Too much “Old” in the “New” Latin American Constitutionalism

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Introduction and Preliminary Clarifications

For some years now, and in particular since the most recent constitutions of Colombia (1991), Venezuela (1999), Ecuador (2008), and Bolivia (2009), there has been talk of a “new Latin American constitutionalism.” I, however, will argue that it is difficult to speak of any “new” Latin American constitutionalism in allusion to these constitutions, for what they contain is too similar to what was had before. The term in question might make sense if “new” is employed strictly as a synonym of “last” or “most recent.” In this case, the idea of “new Latin American constitutionalism” might indeed be pertinent, albeit fairly uninteresting. Regardless, such a narrow definition does not seem to be the one in the minds of most people who talk about “new constitutionalism” (who appear to subscribe, rather, to a “broad,” instead of “narrow” definition of “new” – one that is furthermore generally also more commendatory than neutral).

In what follows, I offer a critical examination of “new Latin American constitutionalism” suggesting that what is presented as “new” turns out to be, in general, too “old.” My primary interest, however, has nothing to do with the dispute over what is innovative and what is not; rather, I am interested in questioning some of the central aspects of this constitutional approach. Basically, I will argue that the persistence of the central traits of the “old” Latin American constitutionalism – above all, the organization of power based on a very limited notion of democracy, one emblematic of the nineteenth century – affects the actual value and appeal of the “new” constitutionalism. Specifically, I maintain that the greatest advances the regional approach to constitutionalism has proposed, which are fundamentally concentrated in the area of constitutional rights (social, economic, cultural, and multicultural), have been in appearance
blocked by the structure in which power is organized, a structure that lies in tension with the principles and aspirations the rights embody. This type of problem, in any case, is compounded by other conflicts that can be observed within these Constitutions, all of which explain to some degree the institutional deficiencies that continue to characterize the region.

The preceding paragraph, however, should not be interpreted as affirming something else, something to which I do not subscribe and that is important to dismiss at the very outset. In the first place, I am adopting a rather modest vision of law here. What I am trying to say is that I understand that law can make contributions towards social reform be used as one tool to address the crises (political, social, or economic) so common in the region, but I believe these contributions, although not insignificant, to be limited. For this reason, I would like to make it clear from the start that I reject both the vision based on a belief in the superficiality of law, favored by a part of the Left for decades, at least until the late 1970s, and the overly optimistic visions that many others maintain, visions that take as a given the autonomy and transformative potential of the law.

Secondly, I would like to dismiss two possible confusions related to the intrinsic value or insignificance of this regional constitutionalism. Before all else, I want to make it known that I find many of the contributions of Latin American constitutionalism to be positive – many of which have enriched global constitutionalism (without going any further, we can look to its contributions in giving social rights constitutional status and its contributions concerning the rights of indigenous communities). In addition, I find these recent Constitutions to be, on balance, better than those that have been predominant in the region since the 19th century. Similarly, I would like to point out that many of the unattractive aspects that I find in Latin American constitutionalism do not correlate with virtues that, by contrast, I note in European and
North American constitutionalism. I recognize in those traditions some problems similar to those I see in Latin American constitutionalism and others that are more unique to them. In any case, I will not elaborate further here on the analysis of extra-regional constitutionalism that I have already, in part, discussed in other pieces.¹

Lastly, and before focusing in on the substance of my argument, I would like to make explicit a few presuppositions. In my examination of different national constitutions in the region, I always assume that they – beyond the obvious complexities that are unique to them – are united by certain common traits. First of all, I see them as divided in two main parts, that is, in one *organic* section, which refers to the organization of power, and in one *dogmatic* section, which involves the declaration of rights.²

I also maintain that both parts of the constitutions are in fact interrelated, despite frequent efforts to read them as autonomous sections. Following another presumption in my approach, any reform that is effectuated on one of these sections tends to have an impact not only within that section – let us call this the *intra-sectional impact* – but also in the opposite section – which I will call the *inter-sectional impact*. In order to adequately evaluate any proposal for constitutional reform, it is therefore necessary to determine, in each case, the chances of success for the reforms introduced – which includes assessing the odds that the reform will manage to “overcome” the inertial forces of the existing Constitution. We should thus recognize what must be done to ensure that the “new” reform prevails over the existing “old” constitutional scheme –

¹ In particular, in Gargarella (2013) and especially in Gargarella (2010), I looked at similarities and differences between Latin American and U.S. constitutionalism. More recently I did the same in Gargarella (2014).
² I am aware of how broad the reference to “Latin American constitutionalism” is, and that it includes countries whose histories and cultures vary to large degree. In previous work, such as those cited in the last footnote, I have tried to examine the constitutional development in the region by looking in detail at some of the many similarities and differences that exist among those countries’ constitutional traditions. These traits include – clearly, I would add – the essential information regarding the basic structure of the organization of power and the basic structure for the organization of rights that are present in most national constitutions.
how to make sure the “new” triumphs over the “old.” It involves a juridical calculation on the part of Latin American reformists that, for the most part, has been conspicuously absent or inadequate.

In what follows, then, I will give an account of the modalities that characterize Latin American constitutionalism’s evolution over time, paying particular attention to what remains the same and what changes in each phase. This will create better conditions for evaluating the centuries-long constitutional legacy we have inherited.

*The four stages of Latin American constitutionalism*

With the help of Juan Bautista Alberdi – one of the great 19th century ideologues of Latin American constitutionalism – I am going to divide the evolution of the regional constitutionalism into four stages, each of which is characterized by the different problems addressed:

“experimental” constitutionalism (1810-1850); “foundational” constitutionalism (1850-1917);

*Experimental constitutionalism or the constitutions of independence.*

Alberdi spoke of a “primary constitutional right” following independence, which especially involved consolidation. Within this “primary constitutionalism” we find, for example, constitutions such as that of Chile (1823 and 1833 – the most stable constitution in 19th century Latin America and upon which Alberdi and Mariano Egaña, respectively, had great influence); the failed monarchist-leaning experiments attempted in Argentina and Mexico; and several constitutional projects attempted by Simon Bolivar in Bolivia or New Granada.
In chapter 2 of his most influential work, *Bases and Starting Points for the Political Organization of the Argentine Republic*, Alberdi explores the content of this “primary constitutional right” of the region in the following terms:

What are, of what consists, the obstacles contained in the primary constitutional right? All of the constitutions that came out of South America during the war of independence were the complete expression of the prevailing need of the times. This need was ending the political power that Europe had exercised over the continent, starting with the conquest and continuing with colonialism: and as a means to ensure its complete extinction, this need meant going as far as denying Europe any type of superiority whatsoever in these countries. Independence and external freedom were the vital interests that preoccupied the legislators at the time (Alberdi 1981, 26).³

This “primary constitutional right” was fundamentally employed to consolidate independence, which explains the abundance at the time of institutional organizations meant to concentrate power, as many believed doing so represented the only means of ensuring the order and stability that was desired. It was, without doubt, the time of greatest experimentation with the region’s constitutional history, including atypical (and short-lived) attempts such as that of “Moral Power” which Simon Bolivar presented at the Congress of Angostura in 1819 (which, however, the 1999 Venezuelan Constitution invoked); the “Moderating Power” approach à la Benjamin Constant attempted in Brazil in 1824, in Nicaragua in 1826, in Mexico in 1836, and implicit in the Moral Code and the “Visiting Senators” (moral guardians) put forward in 1823 by Juan Egaña in Chile; we also see forays that are decidedly corporatist (for example, Senates composed of clergy, military officers, large landowners and industrialists, etc.), such as the proposals of Lucas Alaman in Mexico (1834), those incorporated into the 1919 Argentine Constitution; monarchist experiments such as those launched early on by Manuel Belgrano in Argentina or

³ These early responses, Alberdi recognized, had been adequate in formulating that against which the constitutions should be conceived: “All the ills of America were thus comprised of and defined by its dependence on a conquering government belonging to Europe: by consequence all remedy for their ills were seen in removing the influence of Europe” (ibid).
carried out by Agustín Iturbide in Mexico in 1821 (Mexico would briefly experiment with this again in 1863); the “three-headed” executive system studied at an early stage in Venezuela and Peru; and ultra-federalist attempts evident in, for example, the 1863 Colombian Constitution.

The foundational period of Latin American constitutionalism.

Here we have the phase during which Alberdi and his contemporaries began to draft constitutions. This period – we can say from 1850 to around the century’s end – represents the second and decisive stage of Latin American constitutionalism. Alberdi believed that the generation of constitutionalists that he represented should direct their efforts towards promoting a new kind of constitutionalism, one motivated by preoccupations distinct from those that had dominated the first period described above. Once independence had been consolidated, it was time – Alberdi held – to channel attention to strengthening the economy through constitutional means. In Alberdi’s words (and many of the intellectual references of the time, such as José María Samper in Colombia and Andrés Bello in Chile, seemed to concur with him):

In those days (of the “first constitutionalism”), the priority was securing independence through arms; today we must attempt to ensure it through the material and moral growth of our people. The political objectives were the great objectives of the time; today we must devote ourselves especially with economic objectives (ibid., 123).

The period turned out to be particularly productive, and it was then that many of the most influential national constitutions in the history of Latin American constitutionalism were written. The strength demonstrated by these constitutions and the stability they acquired are signs of how adapted they were to their times and, in addition, of the solid pact behind them: for the first time, the constitutions were built upon a deep, substantive agreement between the

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4 These include the 1857 Argentine Constitution, the 1857 Mexican Constitution, the 1886 Colombian Constitution, and the 1891 Brazilian Constitution.
primary opposing forces present in the region at the time, that is, liberals and conservatives (sometimes referred to by other names). The constitutions that emerged played a decisive role in consolidating national organizations centralized territorially and, in political terms, concentrating power in the figure of a potent Executive.

In the terms employed by the publicist Alberti, the core of that agreement was captured in the formula: limited “political liberties”; very broad “civil liberties” (“What I desire are unlimited and extremely abundant civil liberties for our people, among which are found the economic liberties to acquire, transfer, negotiate, exchange, circulate and exercise any and all industry”).\(^5\)

*Social constitutionalism.*

The start of the *third phase* of Latin American constitutionalism can be located near the beginning of the 20th century, and in particular with the 1917 Mexican Constitution. A period characterized by greater attention to political and social liberties appeared to dawn. These issues at the fore – in general, everything related to the so-called “social question” – had been postponed for future consideration during the period of “foundational constitutionalism.” The Mexican Constitution was in fact the first in the world to include a large and very complete list of social rights. It took quite a while but one by one the constitutions of Latin America began

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\(^5\) Alberdi continued: “These liberties, common to citizens and foreigners (by Articles 14 and 20 of the Constitution), are those that are called for to populate, enrich, and civilize these countries, not political liberties, an instrument of disquiet and ambition in our hands and of little interest to the foreigner who comes to us in search of well-being, family, dignity, and peace. It is fortunate that the most fertile liberties are the most practical ones, above all because they are accessible for the foreigner who brings with him the knowledge of their exercise.” Juan Bautista Alberdi, “Sistema Economico y Rentistico,” in Alberdi (2009), tome xiv, 64-65.
adopting similar declarations, leading to the presence of new or reformed constitutions with an accentuated social profile.\textsuperscript{6}

\textit{Human rights or multicultural constitutionalism.}

Lastly, during what we might consider the last and most recent phase of development in Latin American constitutionalism, came the wave of reforms in the late twentieth century. These reforms include texts of distinct character, such as the Constitutions of Colombia (1991), Argentina (1994), Venezuela (1999), Ecuador (2008), Bolivia (2009), and Mexico (2011). Although, as we shall see, these constitutions did not involve the introduction of substantive changes in relation to the documents which preceded them – a central claim of this piece that I discuss in more detail later on – it can be said that they tended to expand in a relevant way the existing lists of rights. This was accomplished, above all, by the incorporation of concern for human rights, and in particular issues related to the rights of indigenous communities, which had not been seriously considered in previous systems. These commitments seem to have been motivated, in a very special way, by the succession of bloody dictatorships that ravaged the region in the 70s.

We have thus identified four important stages of reforms in the region – phases in which a significant number of countries amended their constitutions. These four stages, as we saw, corresponded – in very broad lines – to four different motives, distinct from each other yet each important: consolidating independence; bolstering economic growth; addressing the deferred social question; and making a stronger commitment to the defense of human rights.

\textsuperscript{6} For example, the 1937 Brazilian Constitution, the 1938 Bolivian Constitution, the 1940 Cuban Constitution, the 1949 Argentine Constitution, and the 1949 Costa Rican Constitution.
The two key moments of Latin American constitutionalism

Of the four main stages of Latin American constitutionalism, two stand out from the others: the second – the foundational moment of regional constitutionalism, and the third – the age of social constitutionalism. The way I understand them, these are the only two phases that were critical to the development of the regional constitutionalism by virtue of the impact they had on the structure of Latin American constitutions. As I will argue, the reforms introduced in the mid-nineteenth century were decisive with regard the organization of power outlined by the Constitution: they defined the character of the structures of power, making them what they remain today. Meanwhile, the reforms introduced in the first half of the twentieth century proved decisive in relation to the declarations of rights typical of Latin American Constitutions: they defined the character of such declarations of rights, which also remain to this day characterized by the traits then given them.

In descriptive terms, I would say that the current Latin American constitutions are still marked by two main features, one relating to the organization of powers that was acquired in the mid-nineteenth century, and another related to their organization of rights, acquired in the mid-twentieth century. Since then and up to the present day, the Constitutions have done nothing other than temper or, more often, reinforce these features without imposing any substantive changes on them. This is why we cannot speak, in any interesting way, of a “new” Latin American constitutionalism.

The other part of the argument I want to advance – its more normative aspect, which is what I am most interested in defending – is that the structure of powers that has remained in place since the mid-nineteenth century represents a very heavy, negative legacy for current day
constitutionalism – a heavy legacy that the changes in the declarations of rights at the end of the twentieth century could not remedy. I make reference to a “heavy legacy” because the power structures still in force are related to a way of understanding democracy that is very typical of the nineteenth century, and therefore appears to conflict with present day intuitions that are more democratic, or more favorable of self-government. Besides, the legacy is heavy because the structure of power lies in tension with the declarations of rights in force and – given the stability, centrality and force of the structure – it is capable of impeding the implementation of the social and multicultural commitments represented in the sections on rights.

In what follows I will focus on the description of the two fundamental moments of the regional constitutionalism, moving from there to the normative argument that motivates this article.

i) An unbalanced system of “checks and balances” favoring the Executive: The first “trademark” of the regional constitutionalism

In the mid-nineteenth century a crucial political movement took place in Latin America, rising from the gradual but resolute rapprochement of liberal and conservative forces that, until then, and in most of the countries of the region, had waged bloody battles against each other.7 In some countries, such as Argentina, Brazil or Mexico, the coming together of these two sides occurred through direct negotiation of the constitution, with the two opposing forces together, sitting at the same table. In Chile, the pact acquired “deferred” aspects when the “hard”

7 The question surrounding the reasons for the liberal-conservative pact – its process of progressive confluence or fusion – after decades of armed conflict must still be answered with precision. Some might say that the change was due to the threatening (albeit fleeting) presence of radicalized groups (above all in Colombia, Peru, and Chile) following the 1848 “red revolutions” in Europe. Others might point, however, to the concern for self-subsistence and awareness of the costs that continued hostility imposed on both sides. For the time being I will leave the question open in order to concentrate directly on the examination of how the pact translated into the constitutional domain yet adding, in any case, that the pact gradually spread across the region between 1850 and the close of the century.
constitutional conservatism embodied in the 1833 Constitution began to “thaw,” giving way to gradual liberalization. In Colombia, however, the process followed the path opposite to that of Chile: the “hard” constitutional liberalism imposed by successive constitutions in 1853, 1858 and 1863, started to lose strength, opening the way for increasing conservatism, which was consolidated in the 1866 Constitution.

This period is especially important. On one hand, because it was when many of the most significant Constitutions of Latin American history were established. In fact, many of the texts then approved\(^8\) remain unavoidable reference points for understanding constitutionalism in the region in its current form. In particular, as I have previously argued, it was then that the structure organizing power took to a large degree its definitive form that continues to characterize most of the constitutions in the region. In support of this argument, we must recognize that in the previous period – the period following independence – the constitutional disputes tended to oppose liberals against conservatives, both of whom alternated in power and sought to impose their constitutional projects on the other: the conservative Constitution of Chile, in 1823, was succeeded by the more liberal one of 1828, which was replaced by the more conservative of 1833; Colombia's conservative constitutionalism 1843 was succeeded by an ultra-liberal one in 1853; the liberalism of the Mexican Constitution of 1824 was followed by the enactment of the Constitutional Laws of 1836 and the Organic Bases of 1843 countering it; and so on. This violent succession of governments, policies and constitutions resulted in constitutional systems that oscillated between extremes – typically from formulas for concentrated power in the name of order to the “fearful responses” and attempts to limit power – within a range of forms varied and open to experimentation. Once the liberal-conservative pact was consolidated, however,

\(^8\) Those of Argentina (1853), Colombia (1886), Mexico (1857), among others.
much of that initial experimentation ended: finished were decidedly corporatist attempts; monarchist experiments tailed off too; no longer were “three-headed” Executives to be found; institutions such as the “Moral Power,” “Moderating Power,” and “Visiting Senators” disappeared from the constitutional map.

Starting in the mid-nineteenth century we begin to encounter more defined constitutional schemes, structures less open to experimentation, and ever since very few variations within rather narrow margins have been introduced. The general structure of power was thus stabilized in terms of the features defined by the liberal-conservative pact: a system of “checks and balances” or “balances and counter-balances” ultimately “unbalanced” in favor of the Executive, which implied – stemming from the pact – a partial overlap between the demands of liberals (a system of *checks and balances* following the American style) and those of conservatives (a system organized around the Executive).

Something similar can be seen in the area territorial organization (i.e., the tension between centralism and federalism) and, also very specially, in that of rights, where the question was (in most cases, at least) how to integrate the demands of liberals and conservatives where the differences between the two camps were particularly significant because of the religious factor, which was what had driven them to take up arms for decades. The formulas for integration chosen at the time were diverse, and in most cases left much to be desired. They ranged from maintaining *silence* on the matter, the option favored by the Mexican constituent assembly in 1857 – which omitted the demands of both groups – to double invocation and direct superposition of the demands of both sides, for which the Argentines constituents inclined in 1853 (establishing religious tolerance in Art. 14 and special status for the Catholic Church in Art. 2).
Three issues, among several others, stand out as derivatives of the preceding analysis. The first to highlight is the curious formula for organizing power chosen by the architects of the liberal-conservative pact: a model of “checks and balances” that was ultimately “unbalanced.” The point is interesting because the chosen scheme involved “opening” a deep “wound,” from the start, in a model – that of checks and balances – that held balance itself as its organizing principle. It is possible to raise many objections to the scheme for the organization of power proposed at the time by James Madison, yet regardless the objections, his scheme purported to follow the distinctive virtue of balance between powers based on the attribution of relatively equal power to each of the distinct branches of government. By disrupting the balance at the outset, tilting the organization of power in favor the Executive (which was what Alberdi proposed because he saw the need to combine the American model with the Chilean model), all the logic of the system of checks and balances – the logic that gave the system its meaning and appeal – was, from the first moment, directly jeopardized. Many of the persistent problems affecting the health of Latin American institutions are related to that dubious initial decision so difficult to justify.

The second issue I would emphasize involves the deferred question regarding the explanation, in constitutional terms, of the liberal-conservative pact, which seems sudden given the profound differences that divided the two sides so starkly: conservatives, for instance, preferred systems that concentrated power and lists of rights organized around religious principles, two demands that liberals apparently emphatically rejected. Despite this tension, the fact is that, in the section on the organization of power and in the organization of rights, there was also fertile terrain where the two positions could come together. Indeed, concerning the organization of power, it is clear that what both liberals and conservatives feared above all was
anarchy and unbridled majoritarianism. As such, it was not difficult for the two sides to agree on the need for constitutional instruments to curb the (increasingly) menacing power of the majority: the Constitution would thus be based on a strong principle of “mistrust” of majoritarian power – a coincidence that is without doubt very forceful in explaining the motives and nature of the legal arrangements then made.

The same dynamic would reemerge in the area of rights: liberals and conservatives agreed on the need to limit political rights, at least for the moment, in the aim of preserving other rights – particularly those related to property, contracts, and free trade – which they saw as threatened by the expansion of majority rule. In his work *The Economic and Renter System*, Alberdi thus asked for freedoms that were “unlimited and very abundant for our people,” among which he included “civil liberties” such as the “economic freedoms to acquire, sell, work, navigate, trade, transport and exercise any industry” (Alberdi 1920, vol xiv, 64-5). We find the same type of demands in the liberal José María Samper of Colombia (especially at the time of the 1886 Constitution, Samper 1881 XXX) or in Andrés Bello of Chile. Bello, primarily engaged in drafting the Civil Code, justified his task holding that:

> people are less apprehensive for the preservation of their political freedom than their civil rights ... Rarely is a man so devoid of egoism that he prefer the exercise of any political rights conceded by the fundamental code of the State to the preservation and maintenance of their interests and existence, or that he would feel more injured when arbitrarily deprived of, for example, the right of suffrage, than when he is violently stripped of his property (Jaksic 2001 XXX, 212).

The third point I want to emphasize is that the liberal-conservative consensus also points to the presence of an “excluded third party,” i.e., the radical-republican forces that had exerted significant pressure within the constitutional discussion from the beginning of the nineteenth century. As we shall see, this fundamental exclusion, which was often partially repaired in the
twentieth century, is crucial to the explanation of the type of constitutional formulas ultimately adopted in the foundational period. In other words, the Constitutions then elaborated can be understood both in terms of the forces that formulated them and the initiatives that were neglected; namely those who advocated – let me put it this way – “extended political rights, and limited property rights;” more decentralized and democratic governments; and a marked emphasis on the “social question.”

**ii) Robust rights declarations: The second “trademark” of the regional constitutionalism**

As noted in the previous section, to understand the developments in constitutional matters in Latin America from 1850 to 1890, consideration of the exclusion or relegation of the “social question” is essential. The pretense of limiting political rights was explicit during the first stage of regional constitutionalism. Attention was actively diverted from the social problems that were already present – problems mainly linked to the economic and political inequalities that arose during the colonial period, and that the post-colonial period had failed to solve. The notable Argentine historian Tulio Halperin Dongi defined the program that increasingly given priority in the mid-nineteenth century (and which Halperin Donghi identified with policies such as those promoted by Alberdi), as a model of “progressive authoritarianism” – a “blend of political rigor and economic activism.” In his words:

Alberdi turned a deaf ear to the ‘social’ causes supposedly present in economic liberalism – just as they are in the authoritarianism – of Louis Napoleon. For him, indeed, the well-being that the development of the economy makes possible is not only intended to offset the limitations on political freedom, but also to mitigate the social tensions dramatically revealed in 1848” (Halperin Donghi 1980, XXXI).
The open resistance of conservative liberals against the first serious attempts to remedy the “social question” found dramatic expression in the Mexican Constitutional Convention of 1857.\(^9\)

The fact is that this “constitutional resistance” only reflected the increasing levels of coercion and political repression that began to characterize the region in the late nineteenth century. The “burst” of such tensions begins to occur early in the next century – an explosion that would force the ruling elite to provide immediate answers to the demands put off until then. The responses, as we know, took different and very significant forms, ranging from the passage from “Regulatory State” to “Welfare State” to the adoption of more open political systems. At the constitutional level, as we shall see, the overwhelming response was the emergence of social constitutionalism, basically meaning the introduction of comprehensive lists of social, political, cultural and economic rights in the Constitution.

The greatest illustration of what happened then at the constitutional level is once again to be found in Mexico, where the crisis reached dramatic levels, first expressed in a successful revolutionary movement, and, soon after, in a very pertinent constitutional reform that resulted in

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\(^9\) At the time, the “pure” liberal Ponciano Arriaga had proposed important modifications to the existing system of private property, the same way the constituent Castillo Velasco had suggested adopting agrarian measures tending to transfer property to those who had none. These proposals, together with those of constituents Ignacio Ramírez and Isidoro Olvera, were distinct in a Convention where the “social question” was present in a way that it had been in no other in the region. The primary criticisms of these proposals came from constituent Vallarta, whose speech symbolized the defense of economic liberalism. Vallarta affirmed in it that “from the moment Quesnay proclaimed his famous principle of ‘laissez-faire, laissez-passer’ to the time Smith proved the economic maxim of ’universal competition’ (I accept that the state in which people are, and on that supposition rests my reasoning); since then, Sir, it is no longer permissible to doubt that those questions remain unresolved. The principle of competition has proven that all protection of industry is not just inefficient but fatal; that the law cannot intervene in production; that the political economy does not want any more from the legislator than the removal of all obstacles, including protective ones; that solely individual interest, in the end, is that which must create, manage, and protect all manners of production, because only it possesses the activity, vigilance, and judgment necessary to prevent production from becoming burdensome. From such certain principles I deduce this conclusion: our Constitution must limit itself exclusively to proclaim the freedom to work. It must not go down into details to impede the abuses of which we complain” (Zarco 1957, 55-6).
the 1917 Constitution. It was, as we shall see, the first constitution in the world that included a long list of social and economic rights within its body of articles.

To understand Mexican constitutional history and, more generally, that of the entire region, what happened in 1917 in Mexico is enormously relevant. Regarding the constitutional reforms then advanced in Mexico, I would like to highlight at least two issues. First of all, the Constitution then approved is still revered, nationally and internationally, for its radical content. If we look at the history immediately preceding it, however, one could say that the text is also surprising for its extreme moderation, given the context in which it arose – remember that shortly before the Constitution was approved, the common demand among those who forced it through was the proclamation, “expropriation, confiscation, restitution” (Gilly 1994). Secondly I would like to point out that the aspiration to a highly attentive examination of what occurred requires that we distinguish between the important progress, in constitutional terms, that was then achieved, in constitutional terms, and the continuities – all that was not accomplished. Basically, if the 1917 Constitution is surprising, it is because of the huge change that it operated in the area of rights; but if it raises concerns, it is because of the way that the Constitution essentially remained the same as before with regards everything related to the structure of power it established.

In any case, the fact is that the second great “trademark” of regional constitutionalism surfaces in these years: robust, extensive, and generous statements of rights. Gradually, other countries in the region began brandishing declarations of rights inspired by the Mexican
example, such as those of Brazil in 1937, Bolivia in 1938, Cuba in 1940, Ecuador in 1945, Argentina in 1949 and Costa Rica in 1949.\textsuperscript{10}

Mention has already been made how the consolidation (in the mid-nineteenth century) of a certain structure of concentrated power also represented a definitive departure from the phase marked by experimentation – especially with regards different ways to organize power – that typified the first half of the nineteenth century just after independence. Now we see how the affirmation of long lists of social, economic and cultural rights (in the mid-twentieth century), also represented a departure from the model of rights organization that had been dominant until then. The model that had previously prevailed was characterized by lists of rights that were spartan, brief, and focused on what today we call “classical liberal rights”: rights related to property, contracts, and a few basic freedoms, typically those of expression, association, due process and, occasionally, religious tolerance. The model basically guaranteed “negative rights” to the extent that they required of the State some “non-action” regarding established protections for individuals: prohibited was interference of individuals in ways affecting their physical integrity, fundamental freedoms, or property. Starting in 1917, Mexico, and then Latin America (and much of the West) changed, at least in constitutional terms. New constitutions came to consecrate as their own more complex lists of rights, breaking the old mold, and appending new social, economic and cultural rights to the existing schema of liberal rights.

At this point, I would like to bring attention to three more issues before turning to the analysis of the “last” period of the regional constitutionalism. In the first place, I would like to point out that, ever since the emergence of the Mexican social constitutionalism, the rights declarations typical of Western constitutionalism have shown similar complexity. With few

\textsuperscript{10} In the interest of brevity, I will not go into some of the attempts of the first half of the century to partially moderate presidential power which I addressed in Gargarella (2013).
exceptions, all included within their lists of rights both the classical liberal rights and annexed the new social, economic, and cultural rights that were brought by the Mexican Revolution. This was the case with very few exceptions: in the United States, for example, the Constitution retained its exclusive grip on the old system of “negative rights” – classical liberal rights (despite attempts to interpret it otherwise to find in its heart “welfare rights”). Other countries – even Latin American ones, as in the case of Chile – represented exceptions by preferring to reaffirm a modest, austere list of rights.

Secondly, I would also like to mention another remarkable fact: except in cases associated with military coups, since 1917 the tendency in Latin America has only been to further expand the lists of rights, adding to those already incorporated new social, economic and cultural rights. That is to say, despite the high number of constitutional reforms produced in the twentieth century (around one hundred), and in spite of the criticism pointing to the existence of “rights inflation,” because of the lack of implementation of the new rights, or the “poetic,” “utopian,” or “purely declamatory” character of their constitutions, the truth is that Latin America would not or could not reverse the process of expansion of constitutional rights that was initiated in the early twentieth century. The long, generous lists of rights then incorporated as a (second) “trademark” of this new constitutionalism, have only been reaffirmed, confirmed, and extended time and time again ever since.

In the third place, I would call attention to the peculiarity of what was actually carried out in this “social” stage of the regional constitutionalism. To put it in metaphorical terms, starting in the early twentieth century, the “working class” came to occupy a central role not only in the life of the region in economic and labor terms, but also in legal terms: it began to enter spheres of public life hitherto closed to it, including influence over the Constitution. It is
important to recognize, however, that the working class did not enter into the hall where the Constitution was hashed out through the front door – into the chamber where the “levers of power” are found – but rather found their way into the Constitution through a “side door” – such as in the form of a bill of rights. And this entry into the Constitution, moreover, did not mean that the working class actually gained entry – beyond the inclusion of an extended bill of rights – to the rest of the Constitution: entrance to the “engine room” of the Constitution remained barred.

The “last” period of the regional constitutionalism

In light of what has been discussed so far, it should be simple to see why it does not make much sense to talk of the dawning of a "new" type of Latin American constitutionalism based on the recent reforms. What I maintain is, rather, that the so-called “new constitutionalism” simply reinforces certain features already very much present in the constitutional framework of Latin America. After the last wave of reforms, we find that (i) the organic part of the new Constitutions is still characterized by a power structure politically concentrated and territorially centralized and that at the same time (ii) the dogmatic part of the new Constitutions continue distinguish themselves with robust statements of generous and extensive rights, which combine individual and social rights of various kinds. In other words, the “double trademark” that began to characterize Latin American constitutionalism in the early twentieth century remains as vigorous as ever.

This last observation, in any case, does not mean that the “last” Latin American constitutionalism represents has achieved very little, or nothing innovative or important. I merely mean to point out that the old structures remain intact, which I believe very relevant in order to
describe where we now find ourselves and the type of constitutional problems we face. I will now briefly review what Latin American constitutionalism offers now before undertaking a deeper critical analysis.

_Declarations of Rights_

As I understand them, a fundamental characteristic of the "last" reforms is represented by novel developments that were introduced into the declarations of rights. These developments targeted at least three major objectives in response to three major types of historical "faults" of the regional constitutionalism: i) its disregard for the rights of "the neglected among neglected" (typically indigenous communities); ii) its persistent disdain for human rights; and iii) its inability to ensure and give effective force to the political rights of the majority of voters in a way that would encourage "active citizenship." Let us look at these in more detail.

i) First, in this most recent phase, the social commitments assumed by the Constitution beginning in the early twentieth century were expanded, reaching sectors – primarily indigenous groups and women – and matters – the "third generation" rights – that had not been included or recognized in the first "social wave" of the regional constitutionalism. The "excluded among the excluded" – who had not been recognized by the constitution at the time when the doors were opened to the working class itself – were granted “entry.” Constitutions thus acquired a more "multicultural" profile, and began to recognize the value of measures such as affirmative action. At the same time, constituents sought to "upgrade" their old texts in light of the prevailing "new awareness of rights" (environmental, consumer, user, etc.). Today – just to cite a few
examples – gender equality is promoted in the Constitutions of Argentina art 37; Bolivia arts. 11, 15, 26; Colombia art. 40; Costa Rica art. 95; Ecuador art. 65; Nicaragua art. 48; Paraguay art. 48; Dominican Republic art. 39; Venezuela art. 88). Affirmative action is stipulated in the Constitutions of Argentina art. 75 inc. 23; Bolivia art. 71; Colombia art. 13; Ecuador art. 65; Mexico art. 2 inc. b; Nicaragua arts. 48, 56, 62; Paraguay art. 46; Dominican Republic art. 39, 58; Venezuela art. 21. There are declarations on environmental protection in the Constitutions of Argentina Art.41; Bolivia Art.33; Brazil Art.22; Chile art. 19 inc. 8; Colombia art.79; Costa Rica Art.50; Ecuador art.14; El Salvador art. 117; Guatemala art. 97; Honduras art. 143; Mexico art. 4; Nicaragua art. 60; Art.118 Panama; Paraguay art. 7; Peru art. 2; Dominican Republic art. 66; Uruguay art. 47; Venezuela Art.117. The existence of a plural or multicultural State or national identity is affirmed in the Constitutions of Bolivia, Colombia, Ecuador, Paraguay, starting in the very first articles; Mexico art. 2; Nicaragua art. 5; Peru art. 2 inc. 19; Venezuela art. 6. (XXX)

ii) Secondly, the new Constitutions very decisively embraced a commitment to human rights. The constitutional cause of human rights is extremely important because it expresses the reconciliation of significant parts of Latin American intellectuals with the "lists of rights" that they had despised for decades – often for ideological reasons linked to vestiges of older Marxist theory. Basically, after the wave of brutal dictatorships that ravaged the region in the 70s, the need for comprehensive and effective basic human rights protection gained recognition in a wide range of distinct areas. It was realized that legal issues such as due process and freedom of conscience were actually matters of life and death – and not “mere aspects of super-structure.” The ways in which Latin American countries incorporated human rights into their constitutions
varied, and were especially influenced by the numerous international human rights treaties signed by countries in the region over the decades. Formulas were often sought to recognize the special value of those treaties, in order to give them legal or supralegal status. Currently, constitutional or supralegal status is given to human rights treaties in: Argentina art. 75 inc. 22; Bolivia art. 256; Brazil art. 5; Colombia art. 93; Costa Rica art. 7; Ecuador art. 417; El Salvador art. 144; Guatemala art. 46; Honduras art. 18; Paraguay art. 141; Peru art. 56; Dominican Republic art. 74; Venezuela art. 23. (XXX)

iii) Thirdly, the most recent phase of Latin American constitutionalism is marked by an attempt to remedy the serious democratic deficit that has for decades gravely affected the region. Such reforms were based on the recognition that political institutions were not working well and that they did not incentivize the political intervention of the citizenry. Given the widespread nature of the complaints directed at politics, Latin American constitutionalism proposed various formulas designed to open up greater opportunity and space for popular control and decision-making. In this regard, the latest Constitutions approved in the region include mechanisms for popular initiatives; incorporate the institution of open or popular cabildos (an institution of local decision-making akin to town hall meetings or councils that began in the colonial era); establish forms of popular control over public policies; establish procedures for referendum or popular consultation; and include mechanisms for the revocation of mandates.

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11 Argentina Article 39; Bolivia art. 162; Brazil art 14; Colombia Article 155; Art. 123; Costa Rica, Ecuador art. 103; Guatemala art. 277; Honduras art. 5; Nicaragua 140; Panama arts. 238, 314; Paraguay, art. 123; Peru art. 107; Dominican Republic art. 97; Uruguay, art. 79; Venezuela, art. 70.
12 Bolivia art. 11; Colombia Section 103; Ecuador art. 100; Panama art. 151; Dominican Republic art. 30; Venezuela art. 70
13 Bolivia art. 24; Brazil arts. 10, 194, 198, 204; Colombia arts. 103, 270; Ecuador, art. 100; Guatemala art. 98; Mexico art. 26; Nicaragua arts. 138, 196; Panama art. 233
14 Argentina art. 40; Bolivia art. 14; Colombia arts 103, 374; Costa Rica art. 105; Ecuador art. 104; Guatemala art. 173; Honduras art. 5; Mexico art. 26; Nicaragua art. 2; Panama arts. 238, 313, 325; Paraguay arts. 121, 122; Peru arts 32, 176; Dominican Republic arts 203, 210, 272; Uruguay arts 79, 331; Venezuela arts 71, 73
Anticipating the analysis that I will go into later, I would like to add a few comments here. First, the tendency to incorporate more and more rights in the Constitution is, obviously, not a bad thing. This despite the reasonable objection that it limits the reach of the democratic will of the people. We can accept, in principle, the value of affirming certain very basic interests of citizens, and trust that this (constitutional) recognition will leave sufficient room for reflection and decisions related to particular circumstances. Second, we can also push back against the reasonable criticism that it is not good to generate too much expectation around the "new rights": the Constitution may well incorporate, at least in part, a program for future political action. In this regard, the assertion of certain commitments and certain aspirations may result in a combination that is in principle acceptable: in part, the Constitution is a wager on the future – a bet that the social conditions surrounding the Constitution, which may be unfavorable to the full expression of all its clauses today, will change in the future, and thus facilitate the realization of rights that today seem difficult to implement. That, however, does not resolve at least two problems that are evident from the outset. On the one hand, the history of Latin American constitutionalism reveals blind obstinacy on the part of local reformers who insist on promoting social change through the introduction of new rights. More precisely, the constituents have demonstrated a notable obsession with incorporating more rights, which has not been matched by a similar obsession with improving – or changing, where warranted – the organization of power (I will come back to this point). This question draws our attention to a larger problem, which is that constituents have not matched their recurring impulse to write more rights into constitutions with a corresponding concern for the conditions necessary for the realization (material, political, legal) of the rights established in the texts.

15 Bolivia art 240; Colombia art 103; Ecuador art 105; Panama art 151; Dominican Republic art 30; Venezuela art. 72
Organization of Power

With little room for serious doubt, it can be said that in many cases the expansion of the list of rights operated by the latest wave of reforms in Latin America came hand in hand with, if it was not directly produced by, a desire to facilitate presidential reelection. That is, the desire of some presidents to be reelected motivated their willingness to trade, in some cases, "more rights" (offered as a pledge to the opposition or citizenry) for "reelection." Cases such as Carlos Menem in Argentina (and the 1994 Constitution); or that of Alberto Fujimori in Peru (and the 1993 Constitution) testify to such agreements. Unfortunately, the reforms therefore tended to focus very strongly on political circumstances of the moment. This goes against the (more traditional and more venerable) notion of Alberdi holding that scarce constitutional energy should be reserved for the social "great dramas" of the time (during his lifetime, these were the struggle for independence and the fight against economic backwardness; today we might identify the fight against inequality).

Regardless, given the size and importance of the “last” period, it may be useful to distinguish between at least two periods within it, associated with two sets of events of great importance in the region. The first, already mentioned, is the rise of bloody dictatorships in the 70s and the second, refers to the social crises that followed the implementation of "structural adjustment programs" ("neoliberalism") in the 90s. Very roughly, we can identify some reformist attempts aimed at moderating somewhat strong residual powers to the Executive following the severe dictatorial period, meant to confront some of the worst legacies of the dictatorship. Meanwhile, after the second period (the social crises that followed the "economic adjustments"), the emphasis was once again put on the need to concentrate power while, in
parallel, constitutional remedies were sought for some of the open sores caused by the prevailing unemployment and inequality.

Concerning the first sub-period I would say that, for more than a decade (mainly in the 80s), several countries repositioned themselves placing more limits on presidential reelection. Among them are Ecuador in 1978, Guatemala in 1985, Honduras in 1982, Colombia in 1991 and Paraguay in 1992. While the trend of moderating presidential powers responded to various motives and was not unidirectional, the fact is that it acquired more defined direction (although, as will shortly see, only for a brief time) following the succession of violent dictatorships in the 70s.

Indeed, and in the same way that – in the area of rights – the passage from dictatorship to democracy favored constitutional reforms that incorporated strong commitments to human rights, regarding the matter of the organization of power, this period of political obscurantism promoted the emergence of an unexpected theoretical consensus oriented towards limited presidential powers. Around then many jurists and social scientists began to question not only concentrated presidential power (which had caused extreme suffering in the years of dictatorship), but also to associate – with reason – the so-called hyper-presidentialism in Latin America with political instability and the recurrent regional practice of staging coups. At least for a while, in the legal and political academy it was argued that although stability had many causes, at least one of them was endogenous to constitutionalism, and was linked to the high levels of concentrated power allowed by local constitutions, which were accompanied by a radical lack of "safety valves" against the kinds of crises that commonly affected the regimes in the region. Latin American hyper-presidentialism, then, began to be identified as a key factor in
explaining the levels of political instability that had characterized the region throughout the century, (Nino 1987; 1003; 1996; Linz & Stepan 1978; Linz & Valenzuela 1994).

For Carlos Nino, for example, "the diagnosis to be made is that one important factor, though certainly not the only one, behind Argentina’s institutional propensity for constant change, was constituted by the formation of a hypertrophied presidentialism" throughout history (Nino 1992 38). Hyper-presidentialism involved concentrating power and responsibilities and expectations in one person, with a mandate fixed for years on end. Any sudden disenchantment with President – any political or economic crisis, any breakdown in his health, any decline in popularity tended to translate into a crisis of the political system, as the system lacked safety valves that would mitigate imbalances, preventing the crisis from spreading to the entire constitutional structure. There was widespread agreement, then, that strongly moderating or eliminating the hyper-presidential system would dampen crises, prevent their conversion into systemic crises, and thereby address recurrent instability (Ackerman 2000; Linz & Valenzuela 1994). However, the fact is that these reformist impulses, meant to somehow moderate traditional Latin American hyper-presidentialism, only occasionally and very partially made their way into the Constitution. Occasionally, there were limitations imposed on presidential powers, and sometimes additional controls on them.

As anticipated, the fact is that for various reasons – especially the aforementioned social crisis unleashed by the "adjustment programs" that swept the region in 90s – the longstanding fear of "chaos" and "anarchy" again led to appeals for the "necessity" of concentrated power and a "strong authority," and years of critical reflection and growing agreement regarding the ills of presidentialism were scrapped from one instant to the next. Such changes help explain, for instance, why, on presidential reelection, the trend observed in the 80s changed direction. From
the early 90s on, nine of the sixteen projects of constitutional reform in particular involve countries that reformed their basic charters to facilitate reelection (Negretto 2013, 33). Reforms thus began to focus more directly on the benefit to the actors who promoted them, favoring extended mandates, or prompt possibility of return to power.

According to a study by Detlef Nolte OJXX, recent changes in reelection matters can be summarized as follows: Argentina, in 1994, went from prohibiting immediate reelection to permitting it; Brazil did the same in 1997; Colombia, in 1991, banned immediate reelection, but in 2005 went back to allowing it; the Dominican Republic did the same, prohibiting immediate reelection in 1994 and reversing in the 2002; Ecuador went from a prohibition of reelection to allowing non-immediate reelection in 1996; Nicaragua went from immediate reelection to non-immediate reelection in 1995; in Panama it was decided in 1994 to allow reelection only after two (instead of one) presidential terms; in Paraguay reelection was prohibited in 1992; in Peru reelection went from non-immediate to immediate in 1993, but in 2000 went back; Venezuela went from a ban on non-immediate reelection to permitting it in 1998 (Nolte 2008, 21). (Note the study comes from Payne et al XX.)

Leaving aside for the moment the issue of allowing or limiting presidential reelection, let us look at – more generally – reforms introduced in recent decades concerning the organization of power. They display various facets, some of which serve the same purpose of reelection (conceding control mechanisms in exchange for statements reaffirming presidential power and/or greater reelection rights), and some of which represent longstanding weariness with the traditional modes of exercising power. Several reforms stand out in this regard, reforms that established the popular election of mayors – Bolivia in 1994; Colombia in 1991; Paraguay in 1992; Venezuela in 1989. Similarly, in Argentina, the 1994 reform brought about popular
election of the (powerful) mayor of the City of Buenos Aires, hitherto appointed by the Executive. There were also electoral reforms that generally favored open competition between political parties and the emergence or dominance of proportional representation systems (Negretto 2013, 25). In some cases, such as Mexico, electoral amendments significantly redefined the terms of political contest. The amendments designed to moderate the legislative powers of the Executive had some effect (Brazil in 1988, Colombia in 1991, Paraguay in 1992, etc.); as did those which strengthened the powers of Congress in relation to the Executive (such as the original mechanism of “muerte cruzada" erected in Ecuador). It is also important to mention the modifications aimed at strengthening judicial independence, which can also be read as moderating the powers of the Executive, and increasing controls on power (Ríos-Figueroa 2011 XXX). The institution of the “Public Ministry” (“Ministerio Público”) was strengthened or renovated; Judicial Councils were created for increased transparency in selecting judges; positions akin to ombudsmen were formed; in the most extreme cases, diversity was favored in the composition of the courts, and some even left the selection of judges, in the last instance, to popular vote. In particular, I would highlight the legal reforms to promote access of ordinary citizens to litigation – reforms concerning legal standing – such as that of the tutela in Colombia (which was substantively renovated with the emergence of a new Constitutional Court) and in Costa Rica (where the famous "Fourth Chamber" became part of the high court to address constitutional issues (Wilson 2005, 2010)). These represented particularly significant changes in the functioning of justice (more on this point to come).

These tendencies contrast, in any case, not only with general measures taken in favor of presidential reelection, but also with others that directly established or further expanded the authority of the Executive. Indeed, in some cases – that of Argentina in 1994, for example – the
reforms basically certified constitutionally powers that the Executive already possessed *de facto* and that were gradually becoming recognized in jurisprudence (i.e., the expansion of the Executive’s legislative capacities or its power to act in emergency situations). (XXX cite NEGR) In other cases the president was directly granted the capacity to set the budget or more directly intervene in economic issues, or to submit proposals for popular approval, and so forth.

As I understand them, these reforms of the power structure have, on balance, insisted on maintaining an array of concentrated political power, which has become a distinctive and defining element of the regional constitutionalism.  

16 This conclusion, moreover, is consistent with the data reported by a major comparative study, the *Comparative Constitutions Project*, as well as with the work of a number of authors who have been working on comparative constitutional analysis.  

17 These studies affirm that the most significant development evident in the regional constitutionalism is related to the "increase in provisions granting legislative powers to the executive branch", representing a remarkable evolution around which all constitutions in the region have tended to converge.  

18 ibid.

19 ibid.

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16 According to Colombian jurist Rodrigo Uprimny, the Constitutions in the region “preserved enormous presidential powers with regards the classic presidential model,” even though “efforts were made to limit presidential power,” while, in general, the tendency was “to authorize the possibility of immediate reelection of the president” (Uprimny 2011, 10). The Argentine Gerardo Pisarello, for his part, distinguishes – within the last wave of constitutional reforms – between those that were produced in moments of “conservative reflux” in the early 90s (including, for example, those promoted by Fujimori in Peru and by Menem in Argentina, but not, however, the 1991 reforms of Colombia) and those that followed, coming at the end of the “structural adjustment” policies (basically including Bolivia, Ecuador, and Venezuela). In Pisarello’s opinion, the first reforms tended to strengthen the figure of president and open the “economic constitution to monetarist or privatization policies”; while at the same time they incorporated “standards for rights production created by international law” that, over time, took on life of their own. He places the second group, on the other hand, directly within a “radical democratic constitutional tradition” (Pisarello 2010, 193).

17 Cheibub et al 2011; Elkins et al 2010; and comments regarding Hartlyn 2011

18 Cheibub et al 2011, 1718

19 ibid.
"distinctly Latin American model of presidential power, which includes a powerful role for the
president in the legislative area and, at the same time, broad emergency powers".\(^{20}\)

Defining what has happened by tying the threads together

In the preceding pages, several important issues that help us better think about the
distinctive features of the regional constitutionalism were identified. Allow me to review what
has been said.

First, we saw that, despite the more than two hundred constitutional reforms produced
over the course of two hundred years, the picture is not one of "constitutional chaos" – where
each new Constitution sought to establish a totally new paradigm – but rather a set of
constitutions that have moved within rather narrow channels that ultimately trace back to the
great constitutional projects at the origin of the regional constitutionalism (mainly those related
to the Spanish Empire – a project of fundamentally conservative traits; to the American
Revolution – a constitutional project of typically liberal character; and to the French Revolution
– a constitutional project with primarily Republican/radical features).

In particular, we noted a relatively short-lived initial period of "experimentation" in Latin
American constitutionalism – which Alberdi called the "first constitutional right" of the region
(1810-1850). In that period, the constitutional proposals were more ambitious, imaginative and
varied than what would come later. After that stage, many of the variations attempted in those
early years fell into neglect. Not only have these early more "experimental" attempts been
abandoned, so have experiments with new and exotic institutions. On a more general and

\(^{20}\) (ibid., 1730)
relevant level, Latin American constitutionalism stopped swinging between its three "mothers" – the original conservative, liberal, and Republican projects – and began to converge in narrower channels, defined – in its primary organizational structure – under the "liberal-conservative" framework. Indeed, from 1850 to present day, it can be said that constitutionalism in the region has tended to move generally (though not in all cases) within fairly constricted lanes, which we have characterized using two main "trademarks."

The first trademark is a remnant of the liberal-conservative consensus reached in the mid-nineteenth century and concerns the organization of power. Ever since, an essentially tripartite division has been maintained in Latin America in which power is territorially concentrated and inclined toward the executive branch. This scheme seems to be based above all on a general distrust of the general population – the meeting point facilitating the liberal-conservative pact – which has resulted in political systems that, with certain known exceptions, generally discourage citizen participation as well as the various forms of popular control and decision-making. At the same time, the liberal-conservative model has created difficulties for legislatures to function independently of the Executive and judicial branches that are regularly threatened by the enormous capacity of the ruling party (usually expressed in the Executive) to intervene in its affairs.

The second trademark we observed was the one that took shape a century later, in the mid-twentieth century, when some of the demands associated with Republican claims of the previous century associated with the "social question" – the "social question" that the leaders of the liberal-conservative pact had decided to postpone – were integrated into the existing structure. Since then, significant changes were made to the declarations of rights typical of the
nineteenth century: today, the old lists of "classical liberal rights" have been appended to include broad commitments to social, economic and cultural rights.

The importance of what has changed this century does not, however, match the importance of what has not changed: the old-fashioned power structures which enshrine concentrated power and highly restricted access to popular participation in politics remain virtually untouched.

It is within this framework that the "new" regional constitutionalism was produced. And, once again, what stand out most of all are the continuities. And in this case – I would insist – the continuities were seriously accentuated. The changes produced are not important either at the level of organization of power or at the level of rights declarations. The reworked bills of rights are expanded to make no mention of groups previously ignored, or of interests not previously considered, or human rights that had been rather scattered and hidden behind other existing rights. Put simply, "there was not much new to invent": the fundamental interests of Latin American citizens were basically already covered in the previously existing Constitutions. It was not wrong, of course, to name the unnamed (new rights, private groups), yet although what was adopted added to or improved something, it was not structurally distinct. Something similar can be said in relation to the changes made to the organization of power. Some interesting changes within the traditional organization occurred, as we saw: mandates were sometimes shortened, and then soon after extended again; some new controls on the Executive were put in place (Ministerio Público, Judicial Councils), while previously unrecognized powers (i.e., powers to intervene in legislative matters) were granted to the Executive. Perhaps the best thing to happen during all this was something that its creators did not completely anticipate, but was, albeit very modestly, in line with what we have been advocating for here, that is, changes
affecting the "levers of power," meant to favor citizen access to the "engine room" of constitutionalism. For example, the "small but significant" variations operated in the judicial system to facilitate and expand the criteria of "legal legitimacy" necessary to litigate in courts (Wilson 2010). In any case, the fact remains that, in its most basic features, the old power structure was not disturbed by the changes: the new changes seemed well suited to the taste of the old prevailing powers. I move, then, to a fuller critical examination of what has been carried out in recent years.

Evaluating the texts: models of overlapping democracy

The largely descriptive tour we have taken thus far turns out to be – in my understanding – relevant in normative terms as well. Not only because the material examined corresponds to particular conceptions and understandings, but also because it is coherent enough to support arguments about what has been done, and what has not, concerning certain constitutional matters in the region.

I believe the previous analysis helps us go much further than the first idea that appears to follow from it, according to which the new too closely resembles the old. That is why, in this section, I will delve more deeply into the assessment of the developments discussed in order to make a stronger argument for the idea that the existing structure leaves much to be desired in terms of its very own proclamation. First of all, I would emphasize the fact that Latin American constitutions superimpose rather opposing models of democracy in correlation with economic ambitions, political ideals, and legal commitments – ultimately, constitutional models – that are at odds with each other.
This idea of "mixing" opposing claims, superimposing some on top of others, is already entrenched in the Latin American constitutional tradition. It was, after all, the primary mechanism for reaching agreement between liberals and conservatives. It was common practice, as we saw, to simply lump together quintessentially liberal aspirations with conservative ones. The liberal scheme of "checks and balances" was combined with – without compunction – an overpowering Executive, just as the liberals’ declarations of religious tolerance were placed side by side others proclaiming state bias in favor of the Catholic Church. A very deficient system of integration of models – a constitutional mixture – was thus chosen, especially given that other systems offered better synthesis (a system, for example, that prohibits the establishment of any religion is not the same as one that affirms the state’s tolerance and, at the same time, its bias regarding religion).

The reforms that have taken place in the constitutional life of the region since then seem to correspond exactly to the same logic of its foundational years. The primary tensions in conflict that have arisen have to do with the presence of at least two different models of democracy facing opposite directions. Indeed, the very "double trademark" of the regional constitutionalism – branches of government arranged according to rules that prevailed in the nineteenth century; rights arranged following those that gained predominance in the regional twentieth century constitutionalism – reveals its unusual two-sided democratic commitment. The structure of power thus corresponded – as it still does – to the democratic principles of the nineteenth century: low popular participation; exclusion of entire sectors; limited political rights – the mechanisms emblematic of wealth-based democracy. Meanwhile, new declarations of rights appear linked to "next generation" democratic discourse and principles. These aim for broad popular participation, for which support is sought in various ways: institutional opportunities are
opened to the public for increased decision-making and control power (establishing recall elections, etc.); political rights are expanded; and, simultaneously, commitments are made to social rights with the aim of promoting even more political participation of majorities (all of which, I will insist, subject to several limitations).  

In democratic terms, ultimately, what one hand of the Constitution was promising, the other was denying.

The same problematic mixture occurs with other matters and areas of the Constitution: many of the new constitutions (clearly such as those in Colombia or Peru) affirm both "neoliberal" economic formulations and proclamations with strong social content, suggesting calls to different economic forms. It is also very common for the "new" Constitutions committed to indigenous rights to affirm the principle of private property and that of communitarian property (or other similar values) simultaneously; or to enshrine the values of private, mixed, and public economy all at the same time.

For some, this type of combination is virtuous: it represents above all a way to bring political parties or interest groups in conflict to commit to the same constitutional project. In constitutional terms, however, such decisions are for many reasons questionable, and take us back to the problems alluded to above, the intra-sectional impact of the reforms. An appropriate question, then, how are the newly incorporated rights (i.e., social, multicultural, etc) related to existing rights? Numerous problems are apparent. In the first place, the text of the Constitution becomes confusing and unclear through this manner of proceeding: what is ultimately the meaning of the Constitution where it simultaneously affirms opposing claims? Furthermore, in this way the Constitution opens itself to contradictory interpretations: it can be held to say a great

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21 This is what, during the 19th century, was expressed in the tension between a political conception that demanded “extremely abundant” “economic freedoms” and limited “political liberties” and another that proposed broad political liberties and restriction on uncontrolled “economic freedoms” that were then in force.
deal, or nothing at all, or everything at once on key issues. What is the point, in such cases, in having a Constitution? Worse yet, organized in this way, the Constitution encourages improper behavior and generates misleading expectations: whoever is litigating in the name of private property is right, but so is the party challenging such possession in the name of ancestral values. To take a case in point: the introduction of the "rights of nature" ("kausay sum") in constitutions such as those of Ecuador and Bolivia, not only reveals more or less obvious problems (i.e., it is unclear what exactly the "ancestral rights" of indigenous communities actually are or whether it really makes sense to speak of the "rights of nature"). One can appreciate the intention behind incorporating new "interpretative principles" that are different from the traditional ones, however, it is hard not to wonder how these principles should be understood when the Constitution does not repudiate other principles and institutions that are contrary to them (i.e., those associated with traditional property rights).

We find problems similar to those we recognize in the relation between the "old" and "new" rights in the Constitution in the link between the "old" power structures and the "new" institutions that have been incorporated. A good illustration of this is found, for instance, in the example of the so-called "train wreck" in Colombia, which pitted the existing Colombian Supreme Court against the new Constitutional Court introduced by the Constitution of 1991. Both institutions have had for years a relationship of rivalry and tension, which began with the very birth of the latter and involves persistent power struggles and unhealthy competition. Another relevant example can be found in Argentina if we examine the relationship between the Supreme Court (present since the first Constitution of 1853) and the Judicial Council, which was introduced by the 1994 constitutional reforms. This is another case

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22 Acosta 2008
23 (Cepeda 2007; Uprimny et al, 2006)
where we see strongly strained relations between the two bodies (tensions that could easily be anticipated the moment the Council was created), involving the difficulty of precisely defining the areas of exclusive competence of each institution, but also (stemming from that difficulty) some harassment by the Court of the Council, in which the former appears jealous of the powers lost that it considered its own. In situations like these, what strikes us is an attitude lacking thorough reflection, or of misguided reflection, by the Latin American constituent assemblies. Be it because of hypocrisy, demagogy, neglect, or some misunderstanding, the constituent assembly acts badly when it does not consider the ways that "the past" will relate to "the present" and how the "old Constitution" will welcome or accommodate the "new" aspects incorporated.

What was just discussed is tied in a special way to what we could call the *intra-sectional impact* of reforms. But the problems in question also extend to – and even become more serious – what we could call the *inter-sectional impact* of reforms. By this, I mean the ways in which the incorporation of new rights affects the organization of power, or the ways in which what we do or stop doing regarding the organization of power affects the declarations of rights.

The problems that appear occur at different levels, and would like to mention some of them, even if I cannot spend as much time as I wish to analyze them. The general problem that frames all of the subsidiary problems is a classical one of constitutionalism, one related to the tension between constitutionalism and democracy. In principle, it is often said, there is something akin to a "zero sum" relationship between the two spheres. So, for instance, incorporating more and more rights in the Constitution equates to less space for collective deliberation: the more questions are resolved in advance through the assertion of rights ("trump cards" against democratic ambitions, as Ronald Dworkin argued in 1977), the less room there is.

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24 (Gargarella 1996)
25 (Elster & Slagstad 1993)
left for the citizenry to democratically determine the best responses to their needs and claims of the moment.

More specifically, a question arises concerning the way we "transfer power" within the Constitution, through every change incorporated into it. To give an example of this we (along with Carlos Nino) might cite a typical occurrence: the desired incorporation of social rights (usually advanced by democratically-minded reformists) amount to a transfer of additional powers to the Judiciary (that is, the least democratic branch of government).²⁶ Note that problems like the above are particularly relevant in contemporary constitutionalism, as many advocates of social rights seek to strengthen the "power of the people" rather than the power of existing legal hierarchies and yet, the way in which they act generates a "constitutional impact" at least in part contrary to their intent.

Finally we come to the question that interests and worries me most, one related to the ways in which the "old structures" block "new proposals" or make them difficult to implement—usually, in this case, the way that the existing system of organization of power impedes the implementation of the new social and multicultural rights.

The issue at stake is not merely one of "simple negligence" in the drafting of the constitutions (that is to say, it is not because, when introducing new rights, we neglected to pay attention to the ways in which the old power structure would or might react). It is, above all, because we do not recognize the peculiar place occupied by "organic" aspects that remained unreformed: what is at stake is the core of the organization of powers, that is, the engine room of the Constitution. Of course, it is easily understood that identifying all the changes that need to be added to "give effective life" to the constitutional modification that interests us is very

²⁶ XXX
difficult. However, ignoring the question of how the constitutional "engine room" will react to constitutional changes introduced ("more rights"), means neglecting the most important question of all. It is in the "engine room" – and nowhere else – that lies the heart of the Constitution: we cannot operate on the Constitution while turning a blind eye to how the power structure in it will react (or, at least, will foreseeably react) to the changes we introduce.

Some might say, "little by little we will get there." Indeed, a parsimonious approach to reforms might be best. However, we should also be aware that what remains "undone" could block adequate implementation of the newly assimilated rights (and the rhetoric subsequent to the incorporation of these rights does not seem to suggest that such awareness exists. Worse yet, my own experience with certain Constituent Assemblies suggests that, when adding to the declarations of rights, it was simply assumed that the changes would not interfere at all – or was actually consistent – with what remained intact). Others might say, more emphatically: "the implementation of rights requires concentrated power." Without wishing to close all discussion on the subject – one which deserves careful attention – I reply that there is a serious problem if we are proposing to concentrate power when our goal is the incorporation of tools to promote the political participation of citizens, or to put in place means to socially and politically "empower" them. To put it even more brutally: there is an obvious problem when you ask help from concentrated power to decentralize it. There is an obvious problem when seeking to promote popular participation you rely on those whose power will be undermined, once such participation becomes effective, to put the mechanisms for it in place. In short, we cannot behave the way so

27 The problem identified is not dissipated by the allegation that the great “enemy” of popular political participation is “concentrated economic power” (Unger 1987). It is not only that a more extensive response to the problem is needed, it is also true that the response ignores, to begin with, the (cited) risks of maintaining concentrated political power (particularly in relation to the fore-mentioned objective of diluting political power) and, secondly, it ignores the ways that concentrated political power tends to interact with or favor directly economic concentration (I will come back to this point).
many Latin American reformers have already, reformers who have worked for the
decentralization of power and greater political participation of citizens in the sphere of rights
without being aware of (or, much worse, ignoring) that political power would remain centralized
and concentrated by the organization of power. It does not make sense to advocate for the
democratization of power on behalf of the marginalized while – instinctively – maintaining
concentrated political power.

Moreover, something equally or more relevant than what was just pointed out: it is not
only that Latin American reformers failed to consider what would happen (or would no longer
happen) in the "engine room" of the Constitution because of their reforms. The problem is that
they seem to have lost sight of the historical dimension of their action all the while ignoring
the effective practice of the regional constitutionalism. A conscientious study of that history
would have enabled them to recognize the constant advance of concentrated power in the
organization of power in the region for hundreds of years. Even more directly: in Latin American
history, attempts of the Executive Branch to expand its power at the expense of the other
branches, and at the expense of the power of the people, are recurrent (although not a necessary
fact). Moreover, popular power tends to be invoked or cited, as an accompaniment or as an
appeal, but not as an autonomous power: autonomous popular power is seen as a threat and, as
such, is resisted. Similarly, the study of Latin American history helps us see how much
concentrated political power is intertwined with concentrated economic power, and how it favors
economic concentration. This affirmation does not mean denying a history of struggle among
certain portions of the economic elite, yet, in any case, reformists cannot act without expecting
repercussions from the all too common link between concentrated political and economic
power. It makes even less sense to favor the concentration of power while genuinely invoking
the will to expand popular power. The fact is: entry to the Constitution has been granted to the citizenry, in particular, albeit belatedly, to the most disadvantaged groups, but only through the section enumerating rights. The time to grant it entry to the "engine room" of the Constitution has come.

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**The Philosophy of the New Latin American Constitutionalism** by Jose Maria MONZÓN 2013

MAGAZINE Magazine Philosophy of Law. Year II, No. 3. Editions Infojus, p. 69

Id Infojus Infojus: DACF140129


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