to the universal legal order, which was created and remains dominated by the West. For example, constraints on sovereignty were forced on decolonizing states beginning with League of Nations members Liberia and Ethiopia in the 1920s and 1930s, and onerous and often destructive loan conditions were imposed on Third

World states through international institutions such as the International Monetary Fund and the World Bank.

Despite its supposedly innovative and transformative nature, some believe the NIEO is doomed to failure because of the Global South's attempt to work within existing international institutions to transform international law. As Pitts suggests, the NIEO's proponents were ultimately unable to resist Western States' use of international law to structure and justify their ongoing domination—"imperialism was too deeply entrenched in international law to be reformed by that very same law." Nevertheless, as Pitts points out, "international law contains resources for critique and frameworks for envisioning greater justice and equity, as . . . in the work of thinkers from Anquetil-Duperron to Hamdan Khodja and Henry Stanley, to C. H. Alexandrowicz and Mohammed Bedjaoui." According to Pitts, if international law "is a moral and political language we can hardly avoid, we can also try to better deploy it, in part by understanding its fraught past." *Boundaries of the International* is an indispensable resource in enhancing such understanding of how to use the histories and theories of international law as a way to confront, limit, and transform the imperial order and finally bring about greater justice and equity.