

## Introduction

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Most constitutional democracies are in trouble: significant numbers of people do not trust their representatives and do not participate in party politics. Surveys reveal alarming figures on how citizens evaluate the worth and functioning of different public institutions and suggest a disconnection between what the citizenry wants and what the political decision-making process produces. Among the many factors that might explain this situation, one is undoubtedly the structure of the institutional system itself, as organized by its constitution. Many of the problems that we presently attribute to modern constitutional democracies are not unfortunate distortions of a properly organized institutional design but are the foreseeable effects of that framework. My aim in this book is not to overemphasize the role of our constitutional history in explaining future political events but rather to pay due regard to an important and often neglected topic.

Constitutional democracies, as we presently know them, were born after long revolutionary movements in defense of the community's independence or against aristocracy. These movements were profoundly egalitarian and expressed this egalitarianism in two basic dimensions. At the personal level, the revolutions claimed, and this was actually their main claim, that all men are created equal and that all have similar basic capacities.<sup>1</sup> At the collective level, they claimed that the community should become self-governing; in other words, they maintained that neither a foreign country nor a particular family or group should rule the country in the name of the people at large.

In practice, though, these promising egalitarian claims, which gave legitimacy to the revolutions, soon fell out of favor. The main

<sup>1</sup> A similar distinction is made between "private" and "public" autonomy in Habermas (1996).

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constitutional projects that grew after the revolutions severely distorted the original egalitarian goals. Clearly hostile to the ideal of personal autonomy, some of these constitutions commanded the use of the coercive powers of the state in favor of a particular religion. Moreover, the majority of the constitutions actually obstructed the idea of having a self-governing community. In this sense, for example, they discouraged civic participation, reduced popular controls to a minimum expression, reserved the “last institutional word” to the least democratic branch of government, and organized a counter-majoritarian political system to replace rather than to “discover” or “refine” the will of the people. In the following chapters, I examine the decreasing influence of egalitarian ideals in American constitutional life and begin to defend a philosophical argument about the importance of these complex ideals. In sum, I explore how our constitutional order came to dishonor the valuable egalitarian promises that gave foundation to our communities.

In analyzing the origins of American constitutionalism, I concentrate primarily on the ideological debates that took place during the founding period of constitutionalism in the region. I examine not only the basic content and impact of the main constitutional ideas that were present then but also their strengths and weaknesses.

When I refer to American constitutionalism, I mean mostly, though not exclusively, the constitutional developments that took place in the United States and in nine Latin American countries, namely, Argentina, Bolivia, Colombia, Chile, Ecuador, Mexico, Peru, Uruguay, and Venezuela. These countries deserve particular attention, among other reasons, because of the richness and variety of their constitutional discussions, especially those concerning the organization of their main public institutions. My focus is mainly on the period when the basic features of their constitutions were shaped – from 1776 to 1801 in the United States and from 1810 to 1860 in the Latin American countries.

Nevertheless, by “constitutional organization” I mean more than just the constitutional debates and the constitutional text. Constitutional documents represent a fundamental but not exclusive part of the enterprise of organizing the “basic structure” of society. This structure includes the most important institutions of society – those in charge of distributing the fundamental rights and duties and dividing the advantages that derive from social cooperation.<sup>2</sup> The constitution

<sup>2</sup> Rawls (1971), chap. 1. For Rawls, the main institutions of society include the political constitution of the country and also its main social and economic dispositions.

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plays a particularly important role in the organization of this basic structure: it expresses the philosophical assumptions and the political aspirations of this enterprise. It also tells us about the costs that society is prepared to pay in order to ensure these goals.

In the study of constitutional documents, I make an important distinction between what are normally considered their two main parts: the bill of rights, which establishes the rights and obligations of the people; and the organization of power, which refers to the distribution of functions and capacities between different branches of government. This distinction helps me to compare the different constitutional models that appeared during the period, each of which organized these two parts of the text in different ways. I describe these three models as radical, conservative, and liberal:

- Radical or majoritarian or populist constitutions may be characterized by their political majoritarianism and their normally implicit defense of moral populism. They try to strengthen the authority of the people, in contrast to conservative constitutions.<sup>3</sup> Radical constitutions also tend to include a list of rights in their texts but, as in conservative constitutions, these rights also seem conditional: they are defended as long as they do not contradict – or as long as they foster – the fundamental interests of the majority.
- Conservative models are characterized by their defense of political elitism and moral perfectionism. They tend to concentrate power and strengthen the authority of the executive while making individual rights dependent on “external” values, such as the values of the Catholic religion. For instance, a conservative constitution may include in its text the right to publish ideas freely in the press but make this right conditional on not attacking the church. My definition of conservatism is very close to a standard definition of political conservatism.<sup>4</sup>
- Liberal constitutions emphasize political moderation and moral neutrality and are fundamentally aimed at solving the main

<sup>3</sup> My definition of majoritarianism overlaps with the concept of “strict majoritarianism” used in Macmillan’s *International Encyclopedia*, which asserts that “not only may a minority never override a majority but also it can never check a majority: a majority vote is conclusive for the whole group.” Ibid., vol. 9, p. 536.

<sup>4</sup> For example, Macmillan’s *International Encyclopedia of the Social Sciences* defines political conservatism as the ideology that “celebrate[s] inherited patterns of morality and tested institutions, that are skeptical about the efficacy of popular government, that can be counted upon to oppose both the reforming plans of the moderate Left and the deranging schemes of the extreme Left, and that draw their heaviest support from men who have a substantial material and psychological stake in the established order.” Sills (1968), vol. 3, p. 291.

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problems that they attribute to the former models. They try to limit and control the exercise of power, ensuring equilibrium between the different branches of government. Liberals want to avoid the risk of both “tyranny” and “anarchy,” which, they assume, derives from the absence of adequate institutional controls. In addition, they try to ensure a very particular protection of individual rights, which they reasonably assume to be unprotected under the previous formulations. Liberals present these rights as unconditional: in their opinion, they should depend neither on the will of one person in particular nor on any person’s conception of the good. My definition of liberalism is also close to the standard international definition of political liberalism.<sup>5</sup>

These different constitutional models refer, in the end, to ideal types or ideal models, which means that in reality we should not expect to find exact or pure expressions of them.<sup>6</sup> These ideal models help us to classify and finally understand the basic organization of the enacted constitutions.<sup>7</sup> Of course, constitutions in most American countries represented strange mixtures of the models just described. This fact does not deny that these constitutions emphasized certain perfectionist features or that other documents tried to foster the state’s moral and political “abstinence.” Some constitutions were more conservative, or liberal, or radical than others. Moreover, in early American history we find paradigmatic constitutions that resembled very closely the pure or ideal models just described. For example, the U.S. Constitution

<sup>5</sup> According to Macmillan’s *International Encyclopedia* “[Liberal] thought and practice have stressed two primary themes. One is the dislike for arbitrary authority, complemented by the aim of replacing that authority by other forms of social practice. A second theme is the free expression of individual personality.” Ibid., vol. 9, p. 276.

<sup>6</sup> I focus on these three basic models because, in my opinion, they represent the main constitutional models that were established in the Americas during the founding period. However, I do not assume this classification to be exhaustive. There are other possible theoretical combinations that I do not explore in this work.

<sup>7</sup> The differences that separate these projects from each other stem from multiple sources. Undoubtedly, one of them has to do with their assumptions about the intellectual and political capacities of the people. Conservatives are normally very skeptical about people’s abilities to take control over their own lives. They assume that there are certain valuable plans of life that need to be followed by each, independent of what each particular person thinks about that option. In their opinion, the state has to use its coercive powers in order to enforce these good ways of life. Liberals, by contrast, assume that each person has to be the only sovereign regarding his or her own life. Paradoxically, perhaps, this confidence in the judgments of each individual is normally translated into a strict distrust of collective opinions. Radicals assume, as do liberals, that people are fundamentally equal with regard to their intellectual capacities. However – and in contrast with liberals – they give priority to the collective decisions of the majority, which many times imply the removal of particular individual choices.

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of 1787 represents a very good illustration of a liberal model. The Chilean Constitution of 1823 and 1833, the one sanctioned in Ecuador in 1869, the one defended by Bartolomé Herrera in Peru in 1860, or the constitutional proposals suggested by Lucas Alamán in Mexico represent excellent examples of conservative constitutions. Finally, the 1776 constitution of Pennsylvania (and many other states after that), the short-lived Mexican Constitution of 1814 (the Apatzingán Constitution), and some of the constitutional initiatives proposed by José Gervasio Artigas in Uruguay or by the Chilean Francisco Bilbao seem close to the radical model. These paradigmatic constitutions help us to understand the nature and ideological affiliation of other documents sanctioned or proposed during the same period.

A question underlying the entire project is whether it makes sense to take constitutions, and particularly Latin American constitutions, so seriously, especially when we recognize how much the political leaders of the time tended to ignore the commands and limits established by these early texts. An extreme example of this attitude was Bolivian president Mariano Melgarejo's assertion that the 1886 constitution, whose enactment he was then celebrating, was very nice, but, that fact notwithstanding, he would rule as he wanted. Granted, if we had to write a definitive history of the political life of these countries, we would probably not dedicate more than a chapter to the development of their constitutions. Yet this would be a very important chapter: constitutions do not represent a mere footnote in the history of the American nations. In the way they designed new constitutions, some politicians and their legal advisers decisively contributed to shaping a new political and legal practice. Undoubtedly, the numerous constitutions sanctioned in Latin America during the nineteenth century provide evidence not only of the fragility of these documents but also of the importance acquired by these constitutions. Even cases like Melgarejo's do not refute the fact that most politicians, including the most authoritarian ones, conceived of the constitution as important, at least in symbolic terms, to the institutional revival of their countries. These documents, despite their mistakes and defects, actually defined the main features of the institutional structure of the countries in question. Also, the old constitutional discussions and documents represent a valuable antecedent, which is indispensable if we want to understand contemporary constitutional discussions. They played a significant role in shaping American "public philosophy."<sup>8</sup>

<sup>8</sup> I take the idea of a "public philosophy" from Sandel (1996), p. 4.

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Of equal importance is the need to define the limits of this enterprise. My analysis of constitutionalism should not be read as a way of minimizing the weight of other causes in determining the success or failure of different political experiences in America. Undoubtedly, the religious fanaticism of certain sectors, the economic voracity of other groups, and the political ambition of certain leaders may be more important than any legal change in explaining the political evolution of the examined countries. However, we should not neglect the impact of constitutionalism. The evidence suggests that certain institutional arrangements favored political stability whereas others did not and that some constitutions contributed to the cause of liberty or equality whereas others cleared the path to authoritarianism. In sum, I assume that constitutions matter when we want to understand and explain the political life of the communities in which we live, even though other factors may be more influential than these pieces of paper.

There is the risk of placing too much emphasis on certain speeches or written documents, or on certain intellectual figures, and thereby neglecting the importance of social processes. After all, does it make sense to dedicate so much attention to written materials that nobody read or to oratorical pieces that only a small and very exclusive elite listened to? Although in most cases the majority of the population was indifferent to all those abstract and seemingly unimportant discussions, even this fact does not deny the value of my research, which, in the end, depends partly, on the scope and ambition of my purposes. For example, I believe that the information that we analyze may be relevant to studying the evolution of certain political ideas in America. The fact that, when formulated, these ideas circulated mainly within a closed elite says nothing against the project. These ideas had and continue to have an impact on the way we organize our daily lives. Many of the political debates that we witness today transmit the echoes of those older discussions.

Another point worth noting is that, although a particular person, say, James Madison, wrote many pieces clearly associated with a certain constitutional conception, such as liberalism, that person is not necessarily a liberal. In fact, many of the political figures I discuss changed their basic ideas dramatically during their lives. The Argentinean Juan Bautista Alberdi, for example, can serve as a good representative of liberal or conservative thinking, depending on what period of his life we consider. For this reason, my references to certain works or a certain author should be taken only as examples of the constitutional conception under examination. This explains why,

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in certain exceptional cases, a name that I associate with a specific concept may later appear associated with another one.

Given the large-scale dimension of this project, the very idea of studying “American constitutionalism” may seem too vast. Because there are too many important differences to take into account when dealing with so many different countries,<sup>9</sup> there is always the risk of making incorrect generalizations about all cases when comparing them with the peculiarities of the countries one knows best. In defense of the scope of the project one could say, first, that this is not a historical project: I am interested mostly in highlighting the influence of certain constitutional ideas in America and examining their weaknesses and strengths. I am not interested in giving an exhaustive account of early constitutional ideas and their influence across different countries. Second, in spite of the significant differences between the countries under scrutiny, many similarities join them together. For example, many of these countries were influenced by similar texts. In Latin America, the Constitution of Cadiz was enormously influential at one time, whereas the U.S. Constitution prevailed at other periods. The same holds true about the influence of Catholicism or the radicalism of the French Revolution in Latin America, or of republicanism in the United States. Throughout the hemisphere, at different periods, different movements and organizations contributed to strengthening certain ideas and disregarding others. Not surprisingly, then, liberals, conservatives, and radicals tended to advance similar constitutional projects even when they lived in different countries and at different times.

My work is to a great extent descriptive. However, the more egalitarian view that I try to reconstruct always accounts for my normative view. I describe this egalitarian conception as one that defends both the individual’s right to self-government and society’s right to self-determination. In this sense, the egalitarian view radically differs from the conservative view, which actually denies both claims. In contrast with the liberal-individualist position, egalitarians say that the constitution has to leave more room for the will of the people, which is in some ways diluted in liberal constitutions because of the specific system of checks and balances that they adopt. In addition, egalitarians say that the defense of rights should include the defense of certain fundamental interests (e.g., the right to shelter) normally

<sup>9</sup> For a similarly ample comparative project, Frank Safford properly describes the limits and possibilities of the task ahead. See Safford (1985). I clearly subscribe to his view.

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neglected in liberal models, interests that should be deemed of fundamental importance if one were committed to defending the value of individual autonomy. Finally, and in contrast with radicals, egalitarians assume that rights have to be defended unconditionally and that the will of the people needs always to be refined. In this sense, they disagree with the radicals' assumption that "the voice of the people is the voice of God."

Comparing these different constitutional proposals should allow us to evaluate the achievements, merits, and defects of each of these projects. In my final assessment, I claim that, after the founding period examined here, the structure of most American constitutions reflected the liberal ideals or, as occurred in many Latin American countries, a combination of liberal and conservative ideals. I also claim that, in the end, these constitutions undermined, at least in part, the egalitarian commitments that were present at the time of the various revolutions seeking independence: a commitment to the idea that all men are created equal as much as a commitment to the idea of collective self-government. Through these constitutional documents, the new political leaders dishonored the egalitarian faith that distinguished their societies' main social commitment: an egalitarian faith that they themselves displayed in the declarations of independence of their countries and in the first articles of the constitutions that they proposed.



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## Chapter One

# Radicalism: Honoring the General Will

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### The Engine of American History

The existence or the possibility, real or imagined, of a government “by its citizens in mass” has been one of the most important causes of the development of American constitutionalism. Legal reforms were often adopted to prevent the radicalization of politics, that is, a situation where the rules simply enforced the norms preferred by the majority.

An illustration of this situation is the development of so-called radical constitutionalism in the United States soon after independence was declared. Following the revolutionary spirit of the time, many states enacted constitutions – the first “radical” constitutions – that came to empower a very active citizenry. These constitutions had a remarkable impact on the minds of the main political leaders of the country, who realized that such institutional systems adopted at the national level would subvert the already fragile order.<sup>1</sup> Many of the fundamental features of the federal constitution may be explained by this historical fact: the early local constitutions taught the leaders what *not* to do at a national level. For example, the system of checks and balances, probably the main creation of the American Federalists, was a direct reaction to the system of “strict separation

<sup>1</sup> According to Gordon Wood, “By the mid-1780s many American leaders had come to believe that *the state legislatures, not the governors, were the political authority to be most feared*. Not only were some of the legislatures violating the individual rights of property-owners through their excessive printing of paper money and their various acts on behalf of debtors, but in all the states the assemblies also pushed beyond the generous grants of legislative authority of the 1776 Revolutionary constitutions and were absorbing numerous executive and judicial duties – directing military operations, for example, and setting aside court judgements.” Wood (2002), pp. 142–143, emphasis added.

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of powers” organized by the radical state constitutions.<sup>2</sup> Thus, we may understand many of the defensive tools reserved to the different branches – the executive’s powers of veto, the newly developed practice of judicial review, the ample legislative functions of the senate – as means that came to weaken the powerful legislatures created by those radical constitutions. Similarly, we may read the strong protections created in favor of property rights and, particularly, against the issuing of “paper money” as a reaction to the policies promoted by the strong state legislatures at the time.

The situation was not substantially different in Latin America. Typically, the Rousseauian ingredients of the constitutions enacted in countries such as Venezuela and Peru after declarations of independence help us to understand many of the exceptional political decisions that followed their approval, including the sudden desire to concentrate the political powers in the hands of a dictator. Although those early and quite radical constitutions were condemned to failure, it is surprising to see how much they were blamed for the political difficulties that ensued. Simon Bolívar’s “Memorial to the Citizens of New Granada by a Citizen of Caracas,” written in 1813, represents an exceptional example of this attitude. In the “Memorial,” Bolívar specified that “among the causes that brought about Venezuela’s downfall the nature of its constitution ranks first, which, I repeat, was as contrary to Venezuela’s interests as it was favorable to those of her adversaries.”<sup>3</sup> Notably, Bolívar faulted the seemingly radical constitution of 1811, which survived only a few days, for making the consolidation of independence impossible. Bolívar, as we know, would soon become one of the most influential (and conservative) constitutional thinkers in Latin America.

<sup>2</sup> I define the “Federalists” as the group responsible for drafting and defending the U.S. federal constitution. Those who rejected the constitution are defined as the “Anti-Federalists.”

<sup>3</sup> See Bolívar (1951), vol. 1, p. 22. He also stated, “The most grievous error committed by Venezuela in making her start on the political stage was, as none can deny, her fatal adoption of the system of tolerance, a system long condemned as weak and inadequate by every man of common sense, yet tenaciously maintained with an unparalleled blindness to the very end.” *Ibid.*, p. 18. A few years later, in the speech he delivered at the inauguration of the second national Congress of Venezuela in Angostura, he went back to his criticisms of the original Venezuelan Constitution, now in order to object to its federalist character. He stated that “no matter how tempting this magnificent federative system might have appeared, and regardless of its possible effect, the Venezuelans were not prepared to enjoy it immediately upon casting off their chains. We were not prepared for such good, for good, like evil, results in death when it is sudden and excessive. Our moral fiber did not then possess the stability necessary to derive benefits from a wholly representative power; a power so sublime, in fact, that it might more nearly befit a republic of saints.” *Ibid.*, p. 181.