4. Constitutionalism in the Americas: a comparison between the U.S. and Latin America

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During the last 20 years, I have been studying the development of constitutionalism in the Americas. For that reason, when I was invited to compare the United States and Latin American constitutionalism, I immediately had some ideas about what I wanted to say. Basically, there were two intuitions that I had, and which I wanted to share. According to the first one, the U.S. model of constitutionalism looked more "solid" and coherent than the Latin American one.[1] According to the second, there was something profoundly wrong in the character of the U.S. Constitution, which made me consider that it was profoundly unattractive. After some reflection on the topic, I realized that the different intuitions I had were related to two different criteria, which I was considering in my analysis. The first intuition appeared to be the product of a *formal* criterion of evaluation, basically referred to the (internal) consistency that distinguished the U.S. Constitution – a kind of consistency that I did not find in most

[1] There is at least one crucial clarification that I need to present, at the beginning of this chapter. In what follows, I will be comparing one country – the U.S. – and a complex region – Latin America – which is obviously a problem. I am aware of this serious difficulty but, after so many years studying Latin American constitutionalism, I can claim at least two things in defense of my project. First, I have already been providing detailed information about the development of constitutionalism in the different countries of the region, which makes me confident about what the legal initiatives that these countries adopted and rejected were. *See*, for instance, Roberto Gargarella (2010), *The Legal Foundations of Inequality* (Cambridge: Cambridge University Press), and Roberto Gargarella (2013), *Latin American Constitutionalism, 1810–2010* (Oxford: Oxford University Press). Second, and precisely for this reason, I consider that it is actually possible to talk about a "Latin American approach to constitutionalism": Latin American countries have been enacting and modifying their Constitutions in similar ways, at similar periods. This fact makes it possible to refer to regional constitutionalism as a "unit", even in spite of the differences that separate the different countries.

Latin American Constitutions. Meanwhile, the second intuition seemed to derive from a more *substantive* criterion, related to some of the most cherished values that distinguished the life of American constitutionalism. Pursuing these initial intuitions, in the following pages I shall compare the development of constitutionalism in the U.S. and in Latin America, using both formal and substantive criteria of comparison.

EVALUATING AMERICAN CONSTITUTIONALISM: TWO CRITERIA

In what follows I will develop my evaluative enterprise about constitutionalism in the Americas. I will do so by taking into account two main criteria, one that is *formal* and the other that is *substantive*. The formal or functional criterion shall refer to the (internal) *consistency* of the constitutional model, while the substantive criterion shall be related to the *egalitarian character* of the model. Let me briefly explain and justify the choice of these criteria.

A formal/functional criterion: constitutional consistency. In constitutional matters, it is possible to talk about "consistency" in at least two different ways. Juan Bautista Alberdi, for example, basically made reference to what I shall call *external consistency.* In effect, Alberdi was particularly interested in examining to what extent the existing Constitutions took the surrounding reality seriously: a proper Constitution – he suggested – had to acknowledge the most serious and pressing problems that characterized the particular time in which it was enacted. For him, it was clear that constitutionalism could not solve all the grave existing social problems, but that question was beside the point. What mattered was that the law dedicated all its energies to face and confront the main existing social, political or economic evils of its time. This is why, for him, the "first constitutionalism" of the region, which had dedicated its main energies to the consolidation of independence, had properly fulfilled its job; and so the "second", with which he was involved.[2]

[2] The same was the case of the "second" wave of reforms, in which he got deeply involved: these reforms – which took place around the mid-1850s – were mainly dedicated to confront economic backwardness, which represented a crucial problem of the time. In his words, the new Argentinian Constitution had to help overcome the problem of the "desert", this is to say, the fact of having an underpopulated country, full of fertile land but lacking in qualified and unqualified labor force (this is why he tried to promote immigration through the Constitution, for example).

Now, it is obviously difficult to evaluate a Constitution according to the criterion of *external* consistency. To do so requires having a clear understanding of the "external" facts that constitutionalism should ideally take into account; and also a clear understanding concerning the best means appropriate for properly dealing with those external problems. In this chapter, I shall only make some preliminary considerations about this kind of consistency, and instead concentrate my attention on a second type of consistency, namely *internal* consistency.

Internal consistency is easier to recognize than the former one. It appears – I submit – when the different parts of the Constitution work in a coordinated manner, one in favor of the other. In what follows, through my references to internal consistency I will be thinking about the two main parts of the Constitution – that is to say, the section of the Constitution that defines the *organization of powers*, and the one that defines the *structure of rights* – and the way in which they relate to each other.

Let me illustrate what I shall understand (and what I shall not) as cases of internal consistency. For example, one could claim that many of the conservative and liberal Constitutions that prevailed in the Americas were – no matter what we think about their normative attractiveness – internally consistent constitutional models. Hyper-conservative Ecuadorean President Gabriel García Moreno – just to begin mentioning one salient case – claimed that the main objects of his government would be to "put our political institutions and our religious beliefs in harmony". For that reason, he proposed adopting a new Constitution that, on the one hand, created an enormously powerful President (he advocated for a very conservative organization of powers), and, on the other hand, made the entire structure of rights dependent on the importance of Catholic religion (i.e., accept freedom of the press only and as far as the press did not offend the religious dogmas). In that way, both parts of the Constitution were prepared to work together (i.e., most probably, a President endowed with supreme powers would be able to ensure social peace and religion).

The same goes, for instance, with liberal Constitutions, which were mainly directed at protecting basic individual liberties, including private property and liberty of contracts. Liberal Constitutions seemed to be well prepared for the achievement of those goals. On the one hand (we shall come back to this), in those Constitutions, public authorities would be strictly controlled by a system of "checks and balances" (organization of powers); while, on the other, the structure of rights would provide strong protections or ensuring "negative liberties" to the individual members of society.

By contrast – and, for hypothesis – a Constitution that came to ensure "negative liberties" through a long list of individual rights, while at the same

time consecrating a super-powerful Executive power, could be deemed internally inconsistent. The same would happen with a Constitution that wanted to dedicate its energies to the imposition of religious values, while establishing, at the same time, a weak Executive authority.

A substantive criterion: egalitarianism. Given the obvious limits of formal and functional analysis, I shall add a second evaluative criterion, which I shall also be using in the following pages. This second criterion will be the (more or less) egalitarian character of the different constitutional projects that appeared in the region, in the last two centuries. Of course, I cannot develop, in this limited space, a broad theory of justice, in order to critically evaluate Latin American constitutionalism. Instead, I shall base my analysis on actual constitutional values and practices, related to the region's constitutional history. In this respect, I shall maintain that the trajectory of American constitutionalism has profoundly been marked by two main ideals, which have been present in the region from the very moment of independence.[3] I am thinking about the values of *collective self-government* and *individual autonomy.* In what follows, I shall call *egalitarian* the Constitution that tries to embrace and put together both these ideals at the same time. By having this regulative ideal in mind, I shall be able to distinguish egalitarian constitutionalism from the other main constitutional models that prevailed in the region in the last two centuries, namely liberalism, conservatism and radicalism (see below). Before saying something more about how to distinguish these models, let me say something about the importance of the values of individual autonomy and collective self-government in the history of constitutionalism in the Americas.

In fact, the choice of these two ideals, namely *individual autonomy* and *collective self-government* is not hazardous. These are two fundamental values that have occupied a crucial place in U.S. political discussions, since the time of independence. Clearly, the main battles that were fought in the region, since independence, were not carried out with the idea of *autonomy* written in the flags of the contenders. However, and just to mention one important example, many relevant military leaders and *caudillos*, in the Americas, did write in their banners expressions such as "religion or death", which in the end clearly referred to the place of individual autonomy in the new nations. In fact, disputes around the power of the Church only summarize and illustrate the many conflicts that appeared in the region concerning individual autonomy. These disputes included, for instance, serious fights concerning the scope of freedom of expression

[3] Gargarella (n 1), Ch. 1.

and freedom of conscience; quarrels about the meaning and implication of freedom of the right to privacy; conflicts about freedom of assembly; etc.

In similar terms, it is not difficult to recognize the influence exercised by the ideal of *collective self-government* in the Americas. Just to begin, the same independence revolutions were centrally based on the republican vindication of the right of the locals to govern themselves. Those revolutions were directly based on a claim of self-government, against the domination of foreign countries – England, in the case of the United States; Spain, in the case of most Latin American countries; Portugal, in the case of Brazil. From the early claim of *no taxation without representation,* presented by the early American colonist against England, the demand for self-government always occupied a privileged place in the disputes of the new societies. Perhaps more significantly, that claim continued occupying a central role in the new nations even *after* independence, although in a very peculiar way. In most cases, in effect, those individuals who had been convoked to the war of independence, took part in it, and offered their lives in it, made the ideal of self-government their own. And – as the historian Gordon Wood always emphasized in his study of the American Revolution – they began to use those doctrines against the leaders of the revolution, who had promoted the value of self-government.[4] They demanded a more relevant role for the popular sectors in the decision-making process; they asked for more spaces for political participation; they disputed – in sum – the political organization that emerged after independence.

As anticipated, by having in mind the meaning and importance of these two ideals, we can achieve a better understanding of the main political and legal disputes that took place in the region, during all these years. Moreover, in this way we can better organize our approach to regional constitutionalism and refine our critical analysis of it.

Thus, the most important constitutional models that have been present in regional constitutionalism can be classified according to the way they related with the two main ideals of autonomy and self-government. To summarize, I would distinguish:

- *A conservative approach* which, from the very beginning of the independence revolution, assumed a restrictive view regarding both the ideals of autonomy and self-government. Conservatism tried to organize the entire constitutional system around one particular *conception of the good* – usually, a particular religion – and at the same

[4] Gordon S. Wood (1969), *The Creation of the American Republic* (New York: W.W. Norton & Company).

time assumed a restrictive and elitist approach, regarding the role of the majority will in the organization of public affairs.

- *A republican approach*, which was directly opposed to the previous one, particularly in regard to the value of the ideal of self-government; and which at the same time tended to see individual autonomy as subordinated to the needs of the general welfare or the demands of a majoritarian politics.
- *A liberal approach*, which came to reverse the priorities of the republican one. Liberals tended to organize the entire constitutional order around the idea of individual autonomy and respect for individual choices; while at the same time showing a disposition to establish severe restrictions to majority rule in the name of protecting individual autonomy.

In sum, what we find here are three different views, which established a different relationship with the values of autonomy and self-government: one that vindicated the ideal of self-government, even at the risk of undermining the ideal of individual autonomy (republicanism); one that, in contrast to the previous one, appeared to be ready to sacrifice the ideal of collective self-government, in the name of preserving individual autonomy (liberalism); and a third view, that was open to challenge both ideals at the same time, in the name of a comprehensive conception of the good (conservatism).

All the previous considerations would require a more detailed analysis, which I cannot develop at this point, but which I tried to develop in other writings.[5] For the moment, I just want to call attention to the existence of an "empty box" within the main schema of American constitutionalism. In effect – and, as it can be seen in Table 4.1 – low-constitutionalism in the Americas offered, in its more than 200 years of history, very diverse Constitutions: some of them defied both ideals at the same time

Table 4.1 Constitutional models: autonomy and self-government

Conservatism	Radicalism	Liberalism	Egalitarianism
Collective self-government (−) Individual autonomy (−)	Collective self-government (+) Individual autonomy (−) (+)	Collective self-government (−) (+) Individual autonomy (+)	Collective self-government (+) Individual autonomy (+)

[5] *See* n 2 above.

(conservative Constitutions); some others defied one of those values, in the name of the other (liberal and radical Constitutions). However, we do not find Constitutions that, at the same time, showed a strong commitment both to the values of individual autonomy and collective self-government, that is to say, *egalitarian Constitutions*. In what follows, I shall use the term "egalitarianism" to refer to this absent model or "empty box", and also this ideal model as the standpoint from which to provide a substantive evaluation of constitutionalism in the Americas.

Now that I have clarified the content of the two evaluative criteria that I will be using in this work, namely consistency and egalitarianism (meaning individual autonomy and collective self-government), I can proceed with the comparative analysis of constitutionalism in the United States and in Latin America. In order to do so, I will first examine both constitutional orders according to the value of consistency, and only then do the same according to their egalitarian character.

EXAMINING THE (INTERNAL) CONSISTENCY OF U.S. CONSTITUTIONALISM

In general terms, I believe that U.S. constitutionalism still remains closely related to the kind of liberalism that distinguished it from its very origins.[6] The liberalism of the U.S. Constitution manifests itself in diverse clauses of the document, including its defense of individual autonomy, and the limits it establishes to abuses of power. One can recognize these commitments in most of the Constitution's fundamental features, including the central role of its system of "checks and balances"; the model of neutrality – and particularly religious tolerance – that it establishes; its defense of private property and free markets; its hostility towards the State's interference with economic matters; its respect of liberty of conscience, liberty of the press, liberty of association; etc.

Now, let me say something concerning the consistency of the U.S. Constitution, both at its *internal* and *external* level. Concerning the issue of *external* consistency – and assuming the absence of adequate parameters for properly examining it – there is at least one significant issue that reveals the existing tensions between the document that was

[6] It is true that the U.S. Constitution establishes a presidentialist system that has become, with the passing of time, still more concentrated, thus threatening the Constitution's internal equilibrium. However, I think that these developments still do not undermine the overall liberal character of the document.

enacted and the actual reality that surrounded it: the issue of slavery, with which the Constitution preferred not to deal even in spite of its crucial and central social importance. When the Framers of the U.S. Constitution minimized and/or hid the problem of slavery, within the original text, they undermined the moral, political and legal value of the Constitution. The unfortunate explosion of the Civil War, some years later, was obviously related to a diversity of factors but, undoubtedly, some of them were related to the nature of the Constitution, which had preferred not to take the question of racial discrimination seriously, and decided to use its energies for other purposes, while denying those radical evils. Undoubtedly, such a constitutional failure represents the main omission – the main internal inconsistency – of the U.S. Constitution.

By contrast, in what concerns its *internal* consistency, the U.S. liberal Constitution can easily pass all the required tests. In fact, the two basic parts of the U.S. Constitution show an almost perfect fit between them, favoring the general well functioning of the legal structure. The main ideal behind the liberal project was the protection and promotion of individual freedom. The main assumption seemed to be that the State, through the use of its coercive powers, represented the most serious threat to personal freedoms. For that reason, liberals proposed using the Constitution to "shield" individuals against potential abuses by the State, and at the same time (the other side of the same coin) to restrict the State's capacities to abuse via its political apparatus.

More specifically, liberals used the Constitution, first, in order to prevent the discretionary use of power and, particularly, to prevent the legislature from becoming a mere instrument in the hands of factious majority groups. Secondly, they tried to prevent the possibility that any government imposed a "moral dictatorship" upon the rest of society (i.e., by establishing an official religion). The constitutional formula for achieving those goals was twofold. It consisted in the establishment of a system of *equilibrium of powers* and a list of basic, inviolable *rights* – particularly rights aimed at the protection of individual freedom, private property, freedom of contract and free markets. Both parts of the Constitutions were thus directed to work together for the promotion of individual freedom and the limitation of power.

To be more specific, the first fundamental feature of the U.S. liberal Constitution consisted of the establishment of basic restrictions concerning the use of power. The idea was to avoid State's abuses and guarantee individual autonomy. In the origins of constitutionalism, and in the face of a particularly serious problem, namely religious imposition, Thomas Jefferson graphically proposed building a "*wall of separation*" that pre-

vented the State from interfering with issues of conscience.[7] Granted, the image of a "wall of separation" was primarily used to refer to the need for preventing the use of State coercion in religious matters. However, that same image helps us understand the liberals' general approach to the issue of the coercive powers of the State. In the end, liberals wanted to build a "wall of separation" that protected each person from the arbitrary imposition of *any* conception of the good; a wall that kept the iron hand of the State away from the people's beliefs.

The second fundamental feature of the U.S. Constitution implied the creation of a system of *checks and balances.* A powerful judiciary, together with bicameralism in Congress, and the powers of veto left in the hands of the Executive, gave shape to the system of "mutual balances". The benefits of this system seem apparent. It forced the legislators to consider their decisions twice, improving the decision-making process; it ensured a special protection to minority groups; it forced each of the different sectors of society to anticipate and evaluate the decisions of the others; it favored the possibility of having "multiple eyes" looking at the same problem; and it made it very difficult for any group of self-interested representatives to simply impose their oppressive decisions upon the others. As James Madison clearly explained in the *Federalist* No. 51 (later known as the *Federalist Papers*), the proposed device provided the members of the different branches of power with the "necessary constitutional means, and personal motives" to resist the oppressive attempts of others. This solution, he argued, was based on a "reflection on human nature":[8] given the impossibility of avoiding or suppressing the people's self-interest as a basic political motivation, the institutional system had to be prepared to counteract its worst consequences. As Madison put it, "ambition must be made to counteract ambition".

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[7] He wrote: "Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof; therefore building a wall of separation between church and State." Thomas Jefferson, "Letter to the Danbury Baptist Association in Jan. 1, 1802", in Jefferson (1999), at 397.

[8] "If men were angels" wrote Madison in the *Federalist* No. 51 "no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."

The liberal State thus came to ensure that each person adopted and followed his or her ideology and cultivated the talents and ideals he or she preferred. Today, we tend to describe this type of State as "neutral". The *neutrality principle* would basically say that the State should not take sides in favor of any particular conception of the good. In other words, the State should not use its coercive powers in favor of or against any view of the good.[9]

In sum, what we see here is that, according to the liberals' constitutional model, both parts of the Constitution have to be organized so as to work together, in a coherent manner. Both parts are directed at ensuring the prevalence of individual agreements upon majority decisions, thus preserving ample room for free choice and personal autonomy.

One additional note: It is interesting to realize that, in their approach to economic issues, liberals simply extended these initial ideas about the law (or the other way around). Once again, they assumed that State interventionism was the source of most (economic, in this case) evils.

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[9] In the U.S., many liberals developed a crusade against the establishment of a religion, first at a local and then at a national level. They wanted to prevent the State from using its force and its resources in favor of a particular faith. James Madison was, once again, a key figure in this movement towards neutrality, which recognized a fundamental antecedent in the work of Roger Williams in Rhode Island. Madison in collaboration with George Mason wrote the first "Declaration of Rights", in Virginia, which came to guarantee complete religious freedom to all Virginians. Every person, they argued, had an equal right to follow his conscience in religious matters. However, politicians like Patrick Henry, an important representative of what we describe as radicalism, opposed that Declaration. Henry proposed supporting the different Christian churches through taxation, arguing that the decline of religion would imply a decline of morals. Against his proposal, Madison argued that the State lacked the authority to demand those payments. Moreover, he asserted that the absence of a prevalent and protected religion would not necessarily imply the moral decay of society. This disgraceful situation could come about, for example, because of inadequate and unjust laws, or the lack of a good educational system, but not as the product of a "neutral" State. Trying to give theoretical foundation to his views, Madison also wrote his well-known paper "Memorial and Remonstrance against Religious Assessments". In this document supported by numerous adherents he asserted the importance of blocking Henry's initiative which appeared to be the first step towards the establishment of a religion. As Milton Konvitz asserted, Madison feared that "the removal of some stones from the new wall of separation of church and state in Virginia might lead to the collapse of the wall and to state support of religion in general". Milton Konvitz (1957), *Fundamental Liberties of a Free People: Religion, Speech, Press, Assembly* (Westport, CT: Greenwood Press Publishers), p. 24. Madison's successful campaign contributed, in addition, to the success of Jefferson's Bill for Establishing Religious Freedom in Virginia (ibid., 24). This was probably the first law in the world enacting complete religious freedom.

Then, and in order to respect people's liberties, it was necessary to allow them to choose freely and carry out their economic initiatives. The parallel they established between the moral, the legal and economic order seemed irreproachable: the State – they assumed – had to be neutral regarding the people's different conceptions of the good and their different preferences. It should impose no conception of the good life upon the people as it should impose no economic regulations. For that reason, it was necessary to organize a framework that allowed each person to pursue his own personal initiatives. In sum: *the personal life of each person – they assumed – should depend on autonomous choices as the public life of the community should depend on the particular initiatives and agreements of the people.* Any State intervention against these individual options was then seen as an unacceptable *irruption* into the life of the people, only capable of *distorting* the free will of the citizenry.

EXAMINING THE (INTERNAL) CONSISTENCY OF LATIN AMERICAN CONSTITUTIONALISM

Let me now examine Latin American constitutionalism, in terms of its consistency. We already know that, in what concerns its *external* consistency, Alberdi declared being satisfied with what legal thinkers of his time had managed to achieve. This is, at least, what he said concerning the so-called "first" regional constitutionalism, and also what he assumed was happening concerning the "second" wave of constitutionalism, to which he made a decisive contribution. Of course, we may agree or not with his own evaluation of Latin America's early constitutional history (I already made reference to the difficulties we have for making "external" evaluations). In any case, at this point I want to only make a basic claim regarding *external* consistency. In my opinion, Latin American constitutionalism has not been doing its job properly in this respect, at least with regard to one fundamental "drama" that has been affecting its own existence during long decades: the "drama" of inequality. In my view, there exists no other equivalent problem in Latin American history. If this were true – as I think it is – this omission would point to a serious problem: regional constitutionalism would have dramatically failed to address and dissolve the main "tragedy" it confronted. By failing to do so, Latin American constitutionalism would have become, unfortunately, co-responsible for the grave levels of inequality of exclusion that still affect the region.

Let me now turn to a more detailed analysis about the *internal* consistency of Latin American Constitutions. In this respect, regional constitutionalism presents at least one particularly significant problem,

with which I have dealt at length in another work.[10] I am referring to the internal tension that the vast majority of Latin American Constitutions incorporate, between the way in which they have articulated the organization of power, and the way in which they have organized their approach to rights. In other words, Latin American Constitutions have put their robust declarations of rights at risk, by the way in which they organize power. Summarily speaking, the problem would be the following: Latin American constitutionalism has systematically affirmed its commitment to the values of democracy, inclusion and horizontality, in the area of rights. It has done so, for example, by recognizing the most diverse rights of the most diverse minorities; or by showing a serious concern for the legal inclusion of the most disadvantaged groups of society. However, all the important things it promoted with regard to rights have been actually defied and put at risk by its unreasonable insistence on maintaining an organization of powers oriented by opposite goals. In fact, the organization of powers in most Latin American Constitutions is still today – after more than 200 years of existence – characterized by its verticalism and its hostility towards democracy and popular participation in politics. In other words, nowadays, most Latin American Constitutions offer advanced, progressive, twenty-first century style declarations of rights; while they still maintain organizations of powers that seem to belong to the eighteenth and nineteenth centuries, and which can still be properly characterized by their authoritarian profile, and its commitment to political exclusion.

To understand what I am saying, it may be worth examining – at least in brief – the main features of Latin American constitutionalism. More particularly, in the following paragraphs I will try to highlight the way in which the peculiar "mixture character" of regional constitutionalism has affected the internal consistency of the region's main Constitutions. For this purpose, in what follows I will explore the "mixed" content of Latin American Constitutions and, more particularly, the tensions that emerged between the Constitutions that were enacted in the nineteenth century, and the reforms that were incorporated in the following centuries.

Nineteenth-century Latin American constitutionalism was the product of a convergence of ideologies – mainly, liberalism and conservatism. If liberals came to the negotiating table with their initiatives for equilibrium of power and moral neutrality (we have already explored this view), conservatives arrived at those discussions with almost opposite proposals. Conservatives wanted to replace liberal neutrality with moral

[10] Gargarella (n 1).

perfectionism: they wanted to have a State that was active in the enforcement of the Catholic religion. Most significantly perhaps, conservatives despised the system of mutual controls: they preferred to have an unchecked, unaccountable figure, in charge of government, and endowed with the powers necessary for ensuring order, peace and stability.[11]

The consequence of the liberal-conservative constitutional compact was the enactment of Constitutions that, in more or less innovative ways, combined the proposals of both political traditions. In general, and already from this early stage, Latin American constitutionalism preferred to *accumulate* rather than *synthetize* the initiatives of both sectors. The Argentinian 1857 Constitution represented an excellent illustration of what was then achieved. In the section of rights, for example, it included, at the same time, and in the same text, both what liberals wanted, namely religious tolerance (article 14 of the National Constitution), and what conservatives demanded, namely a special status for the Catholic religion (article 2 of the Constitution). And we can recognize the same strategy of "accumulation" in the sphere of the organization of powers – in Argentina's Constitution, as in most regional Constitutions. In effect, since the mid-nineteenth century, what we find in the region are Constitutions that, following the desires of liberals, consecrated a system of "checks and balances" but which, at the same time, and following the demands of conservatives, "unbalanced" that purported equilibrium, by providing additional, special powers to an overtly powerful Executive, thus creating (so-called) hyper-presidentialist regimes.[12] By doing so, as

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[11] Following the Napoleonic example, the independence leader Simón Bolívar – whose work was enormously influential in the entire region – proposed for Bolivia an Executive appointed for life and with the power to choose his successor. In his message to the Bolivian Congress (May 1826), he stated: "The President of the Republic, in our Constitution, becomes the sun which, fixed in its orbit, imparts life to the universe. This supreme authority must be perpetual, for in non-hierarchical systems, more than in others, a fixed point is needed about which leaders and citizens, men and affairs can revolve" (Bolívar (1976), at 233).

[12] *See* Carlos Santiago Nino (1997), *The Constitution of Deliberative Democracy* (New Haven, CT: Yale University Press). This was, for example, Alberdi's recommended formula for the particular "drama" affecting Latin America during the 1850s. It was necessary to ensure "order and progress" and, for that reason, the system of equilibrium of powers had to allow the President to become "a King" so as to be able to face situations of crisis and maintain peace. For Alberdi, the Chilean Constitution of 1833 had demonstrated that it existed as a good alternative between "the absolute absence of government and a dictatorial government". This was the model of a "constitutional president who can assume the faculties of a King" in situations of "anarchy". Juan Bautista Alberdi (1981/1852), *Bases y*

I shall clarify, Latin Americans incorporated a serious tension within the same institutional system that they were creating.

Let me clarify this point. First, and to repeat, the main result of the liberal-conservative compact, at the level of the organization of powers, was the creation of hyper-presidential political systems, which, in the end, both liberals and conservatives accepted. On some occasions, Latin Americans transferred to the President the power to declare the *state of siege*, and thus limit rights and individual guarantees; in others, they allowed him to militarily "intervene" in the affairs of local States; in most cases they allowed the President to have a decisive participation in the legislative process; etc. The choice of having a super powerful Executive had, as anticipated, a strong impact upon the system of "checks and balances" that, for that reason, was born "unbalanced". What Latin Americans did concerning the organization of powers, represented a significant departure from the original U.S. model of "checks and balances". More radically – one could add – their decision to empower the Executive in such a way implied putting the entire system of "checks and balances" under risk. James Madison would have easily predicted some of the risks that, since those early days, began to menace Latin American constitutional systems: mainly, the "most dangerous branch" – the one that was in control of military powers and growing economic resources – would begin to exercise an undue influence upon the other branches, and thus destroy the desired equilibrium of powers.

Things became still more worrisome in the following century. In fact, since the beginning of the twentieth century, the political, social, economic and legal situation in the entire region suffered dramatic changes. The old scheme of "order and progress" that had prevailed in Latin America since the mid-nineteenth century, and from which Latin America (and particularly its privileged sectors) greatly benefited, was now in crisis. The politically authoritarian regimes that had managed to ensure economic development with peace were finding increasing difficulties in maintaining the old schema intact. Thus, it became necessary to use greater levels of coercion for keeping the old order stable. The serious political, economic, and social crises of those early years – which demanded profound political and economic changes – found immediate translation into the constitutional order.[13] The way in which constitutionalism attempted to dissipate

puntos de partida para la organización política de la República Argentina (Buenos Aires: Plus Ultra).

[13] Tulio Halperín Donghi (2007), *Historia Contemporánea de América Latina* (Buenos Aires: Alianza).

these crises was by incorporating a concern for the "social question", which was typical of more radical/republican or Rousseauean approaches to constitutionalism. These more radical approaches showed a profound concern with issues of social marginalization, and consequently tended to promote an expansion of political rights, popular participation, and economic equality. Those concerns, we should remember, had been marginalized from the 1850s' constitutional discussions. Now, however, the situation was different – a profound social, political and economic crisis was putting at risk the entire model of "order and progress". This is why reformers began to insist on the importance of incorporating those claims and concerns into the old constitutions.[14]

The beginning of this reform took place in Mexico, and was symbolized by the enactment of the Mexican Constitution in 1917. This Constitution, which followed a dramatic revolutionary movement, represented the first and most radical constitutional response to a crisis that was also a legal crisis. In order to respond to it, it decided to incorporate a long and robust list of social, economic and political rights, which – since then – became a crucial feature of the new Latin American constitutionalism.[15]

The Mexican Constitution became thus the emblem of a new approach to constitutionalism, which began to emphasize the importance of social, economic and political rights. Metaphorically speaking, the "working

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[14] *See* n 2 above.

[15] For instance, article 27 of the Mexican Constitution maintained: "The Nation shall at all times have the right to impose on private property such limitations as the public interest may demand, as well as the right to regulate the utilization of natural resources which are susceptible of appropriation, in order to conserve them and to ensure a more equitable distribution of public wealth. With this end in view, necessary measures shall be taken to divide up large landed estates; to develop small landed holdings in operation; to create new agricultural centers, with necessary lands and waters; to encourage agriculture in general and to prevent the destruction of natural resources, and to protect property from damage to the detriment of society. Centers of population which at present either have no lands or water or which do not possess them in sufficient quantities for the needs of their inhabitants, shall be entitled to grants thereof, which shall be taken from adjacent properties, the rights of small landed holdings in operation being respected at all times." Another crucial clause was article 123, which included wide protections to workers and recognized the role of trade unions; regulated labor relations reaching very detailed issues, which in a way covered most of the topics that later on would come to distinguish modern labor law. The clause made reference, for example, to the maximum duration of work; the use of labor of minors; the rights of pregnant women; minimum wage; right to vacation; the right to equal wages; comfortable and hygienic conditions of labor; labor accidents; the right to strike and lockout; arbitrations; dismissal without cause; social security; right to association; etc.

class" finally found its place in the new Constitution through the new Bill of Rights. The Mexican example was soon followed by almost all the Latin American countries. We recognize constitutional changes, in similar directions, in the Constitutions of Brazil in 1937, Bolivia in 1938, Cuba in 1940, Ecuador in 1945, and Argentina and Costa Rica in 1949.

So, here we find a new important wave of Latin American constitutionalism (the first wave appeared right after independence, and the second in the mid-nineteenth century, with the liberal-conservative compact). And, still more significantly, here we have the second crucial moment in the life of Latin American constitutionalism.

To summarize: The *first fundamental moment of regional constitutionalism* appeared in the mid-nineteenth century: it was the time when Latin America adopted its basic institutional "matrix", which defined its *organization of powers* since then, and to the present. The *second fundamental moment of regional constitutionalism* began in the early twentieth century and was extended to the entire region after a few decades. At that second moment, Latin America defined its *organization of rights*, which marks its Constitutions since then.

Through these two moments we can recognize the two main characteristics that still distinguish Latin American Constitutions, and that – unfortunately – reveal their significant internal inconsistencies. On the one hand, we have Constitutions that organize power in a centralized way, imperfectly combining a schema of "checks and balances" with a strong presidentialism. So, here we find a first important tension affecting most regional Constitutions: the idea of "institutional equilibrium" (which belongs to the system of "checks and balances") does not fit well with the existence of a hyper-powerful Executive authority (this tension – as we know – had also clear ramifications in the section of rights, which on many occasions included commitments to both liberal tolerance and religious imposition). On the other hand, we find that twentieth-century Constitutions came to organize a renewed system of rights in ways that properly emphasized the importance of social, economic and political rights. By doing so, however, the new Constitutions introduced a new and crucial tension within their corpus: they thus began to combine centralized and vertical organization of powers with "democratic" and socially oriented declarations of rights. As a consequence, the new Constitutions began to reflect the main internal tension/inconsistency that still characterizes Latin American constitutionalism: the tension that emerges between a backward-looking organization of powers, and a progressive or forward-looking organization of rights.

EVALUATING THE EGALITARIAN CHARACTER OF U.S. CONSTITUTIONALISM

Let us now turn to the substantive evaluation of U.S. and Latin American constitutionalism. First, I shall examine the U.S. Constitution, by paying attention to its egalitarian character – namely, its relation to the ideals of individual autonomy and collective self-government. In this respect, we may say that the U.S. document demonstrates results that are less attractive and promising than expected. On the one hand, it seems undeniable that the U.S. Constitution presents an interesting profile, which relates to its concern with the preservation of basic individual freedoms. However, and on the other hand, it seems also clear that an "egalitarian deficit" affects both the main sections of the Constitution, this is to say, both its organization of power and its Bill of Rights.

To begin with: from a substantive viewpoint, the most interesting aspects of the document appear in the Constitution's serious concern with preventing all kinds of abuses of power – both the risk of majority abuses and the risk of minority abuses. As Alexander Hamilton put it, the Constitution had to be prepared for the risks of both majority and minority oppression.[16] The Framers' obsession with the risk of mutual oppressions was clear, and certainly valuable from an egalitarian perspective: a self-governed legal community requires avoiding the risk of oppression. More prominently, the U.S. Constitution shows a salutary concern with the value of individual autonomy, which occupies – and should occupy – a central role in any egalitarian project. We may recognize this concern in its Bill of Rights and the liberties it protected, and also in an organization of power that was modeled accordingly: the system of "checks and balances" seemed to be well prepared to ensure the enforcement of those basic, proclaimed liberties.

Having said that, we can now briefly explore the significant problems that the U.S. Constitution manifests, concerning its egalitarianism. Relating to the way in which it organizes the Bill of Rights, the Constitution can be properly read as a "negative Constitution", this is to say as a Constitution that is essentially committed to the preservation of "negative" liberties – say, preventing harming, injuring, robbing, killing other individuals. At the same time, the Constitution appears to disregard (one could claim it is directly hostile to) "positive" liberties, usually related to social rights.[17]

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[16] Max Farrand (ed.) (1937), *The Records of the Federal Convention of 1787* (New Haven, CT: Yale University Press).

[17] For instance, Judge Richard Posner stated: "the Constitution is a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services, even so elementary a service

Without going, at this point, deeper about the "negative" or "positive" character of rights, I would assert that, by closing itself so rigidly to any serious consideration about including social rights in its text, the U.S. Constitution strongly undermined its egalitarian content.[18] And this is so, at least, for two reasons. First, the absence of social rights in the Constitution represents an unattractive feature of the U.S. Constitution because the presence of those rights actually contributes to the cause of equality. At minimum, the presence of social rights contributes to strengthening the idea that all members of society share a common moral equality and – consequently – deserve to be so treated. Second, modern constitutionalism (and here, the Latin American example seems particularly interesting) has already demonstrated that it can deal with social rights without, for that reason, destabilizing the rest of the institutional structure or offending basic democratic values, as some could have expected.[19]

In what concerns the relationship between the organization of powers and egalitarianism, I would say that the U.S. Constitution incurs the typical problem of liberal constitutionalism. The problem is the following: obsessed with ensuring its main declared goal, which is the preservation of individual autonomy, liberal constitutionalism incorporates a diversity of "counter-majoritarian" devices that end up seriously undermining its democratic character. This is what political philosopher Roberto Mangabeira Unger called the *dirty little secret* of modern legal life in the United States.[20]

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as maintaining law and order" (Edelman 1988, 23). Similarly, Judge Scalia has said that "it is impossible to say that our constitution traditions mandate the legal imposition of even so basic a precept of distributive justice as providing food to the destitute" (ibid., 24); and Judge Bork strongly rejected the possibility of "finding" welfare rights in the (U.S.) Constitution.

[18] *See* Jeff King (2012), *Judging Social Rights* (Cambridge: Cambridge University Press); Malcolm Langford (2009), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press).

[19] *See* Daniel Bonilla (2013), *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia* (Cambridge: Cambridge University Press); Roberto Gargarella (2010), *The Legal Foundations of Inequality* (Cambridge: Cambridge University Press); Peter M. Hogg, Allison A. Bushell Thornton and Wade K. Wright (2007), "Charter dialogue revisited – or 'Much Ado about Metaphors'", *Osgoode Hall L.J.*, **45**, 1; Conrado Hübner Mendes, *Constitutional Courts and Deliberative Democracy* (2013) (Oxford: Oxford University Press); Cass Sunstein, *The Second Bill of Rights* (2006) (New York: Basic Books); Mark Tushnet (2004), "Weak-form judicial review: Its implications for legislatures", *NZJPIL*, **2**, 7; Mark Tushnet (2008), *Weak Courts, Strong Rights* (Princeton, NJ: Princeton University Press); Mark Tushnet (2009), "Dialogic judicial review", *Ark. L. Rev.*, **61**, 205.

[20] For him, the "secret" consists of a "discomfort with democracy" that "shows up in every area of contemporary legal culture: in the ceaseless identifica-

Initiatives for the inclusion of counter-majoritarian devices in the Constitution began right after the independence period – particularly between the years 1776 and 1786, which was a time of intense political (and particularly legislative) activism at the State level. In the Federalists' view, the prevalent political situation generated very unfair outcomes: most significantly legislative decisions tended to favor just one particular group, namely the group of the debtors, in other words, the majority of society. Madison made direct reference to this situation in one of the most brilliant political analyses of the time, which was published shortly before the Federal Convention. The paper was called "Vices of the Political System", and there the Virginian mentioned the numerous defects that affected the dominant institutional organization.[21] Most of all though, Madison stressed the vices that derived from the "multiplicity", "mutability" and "injustice" of laws approved at the State level.[22] This is to say, in the lucid analysis of one of the most lucid and influential analysts of the time, the activism of State legislatures appeared as the main source of the existing social problems (the threat posed by the existence of "factions"). These assumptions – without doubt – strongly influenced the redesign of the organization of powers, and help explain the decision to undermine and limit the powers of the Legislature. By weakening the Legislature in that way, the U.S. Constitution also weakened its commitment to the value of collective self-government.

The particular institutional "solutions" that were then adopted, for preventing the influence of majority factions in politics, were diverse (we have already mentioned some of them).[23] Let me just highlight two of them, which are particularly important for our analysis of the egalitarian character of the U.S. Constitution.

A strict separation between public officers and the people. At this point, the first distinctive feature that I would mention, concerning the U.S.

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tion of restraints upon majority rule, rather than of restraints upon the power of dominant minorities, as the overriding responsibility of judges and jurists; in the consequent hypertrophy of countermajoritarian practices and arrangements; in the opposition to all institutional reforms, particularly those designed to heighten the level of popular political engagement, as threats to a regime of rights . . .; in the single-minded focus upon the higher judges and their selection as the most important part of democratic politics". Roberto Mangabeira Unger (1996), *What Should Legal Analysis Become?* (New York: Verso), p. 72.

[21] Among them, he mentioned the States' lack of respect for federal authorities; the absence of norms for preventing political violence; the frequent violations of national laws and international agreements.

[22] Rachal (1975), at 345–58.

[23] However, I have examined many of them in my book (Gargarella, 2010).

Constitution, is what some authors called the "principle of distinction".[24] To state it more clearly: the "Founding Fathers" wanted to avoid the possibility of having political representatives dependent on the will of the people, and thus prey of "factional" or local politics. Their purpose was to ensure a system of "strict separation" between the people and their representatives, under the assumption that the institutional systems that prevailed during the Framing Period, at the local level, failed to avoid that risk. In their opinion, the dominant institutional system, at the State level, allowed the people to exercise intense and undue pressures upon their representatives. The people's representatives tended to become mere "mouthpieces" of their constituency, and were thus forced to represent partial interests, rather than the interests of the whole. This decision, based on a profound distrust about the people's political capacities, implied the acceptance of a particular understanding of political representation, which Edmund Burke had famously presented at Bristol, in 1776, when he defended – through elitist arguments – the "independence" of political representatives. Later on, in the famous *Federalist Papers* No. 10, James Madison presented a similar view for the United States, based on similar assumptions: he did not see political representation as a "second best" or a "necessary evil", but rather as a first desired option. The assumption was that – given their institutional position, social origins and practical experience – representatives would tend to have a better understanding of politics, than the people themselves.[25]

A preference for "internal" rather than "external" controls. The second institutional feature that I want to highlight is closely related to the system of "checks and balances". It refers to the Framers' preference for an "internal", rather than "external", system of controls. Early American politics had experimented with numerous devices for "external" control: from mandatory instructions, to mandatory rotation, to annual elections, to the right to recall, to town meetings, etc. The consolidation of a system of "checks and balances" came together with the reduction of those

[24] Bernard Manin (1997), *The Principles of Representative Government* (Cambridge: Cambridge University Press).

[25] In his words, the representative system had to be directed "to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation, it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose."

external controls to their minimal expression; or their direct suppression (mandatory instructions, the right to recall, etc. were basically eliminated from national politics). The main reason for this was their profound distrust towards majority politics, which was frequently associated with irrationality, passions and excesses.[26] In this context, the only relevant tool for "external" control that remained intact, namely periodic elections, would promptly tend to lose most of its force: without the help of other means of "external" control, periodic elections began to assume an enormous responsibility (expressing the collective viewpoints about politics), which elections cannot properly fulfill by themselves (the people have only one vote to express, perhaps, dozens of claims, demands and rejections). Moreover, and among the "internal" controls that remained intact (basically, the controls exercised by one branch upon the others), those of a more "majoritarian" character were also strongly limited or curtailed: Congress was divided into two Chambers; a Senate (mainly composed of rich property owners) came to control its more "popular" branch; indirect elections became prominent for the election of crucial public officers (the Executive power; the Judiciary; ambassadors; etc.).

As a result, and since the enactment of the 1787 Constitution, "We the people" found severe difficulties in reaching and controlling their representatives, or in influencing the decision-making process, while their representatives in Congress were subjected to the control of large property owners (the Senate), and the strict supervision of the other branches (the House of Representatives' initiatives were thus easily blocked or limited by the other branches, making it very difficult for the majority will to prevail). In sum, the "democratic costs" that liberal constitutionalism accepted paying, in order to preserve basic individual liberties, were undoubtedly excessive from any egalitarian conception that included a serious commitment to the value of collective self-government.

EVALUATING THE EGALITARIAN CHARACTER OF LATIN AMERICAN CONSTITUTIONALISM

Let me now examine the dominant constitutional model in Latin America, namely egalitarianism. The analysis of this issue is, unsurprisingly, difficult and complex. Once again, we can begin this approach by focusing on the two parts of the Constitution, namely the one related to the organization

[26] Roberto Gargarella (2010), *The Legal Foundations of Inequality* (Cambridge: Cambridge University Press).

of power, and the one related to the organization of rights. With regard to the first part, I have already suggested what I think: an egalitarian project is incompatible with the style of organization of power that still today prevails in most of the region. To put it simply: if an egalitarian project requires the democratization of powers, then it cannot defend an institutional system that is based – as Latin American institutional systems are still based – on the concentration of powers, which represent the negation of that democratization. The point is ingenuous and seems to find strong empirical support.[27] Let me provide some additional support to this point.

To begin with, nineteenth-century Latin American Constitutions "distorted" the U.S. liberal model in a significant way, namely by "adding" a strong and centralized Executive authority to the general schema of "check and balances". Such a move implied at least two things. On the one hand, it put the entire structure of "mutual controls" at risk, by making one of the branches more powerful than the rest: the system of "checks and balances" – we should remember – required that the different branches were basically equal in their relative power. On the other hand, this change modified the liberal schema in a conservative way, by making the decision-making process less sensitive to popular demands. In hyper-presidentialist systems, in fact, the people have fewer "points of access" to the production of general legislation. Of course, one could reply that hyper-presidentialism favors a more "direct" relation between the leader and the masses. In that way – the reply could follow – the people would actually influence the decision-making process. However, this reply seems problematic. First, in political schemes that concentrate the authority in the hands of "one", powerful interest groups have (also) only "one" person to convince, pressure or extort, which in principle promises to make their task easier and less costly (and, as we know, interest groups tend to have privileged access to political authorities). Second, the fact that the "leader" has direct communication with the "masses" does not imply that the "masses" have actually good or better chances to have an impact in the policy-making process.[28]

Unfortunately, a good deal of the political, legal and constitutional

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[27] Carlos Santiago Nino (1992), *Fundamentos de Derecho Constitucional* (Buenos Aires: Astrea); Carlos Santiago Nino (1993), "Transition to democracy, corporatism and presidentialism with special reference to Latin America", in Douglas Greenberg, Stanley Katz, Beth Oliveiro and Steven Wheatley (eds), *Constitutionalism and Democracy, Transitions in the Contemporary World* (Oxford: Oxford University Press); Carlos Santiago Nino (1996), *The Constitution of Deliberative Democracy* (New Haven, CT: Yale University Press).

[28] Santiago Nino (1993), id.

doctrine that prevails in the region – even among its most progressive sectors – seems to still be fascinated by the experiences of constitutional authoritarianism, or semi-authoritarianism, which have damaged the region entirely.[29] In defense of this view, there is at least one line of argument that I want to consider. This is the argument that presents hyper-presidentialism as a means for achieving collective self-government.[30] In effect, for some authors, a certain level of concentration of powers seems to represent a necessary condition for confronting and removing the dense web of interests that tend to control the political life of Latin America's unequal societies.[31] For the moment, I would only claim that there are good theoretical reasons and practical experience that work against this view and at the same time in support of an opposite alternative, namely one based on more direct forms of collective self-government. On the one hand, the concentration of power favors abuses of powers; undermines collective deliberation; endangers political stability; and may be perfectly functional to the deepening of social and political inequalities (a review of these arguments appears in Alegre (2006)). On the other hand, the experiences that Latin America had with more direct forms of democracy, have been varied and in no way unsatisfactory: they range from participatory budgets to popular consultation concerning the exploitation of mineral resources, to participatory processes as those defined by the International Labour Organization in case of legislative measures that put the rights of indigenous communities at risk.[32]

To conclude, for the above reasons, it is my opinion that Latin Americans should finally allow their institutions to be more fully connected with democracy, and they could do so by definitely opening the doors of the "engine room" of their Constitutions to popular majorities. Still today, the popular sectors are unfairly prevented from taking control of their political systems. Latin American Constitutions have opened

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[29] Stephen Levitsky and Kenneth Roberts (2011), *The Resurgence of the Latin American Left* (Baltimore: Johns Hopkins).

[30] Roberto Mangabeira Unger (1987), "El sistema de gobierno que le conviene a Brasil", in John M. Carey, *Presidencialismo vs. Parlamentarismo* (Buenos Aires: Consejo para la Consolidación de la Democracia), pp. 57–68.

[31] Unger, for instance, supports this version of hyper-presidentialism in connection with more or less permanent plebiscitary mechanisms, which would allow the people at large to recover and affirm its own voice. There are things to say in favor of this version of the argument but, regrettably, most of those who defend hyper-presidentialism in Latin America, do so without the nuances and qualifications that Unger offers in support of his view.

[32] *See e.g.* Maristela Svampa and Enrique Viale (2014), *Maldesarrollo* (Buenos Aires: Katz Editores).

their doors to the working class and other disadvantaged groups since the early twentieth century, but only in the area of the Bill of Rights. It seems unacceptable today – at the beginning of the twenty-first century – to still find the doors of the "engine room" of the Constitution closed to those disadvantaged sectors.

And what to say, then, with regard to the way in which Latin American Constitutions came to organize their Bills of Rights? Could at least this aspect of the prevailing Constitutions be considered part of a genuine egalitarian effort, worthy of respect and praise? I shall here concentrate my attention on the most important and attractive novelty offered by the Bills of Rights in most Latin American Constitutions, namely the introduction of social, economic, cultural and multicultural rights. However, I want to mention an initial, perhaps minor caveat, before entering into that analysis. The minor point is as follows. On many occasions – I submit – those valuable social rights were introduced into the new or reformed Constitutions under the influence of forces of traditional origins, such as the Catholic Church (that had been renovating its doctrine, in a more "social" direction, at least since the *Encyclical Rerum Novarum,* from 1891). In that way, the "rights revolution" that came to distinguish the new Latin American Constitutions did not represent – at least frequently – a significant departure from the old legal order. Typically, the new Bills of Rights (which included clear commitments to robust lists of social and economic rights) came together with the introduction of new limits upon personal autonomy – limits that were introduced in the name of traditional values – i.e, a patriarchal understanding of the family; a conservative approach to gender issues; etc. This was typically the case of some extremely influential Constitutions, such as those promoted by Getulio Vargas, in Brazil (1934 and 1937), or Juan Perón, in Argentina (1949). So, even in regard to this interesting aspect of the "new Latin American constitutionalism", namely the introduction of "new social rights", the fate of the egalitarian project seemed seriously affected.

In any case, let us leave that caveat aside, and concentrate the analysis on the more promising aspects related to the constitutionalization of social rights. There are, in fact, a lot of things to be said – from an egalitarian perspective – in favor of the constitutionalization of the new rights. First, there are reasons of principle: it could reasonably be argued that, in order to take individuals and groups as equals, it is necessary to recognize (legally) certain basic social and economic rights, particularly in contexts where those rights are usually challenged or violated. Second, there are also symbolic reasons that support the inclusion of new rights favoring the most disadvantaged members of society. For members of those groups, in fact, the constitutional recognition of their equal status is enormously

relevant. In actual practice – one could claim – such recognition has normally had a positive impact in terms of their dignity and their identity (this is what seems to have happened, particularly, with regard to the incorporation of indigenous rights in many of the new regional Constitutions). Third, experience has taught us that the countries that adopted the most austere or "Spartan" Constitution, in what concerns their organization of rights, have become the countries where the (judicial) enforcement of social rights found more difficulties. Think, as a way of illustration, about the cases of Chile or the United States.[33] Fourth, some new constitutional developments – particularly, those related to so-called *dialogic constitutionalism* – help us to recognize that social rights can be enforced without putting in crisis the basic values of democracy and – by contrast – favoring those very values. So, there are many arguments which favor the introduction of social rights into the new Latin American Constitutions. These arguments also help us to recognize the contribution of those legal initiatives to both individual autonomy and collective self-government.

Now, I do not want to deny the importance and force of those arguments, but only add one very important caveat to them, namely that there is a problem when this expansion of the list of rights is not accompanied by consequent changes in the organization of powers. Of course, someone could reply to my claim by saying that the more progressive Latin American constitutional delegates did the best they could, within the difficult circumstances in which they were required to work. They could state: "Progressive delegates began working on the Bill of Rights section of the Constitution, as a first step of a larger project. They succeeded in that job: they completed their mission, with the certainty that their task had to be – and would be – continued and expanded, in the near future, so as to finally achieve the other section of the Constitution (its organization of powers)."

The previous argument confronts at least one important problem (which is not directed at objecting to the incorporation of social rights in the Constitutions, which we have independent reasons to defend). The problem is that the old organization of power – which is, as we

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[33] Bonilla (n 19); Javier Couso, "The politics of judicial review in Chile in the era of domestic transition", in Siri Gloppen, Roberto Gargarella and Elin Skaar (2004), *The Accountability Function of Courts in New Democracies* (London: Frank Cass); César Rodríguez-Garavito (2011), "Beyond the courtroom: The impact of judicial activism on socioeconomic rights in Latin America", *Texas Law Review*, **89** (7), 1669–98; Rodrigo Uprimny (2006), "Legitimidad y conveniencia del control constitucional a la economía", in Rodrigo Uprimny, César Augusto Rodríguez Garavito and Mauricio García Villegas (2006), *¿Justicia para todos? Sistema judicial, derechos sociales y democracia en Colombia* (Bogota: Norma), pp. 147–200.

have seen, distinguished by its liberal-conservative character – does not remain indifferent to the incorporation of a more social and democratic organization of rights. By contrast, such vertical, rather authoritarian organization of the Constitution tends to work against the newly arrived and progressive organization of rights. To state this does not mean to maintain that hyper-presidents, in Latin America, could not or have not, occasionally, promoted relevant social reforms: they can or could do that, and the opposite, basically because they have the power to do almost whatever they want. However, the fact is that the vertical institutional structure that prevails in most Latin American Constitutions tends to become in tension with popular participation and also in tension with the demands of groups fighting for more autonomous power. Not surprisingly, hyper-powerful Presidents tend to read those demands for political participation and control as a direct challenge to their own power and respond accordingly – on many occasions, through the brutal use of the vast coercive powers they have under their control.[34] In this respect, the over-obsession that Latin American doctrinaires have demonstrated towards the expansion of the Bill of Rights – without due attention to the introduction of correlative changes in the organization of powers – cannot but be considered the product of sheer inertia, lack of reflection or, simply, a political mistake, that progressive Latin Americans continue making, without giving much thought to the problem. In sum, Latin American Constitutions seem to have favored self-government through many of their innovations (particularly in the section of rights), while at the same time seemed to help undermine that same value of collective self-government, through the reforms that they decided not to introduce in the old organization of powers.

CONCLUSION

In this chapter, I have critically compared and examined the development of constitutionalism in the U.S. and in Latin America. In order to do so, I have been using one formal criterion, related to the consistency of the different American Constitutions; I have also used a more substantive criterion, related to the egalitarian character of those Constitutions. Summarily speaking, I have first shown the attractiveness of the U.S. Constitution, when compared with most Latin American Constitutions,

[34] Roberto Gargarella (2013), *Latin American Constitutionalism, 1810–2010* (Oxford: Oxford University Press).

in relation to its internal consistency. The U.S. Constitution, which most Latin American countries took as a model or point of reference, seems consistently defined by a liberal philosophy, which is reflected both in a Bill of Rights that is strongly protective of classical rights, and in its organization of powers, which is directed at ensuring political equilibrium. By contrast, most Latin American Constitutions organize an imperfect combination of different, and sometimes opposite, philosophical ideas (which include liberal, conservative and social viewpoints). As a consequence, many of these documents establish controlling mechanisms, which they undermine in the same act, through the adoption of alternative devices that are in tension with the former (i.e., hyper-powerful Executive that does not "fit" within a scheme of "checks and balances"). Similarly, they create a structure of liberal rights, which they immediately challenge with the adoption of other, collective or communal rights that are in tension with the former.

In regard to the second, more substantive analysis, I maintained that most Latin American Constitutions have made significant but imperfect efforts, for becoming more egalitarian. In particular, I claimed that the concentration of powers that most Latin American Constitutions allow, tends to work against the enforcement of the long list of social, economic and cultural rights that these Constitutions properly incorporated. In addition, I also criticized the U.S. Constitution from the perspective of this more substantive criterion. In general terms, I claimed that the U.S. Constitution honors the value of individual autonomy at the cost of sacrificing the value of collective self-government. More specifically, I maintained that the "negative" aspects of the U.S. Constitution, which failed to include any social, economic or cultural right in its Bill of Rights, is unattractive from an egalitarian perspective.

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