

The ‘empty box’ of democratic constitutionalism

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Introduction

In this text, I want to refer to an ‘absent’ conception within modern democratic constitutionalism: an *egalitarian constitutionalism*. To do so, I shall first situate this ‘absent’ conception within the landscape of democratic constitutionalism as it currently exists. I shall analyze, in this respect, three different approaches, which offer a complete picture of the map we find in the area. I shall refer, then, to *conservative, republican and liberal* approaches to constitutionalism. My hope is that we will be able to better understand the contents and contours of egalitarian constitutionalism, in contrast to those other three ‘present’ approaches.

My analysis will seek to give substance to the alternatives mentioned, which I shall illustrate through examples coming from Western constitutional practice. In a particular - but by no means exclusive - way, I shall take most of my examples from an area and period of time I know in some detail - Latin America, 19th century - which offers us an exceptional ‘laboratory’ of ‘trial and error’ in constitutional matters.

I shall introduce and organize these different perspectives on constitutionalism, by taking as a starting point two ideas that seem inescapable in the history of the field -two ideas that I take as *foundational* within constitutionalism. The first one refers to the notion of *individual autonomy*, and the second relates to the notion of *collective self-government*. Those two ideas -I assume- lie behind all the constitutional projects mentioned. In short, every constitution, as I shall explain in a moment, develops in dialogue with such ideals.

I am aware that I will be here referring to notions -autonomy, self-government- that have been present in our public discussion for centuries, and that -partly for that reason- are as important as they are difficult to define: we have highly contested visions of such ideals. However, I believe that, for the purposes of this paper, it is not necessary to resolve these conceptual disputes definitively; nor is it necessary to opt for strict definitions, which gain in precision at the cost of greater exclusion. I am interested in relying on open and encompassing concepts, so that the theoretical map I present is capable of including the enormous diversity of Constitutions or constitutional models that we have known in these more than two centuries of constitutionalism.

In what follows, I will use the notion of ‘individual autonomy’ as a way of referring to what we usually call ‘personal freedoms’: religious freedom, freedom of thought, freedom of criticism, freedom of movement. Following Carlos Nino, I will relate the notion of individual autonomy to the “free individual adoption of ideals of human excellence and of plans of life based on them”.¹ I will be referring to freedoms that we

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seek to protect through the constitution -more specifically, through a list of individual, irrevocable and unconditional rights. Similarly, I will use the notion of ‘collective self-government,’ as a way of referring to what we usually call ‘democracy’ or ‘government by the people’. Thus, a constitution that - in my terms - seeks to strengthen ‘collective self-government’ will be one that reserves greater space for citizens (or, eventually, their representative bodies) in the decision-making process (i.e., through the strengthening of the legislative body; or the opening of greater opportunities for popular participation in public affairs).

To say this is not to argue that all the constitutional projects we know of have been inexorably nourished by both ideas, nor, much less, that all such projects have been intended or come to honor, in one way or another, such ideals. Rather, I maintain that all the constitutions we know, relate in one or another way to those two ideals: sometimes supporting one of them, to the detriment of the other; sometimes resisting both, etc.; but always in dialogue with them. Ronald Dworkin once argued that the constitution - every constitution - could be understood as a reflection on the ideas of liberty and equality.² Similarly, Jurgen Habermas alluded to the ‘co-originality’ of the notions of democracy and human rights.³ In different ways, such authors - inescapable references for our studies on law and philosophy - thus alluded to the intuition that frames these reflections. In such a way, they drew our attention to the presence of (two) foundational notions, related and in tension with each other, linked to the ways in which we institutionalize our life in common.

Examining, then, how different constitutional traditions have situated themselves in relation to the ideals described - individual autonomy; collective self-government - I present the following table (of Weberian ‘ideal types’) of constitutional conceptions.⁴

<p>CONSERVADURISM: -individual autonomy -collective self-government</p>	<p>LIBERALISM: +individual autonomy -collective self-government</p>
<p>REPUBLICANISM: -individual autonomy +collective self-government</p>	<p>EGALITARIANISM (the “empty box”) +individual autonomy +collective self-government</p>

Union or the European Research Council Executive Agency. Neither the European Union nor the granting authority can be held responsible for them.

¹ C. Nino, *The Ethics of Human rights* (Oxford University Press, Oxford, 1991), 132.

² R. Dworkin, *Freedom’s Law* (Harvard University Press, Cambridge, 1996)

³ J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory on Law and Democracy* (MIT Press, Cambridge, 1996).

⁴ See, in this respect, R. Gargarella, *Latin American Constitutionalism* (Oxford University Press, Oxford 2013).

In my view, over the last two long centuries, we have experienced (i) strongly *conservative* legal systems, which have sought to impose an official way of thinking (typically, a state religion) by hindering or obstructing individual autonomy; while blocking the possibilities of collective self-government (i.e., by severely limiting political rights). We have also had the experience of (ii) *majoritarian or republican* constitutional systems which, in their unrestricted defense of the ideal of self-government, have promoted majoritarian institutions capable of sweeping away certain basic personal freedoms (i.e., through initiatives aimed at ‘cultivating civic virtues’). In addition, we have also known of (iii) *liberal* legal systems, which were able to protect personal liberties (typically, freedom of thought; free press; religious tolerance), although – very frequently - at the cost of embracing a strongly counter-majoritarian (or, to put it another way - weakly democratic) organization of power (assuming this objective - democratic restraint - as a necessary condition for the preservation of personal liberties).

In favor of this distinction between conservative, liberal and radical or republican positions, let me point out that it fits well with common understandings in political and constitutional theory of the meaning of the respective ideals.⁵ In addition to this, it seems easy to find support for this tripartite distinction within the history of Western constitutionalism.⁶ Once again, to state this does not imply denying the complexity of constitutional history and the ambiguities inherent in the different constitutional models cited (which, in practice, tended to appear more ‘mixed’ than ‘pure’).

What has been said so far also allows me to derive an observation of great interest – one that is crucial for this paper - which is the presence of an ‘empty box’ in the history of constitutionalism. In fact: we have known a constitutional conception that appeared in conflict with both the ideals of individual autonomy and self-government (conservatism);

⁵ See, for example, the way in which the ideas of conservatism, majoritarianism and liberalism are defined in the *International Encyclopedia of Social Sciences*, see D. Sills, ed., *International Encyclopedia of Social Sciences* (The Macmillan Company & The Free Press, 1968).

⁶ To begin with, think about the two great events of modern constitutionalism, namely the French and American Revolutions, and the Constitutions that followed them. See, for example, J. Elster, “Constitutional bootstrapping in Paris and Philadelphia” (1993), *Cardozo Law Review* 14, 549-76. Both Revolutions had an extraordinary impact throughout the world, and their major legal works left an undeniable imprint throughout the Americas. The first revolutionary constitutionalism coming from France, with its Rousseauian antecedents and Jacobin continuities, came to represent radical, anti-conservative constitutionalism in the region. Meanwhile, and in the face of this, the American Constitution began to symbolize the model of “checks and balances”; the separation of Church and State; the Bill of Rights - in other words, liberalism. Along with these two traditions, the other great constitutional tradition that played a crucial role in the constitutional debates of the late eighteenth and early twenty-first centuries was that of the Hispanic Empire. In Latin America, in particular, four hundred years of colonization, imposed by the force of the sword, represented an extraordinary support base for the development of an undoubtedly conservative legacy.

another that accepted to undermine individual autonomy at the cost of strengthening collective self-government (republicanism); and yet another that opted for the opposite route, by affirming individual autonomy, but paying the price of (accepting to dilute) collective self-government (liberalism). The point is that history does not provide us with clear examples of the missing alternative, namely, a constitutional model that sought to honor, at the same time, both the values of individual autonomy and collective self-government. This is why we can speak of the ‘empty box’ of our constitutional history. Allow me, in what follows, to give a more detailed account of each of the cited constitutional models, and then elaborate on the missing alternative.

The Conservative Model: The Cross and the Sword

The conservative constitutional model is the one that appeared in direct conflict with the two founding ideals of modern constitutionalism: democracy and personal freedom; self-government and individual autonomy. A good expression of this view appears in the image that came to represent this model, during the colonial times, namely the image of ‘the cross and the sword’: in other words, religion (in moral matters) and order (in political matters). As Ecuadorian President Gabriel García Moreno paradigmatically argued before the Constituent Convention that would draft the (extreme and conservative) Constitution of 1869: “The draft Constitution that will be presented to you contains... (two) principal objects...which I have had in mind: the first, to bring our political institutions into harmony with our religious belief” - that is, the cross -; and the second, “to invest the public authority with sufficient strength to resist the onslaughts of anarchy” - that is, the sword.⁷

More specifically, what we find, through the idea of ‘the cross,’ is the conviction that the new societies had to be reorganized around a comprehensive moral project: usually, but not exclusively, that of the Catholic Church. At the same time - and this is what we recognize in the image of ‘the sword’ - there is an appeal to the use of coercion in order to recover or impose order - an order intimately linked to this comprehensive project. Many of the initial and most important Constitutions passed in 19th century Latin America clearly responded to these premises. Think, for example, of Constitutions such as those of Chile 1833 (one of the most enduring in Latin American history); Colombia 1843 or 1886; Ecuador 1869; Mexico 1843; or Peru 1839.

Let me pay some attention to the politico-moral initiatives, and above all, the constitutional forms, through which conservatism confronted, resisted or obstructed the two founding ideals of constitutionalism - personal autonomy and collective self-government. I shall refer, in this respect, to the (conservative) principles of *moral perfectionism*, and *political elitism*.

⁷ G. García Moreno, *Escritos y discursos de Gabriel García Moreno* (Imprenta del Clero, Quito 1887), 275-6. Similarly, the Argentine publicist Félix Frías maintained: ‘Order in the shadow and under the protection of the Cross is my entire political program’. See, T. Halperín Donghi, *Proyecto y Construcción de una Nación* (Caracas: Biblioteca Ayacucho, 1980), 43-3.

I concentrate, first, on moral perfectionism, an idea that appears clearly in tension with the principle of personal autonomy. Perfectionism alludes to a principle that assumes an ontological claim about the existence of certain moral truths about the good life (i.e., typically - in Latin America - related to the Catholic religion); and also, an epistemic claim, which affirms that a majority of citizens have difficulties in aligning their behavior in the terms demanded by those guidelines. For conservatives, this latter circumstance left a majority of people at the mercy of deception or confusion and, consequently, at the gates of personal degradation, of a life in vice or corruption.⁸ Therefore the need for external corrections coming from a strong political authority. In line with this view, constitutional conservatism proposed using the coercive apparatus of the state for favoring, benefiting, or (in the most extreme cases) directly imposing on the population, a particular conception of the good (usually, in Latin American history, this implied placing the state at the service of a particular religion). This, both with the aim of making the proper moral conception prevail, and preventing the degradation of the people and its customs.

All of the above reasoning may seem too abstract or complex, but the fact is that this view is easily recognizable in countless central measures and initiatives in American constitutional history. To illustrate this, we can begin by resorting to this statement by Miguel Antonio Caro, who was President of Colombia (1892-1898), and one of the main architects of conservative constitutionalism in his country. Caro said: ‘If man has the right to think and say everything, he also has the right to do everything: absolute freedom of thought and speech brings with it the freedom of vice, madness and crime.’⁹ This way of thinking gave intellectual backing to the (conservative) Constitution of 1886 - one of the most important in Colombian history, and one that Caro was instrumental in writing. In this brief statement by the former Colombian President and constituent, we recognize everything that has already been said: the certainty of a proper moral order; the distrust of the citizenry; the demand for order; the vocation to transfer this strict conception of politics to constitutional forms (i.e., in restrictions on freedom of expression, religious freedom, etc.). We find a similar view in the testimonies of the independence hero Simón Bolívar (who, unlike Caro, and rather exceptionally in the region, held a conservative *but secular* constitutional vision). Criticizing the - revolutionary - constitutional model coming from revolutionary France, Bolívar wrote virulently against (what he considered) the ‘exaggerated maxims of the rights of man’. These abusive claims, he added, purport to authorize each man to “govern himself, (thus) breaking social pacts and constituting nations in anarchy”.¹⁰ Once again, in this brief Bolivarian declaration, we can see the exaltation of a political and moral order that is considered threatened; the distrust of the

⁸ As philosopher Thomas Scanlon points out, perfectionism is distinguished ‘by a strong tendency towards elitism,’ which is evident when it places ‘a much greater emphasis on the needs and interests of some members of society as opposed to [the needs and interests] of others.’ T. Scanlon, “The Principles of Justice,” in N. Daniels (ed.), *Reading Rawls* (Basil Blackwells, Oxford, 1975), 181.

⁹ J. L. Romero, & A. Romero (eds.), *Pensamiento Conservador, 1815-1898* (Biblioteca de Ayacucho, Caracas 1978), 69.

¹⁰ S. Bolívar, *Doctrina del Libertador* (Biblioteca de Ayacucho, 1976).

citizenry; and most of all the conviction that authority must be re-established, in the face of the only alternative that is considered attainable, which is described as anarchic.¹¹

In Latin America, the moral commitments of conservatism became mainly expressed through constitutional clauses aimed at favoring the Catholic religion. This was done either by declaring Catholicism to be the official religion (81% of the Constitutions issued during the 19th century) or by directly prohibiting the public worship of other religions (54% of them).¹² In extreme cases, as in Ecuador 1869, the Constitution established that citizenship itself was reserved to individuals professing the Catholic religion. On other occasions, as in Chile 1823, the Constitution was accompanied with a Moral Code of more than six hundred articles, through which the State sought to regulate even the most elementary aspects of private life.¹³

More significantly, conservatives did not see declaration of constitutional rights as a list of guarantees that the State had to protect in an unconditional manner. Rather, for conservatives, the protection of rights was conditional on the primary safeguarding of religion. As Juan Egaña said,

It is a mistake to allow all kinds of slander and insult, and to attack the most sacred and inviolable principles of religion and morality, with the expectation of later punishing their authors... The sum of the evils that freedom of the press produces on religion, morality, the mutual internal concord of citizens, and even the external credit of the nation, is much greater than its goods.¹⁴

In sum, for the conservative state, it was possible to commit itself to the “classical” list of individual rights (freedom of expression, freedom of association, freedom of thought) and at the same time, and through that same constitutive act, ‘subvert’ the very sense of having a list of rights, by making those rights dependent on the religious principle.

Let us now turn to the second fundamental aspect of conservative constitutionalism, which takes us to examine the principle of *political elitism*. Political elitism, as I shall understand it, refers to the existence of “political truths” that the majority of the population is not sufficiently prepared to recognize. Again, what we find here is an ontological claim, which asserts the existence of certain political truths that should guide public life; and an epistemological claim about who is or is not qualified to know or have access to such political truths (in this case, what conservatives assume is that the majority of the population is not well equipped to decide for itself how to organize the fundamental

¹¹ J. Paz Soldán, *Derecho constitucional peruano* (Ediciones Librería Studium, Lima 1973).

¹² B. Loveman, *The Constitution of Tyranny. Regimes of Exception in Spanish America* (University of Pittsburgh Press, Pittsburgh 1993).

¹³ The Moral Code laid down regulations on the tenor of ties between parents and children; on the manner of celebration of public and private festivals; on the use of alcohol; on leisure and vagrancy; on the modes of popular music; on national dances; on conduct to be exalted as virtuous, or persecuted and repressed as vicious. S. Collier, *Ideas and Politics of Chilean Independence* (Cambridge University Press, Cambridge 1967).

¹⁴ J. Egaña, *Juan Egaña. Antología* (Andrés Bello, Santiago de Chile 1969, 84-85).

aspects of common life). The (political) corollary of this position is that the power of decision has to be left in the hands of some kind of aristocracy: an elite of technicians or well-prepared or intellectually gifted individuals.

In many cases - typically in Latin America at the beginning of the nineteenth century - this political elitism appeared in its crudest or most brutal forms: for conservatives, the majority of the citizenry was simply not ready for self-government, and had therefore to be deprived of political rights -kept away from any public responsibility. The testimonies that can be gathered in this respect are numerous. A clear (and rather late) expression of this understanding of politics was expressed by the conservative priest Bartolomé Herrera, in Peru, 1860. For Herrera,

the people, that is, the sum of individuals of all ages and conditions, have neither the capacity nor the right to create laws. Laws are eternal principles originating in the nature of all things, principles that cannot be clearly perceived except by those who are accustomed to the difficulties of this mental effort and exercised in the arts of scientific investigation.¹⁵

Now, what interests us most about this political elitism are its constitutional implications: we want to recognize how this rejection of the principle of self-government was translated into the constitution. Perhaps the main constitutional implication of political elitism was the defense of the concentration of political authority. This goal manifested itself through two main proposals, namely political centralism and strong presidentialism. These basic ideas, which fit well with the legal history of Latin American constitutionalism, find a strong external reference in the English monarchical model, as well as in the Napoleonic Consular Constitutions of 1799 and 1892, which were enormously influential in the region.

This conservative political model, which came to combine extreme centralism with extreme presidentialism, took various forms in Latin America: from the theocratic model defended by President García Moreno in Ecuador, to that of the President for Life, proposed by Bolívar; the isolationist authoritarianism of the Paraguayan ‘supreme dictators’ Gaspar Rodríguez de Francia and Francisco Solano López;¹⁶ or the imperial-type model defended in Brazilian constitutionalism;¹⁷ or the scheme of the ‘Supreme Conservative Power’, created by the Mexican Constitution of 1836. Even the Latin

¹⁵ J. Basadre, *Historia de la República del Perú*, (Editorial Cultura Antártica, Lima 1949); B. Herrera, *Escritos y discursos* (Librería Francesa, Lima 1929), 131. Of similar interest is Herrera's polemic with the brothers José and Pedro Gálvez (see, in particular, the debate between Herrera, as rector of the ultra-conservative Colegio de San Carlos, and Pedro Gálvez, director of the liberal *Colegio de Nuestra Señora de Guadalupe*). See, for example, J. Leguía, *Elogio de don José Gálvez* (Imprenta Garcilaso, Lima 1927); J. Leguía, *Estudios históricos* (Biblioteca América, Santiago de Chile, 1939).

¹⁶ J. L. Romero, *El pensamiento político de la derecha latinoamericana* (Paidós, Buenos Aires, 1970).

¹⁷ P. Calmón, *Historia de Brasil* (BR J Olympio, Río de Janeiro, 1959), vol. 4; G. Mendes et al, *Curso de Direito Constitucional* (Editora Saraiva, Sao Paulo, 2008).

American conservative model came to be expressed through monarchical proposals which, although exceptional in the region, attained a singular importance.¹⁸

In short, we have been concerned, up to this point, with conservative constitutionalism. I was interested in presenting it, in particular, in its conflicted relationship with the two foundational ideals of modern constitutionalism - individual autonomy, collective self-government.

The republican model: for the ‘general will’.

The republican or radical model is the one that grew with, and was nourished by, the independence fight. It is the constitutional model that placed the achievement of collective self-government at the center of its ambitions -the one that, for such reason, showed a willingness to limit or even sacrifice basic personal liberties on the altar of the sovereignty of the people. While there is no logical or necessary connection between a certain defense of political majoritarianism and the ‘tyranny of the majority’, it is true that modern history has shown the recurrence of that possibility. In Europe, the ‘Jacobin moment’ of the French Constitution of 1793 accompanied the time of political ‘terror’ - the guillotine for enemies of the revolution. In Latin America, Haiti’s ‘black revolution’ (1791-1804) was carried out in the name of those same emancipatory ideals of the French Revolution and left in its wake violence and atrocious deaths, which had an extraordinary impact on the young leaders of the independence revolution. For Simón Bolívar, for example, the connection between political radicalism, popular violence and massive violation of rights appeared then as necessary and inexorable.¹⁹ This was so, although - as we shall see - the link between radical constitutionalism and rights turned out to be much more complex and interesting than what its critics denounced.

Interestingly, if constitutional conservatism usually implied a challenge to the two founding principles of constitutionalism - individual autonomy and collective self-government - republicanism meant the vindication of one of those ideals - that of self-government - frequently at the expense of the other - personal autonomy. Basic personal liberties were thus placed at the service of popular sovereignty.

Just as in the case of conservatism I referred to two alternative principles -moral perfectionism and political elitism - in the case of republicanism I will allude to two other principles, intended to illustrate the link (and tensions) between this radical conception and the founding principles of constitutionalism (personal autonomy-collective self-

¹⁸ F. Safford, "Politics, Ideology and Society in Post-Independence Spanish America," in L. Bethell, ed., *The Cambridge History of Latin America* (Cambridge University Press, Cambridge, 1985), vol. III, pp. 360-361.

¹⁹ Bolívar, *Doctrina...*, 12. V. Belaúnde, *Bolívar and the Political Thought of the Spanish American Revolution* (Octagon Books, New York, 1967).

government).²⁰ I will refer, then, to the principles of *political majoritarianism* and *moral populism*.

In line with the priority that republicanism assigned to the value of self-government, I will take the first of the aforementioned ideas, namely *political majoritarianism*, as the axis of this vision. Through this idea, I will summarize the various ways in which, in different contexts, republican constitutionalism claimed or sought to express its faith in the principle of collective self-government. By political majoritarianism, I will refer to the view according to which the fundamental decisions of a community, about how to organize life in common, should be made by all members of that community, according to criteria ultimately informed by majority rule. Political majoritarianism reveals constitutional republicanism in its most proper and opposite facet to conservatism. Indeed, the political elitism that we associated with the conservative project shifts here to a position that rests on the superior authority of popular majorities. What is emphatically affirmed here is what was drastically rejected there: the right of majorities to govern themselves, to make their own rules, and to decide for themselves how they want to conduct their life in common.

The majoritarian principle took many and varied forms at the dawn of modernity. In revolutionary France, the kind of political majoritarianism I am referring to could be seen, for example, in the Rousseauian ideology that contributed to the fall of the monarchy. Notions such as ‘general will,’ ‘popular sovereignty,’ ‘social contract,’ etc., which were to exert an extraordinary influence on the revolutionary processes of the nineteenth century, typically account for the majoritarian component to which I refer here. Traces of the same majoritarian discourse - anti-monarchist, anti-authoritarian, contrary to the concentration of powers - can also be seen in English radicalism in the seventeenth century. This early radicalism had surfaced in England through the ‘Putney debates’ (1647), and would gain increasing strength in the following century, with the Wilkes Affair of 1764, and the growth of radical groups (the Radical Dissenters, the Society of the Supporters of the Bill of Rights), which advanced the most extreme and interesting anti-monarchist proposals in their time.²¹ Many of the leading figures of that movement - I am thinking of intellectuals such as Richard Price, Joseph Priestley, James Burgh, John Cartwright - decisively contributed to articulate a democratic discourse, which openly revolved around the idea of self-government.²² Those same ideas would then travel to America, in particular through the works of Thomas Paine, an author who was called to play

²⁰ For a definition of political radicalism in America see, in particular, D. Sobrevilla, “Introducción,” in D. Sobrevilla ed., *Manuel González Prada. Textos Esenciales* (Fondo Editorial del Congreso del Perú, Lima 2009), 21.

²¹ C. Cone, *The English Jacobins. Reformers in Late 18th Century England*, New York: Scribner, 1968).

²² C. Cone, *Burke and the Nature of Politics* (University of Kentucky Press, Lexington, 1957); C. Hay, *James Burgh. Spokesman for Reform in Hanoverian England* (University Press of America, New York, 1979).

a decisive role in the founding period of American constitutionalism, i.e., through Pennsylvania's 1776 Constitution.

Let me say something more regarding the impact exerted by radical constitutionalism - especially in its majoritarian expression - in America. First of all, I will make some reference to the case of the United States, where the Revolution of Independence revolved, in a special way, around demands for self-government -thus, in the claim 'no taxation without representation'. Not surprisingly, then, after the Revolution, the idea that the members of each community should take control over their own affairs came to play a key political role. As Fisher Ames argued, the citizenry began to 'turn against their own masters the doctrines they had been taught in order to carry the revolution forward'.²³

For our purposes, it is crucial to examine how this majoritarian discourse began to permeate public life, and was soon translated into the first radical constitutions that emerged at the state level (1776-1785). Many of these Constitutions - with the pioneering and most consistent example of the aforementioned 1776 Pennsylvania Constitution - exhibited principles and clauses favorable to the rights of the majorities (i.e., the right to recall; mandatory rotation; annual elections; etc.).

Among the multiple "majoritarian" mechanisms adopted by those early state constitutions, we can find some such as the following: Unicameral legislatures (as in the constitutions of Georgia, Pennsylvania, and Vermont); Executives elected through the legislature (in nine of the eighteen constitutions adopted just after American independence); an Executive lacking veto powers; a popularly elected Council, oriented to control the proper functioning of the Constitution (constitutions of Pennsylvania and Vermont); popular election for candidates for most positions of government; a Senate directly elected by the citizenry (in all cases except the Maryland Constitution); rotation for most important positions of government (constitutions of Delaware; Georgia; Maryland, North Carolina; Pennsylvania, and Virginia); and a bill of rights, in almost all states.²⁴ Such constitutional clauses may have been unsophisticated, and were surely imperfect, but they were, in any case, a good demonstration of how a radical constitutional could look like.

In the case of Latin America - unlike in the United States – we find almost no political experiences genuinely linked to radical constitutionalism. Much less, then, do we find Constitutions with a radical content, this is to say oriented towards affirming the principles of majoritarianism. We do find, however, a number of thinkers who consistently honored the principles of majoritarianism; and a few Constitutions that can

²³ G. Wood, *The Radicalism of the American Revolution* (Alfred Knopf, New York 1992), 215.

²⁴ I take this summary, particularly, from D. Lutz, *The Origins of American Constitutionalism* (Louisiana University Press, Baton Rouge 1988).

be linked with those ideals.²⁵ Some of these Constitutions, such as that of Venezuela 1811, came to symbolize (at least, in the rhetoric of their enemies), Rousseauian radicalism (more for their language than for their content). Other radical documents, such as the Mexican 1814 Constitution (a Constitution that was written by the Mexican ‘revolutionary priests’ in Apatzingán), did not have an effective life. Still others, such as the Colombian Constitution of *Rionegro* (1863) - usually seen a symbol of political radicalism - was more an expression of extreme liberalism than a product of radical constitutionalism.

In any case - and this is very relevant for the purposes of this text - it is important to stress that, as in the case of the United States, radicalism mattered less for what it contributed or left as a constitutional legacy, than for what it represented: it was the model against which the basic institutions of modern constitutionalism (i.e. limited powers; systems of checks and balances; strong individual rights; etc.) took shape. The forms that the majoritarian discourse took in Latin America were diverse, but in all of them we can recognize the radicals' commitment to *collectivist, anti-individualist, anti-authoritarian* institutional alternatives, based on respect to majority rule and state activism. We can find illustrations of this view in the Chilean Francisco Bilbao's radical critique to the delegation of power, but also in the strong anti-presidentialist proposals defended by the first radicals in New Granada or Peru (who reacted against the authoritarian militarism of Simon Bolivar). We see traces of the republican view in the defense of political federalism and decentralization of authority (thus, in the work of American anti-federalists; the Mexican *liberales puros*; the initiatives of radical liberals in Colombia; etc.); and even in the early and noted initiatives promoted by the Peruvian Flora Tristán, in defense of the rights of women and workers.

The other distinctive feature of republican constitutionalism was, as I anticipated, *moral populism*. The notion of moral populism implies the extension of the majoritarian principle into the realm of morality and rights.²⁶ The idea can be better understood if one

²⁵ Notable among such thinkers for his strong arguments in defense of democratic self-government was the Chilean activist Francisco Bilbao, who - together with his compatriot Santiago Arcos - had been closely acquainted with, and taken part in, the revolutionary and democratic movement of 1848 in France. In one of his most memorable writings of 1855, entitled ‘The Government of Liberty’, Bilbao (at that time in exile in Peru) reflected on constitutionalism and the place that the popular majorities should occupy in the new society, and he did so with a clearly Rousseauian language and ideology, directly vindicating the only Constitution he considered ‘worthy of being remembered’ in the history of humanity, that is, the Jacobin Constitution of 1793. See, F. Bilbao, “El gobierno de la libertad,” in *Francisco Bilbao, 1823-1865* (Editorial Cuarto Propio, Santiago de Chile 2007). In a statement of the scope of his majoritarianism, Bilbao defended direct democracy against those who consider it impracticable (Bilbao 2007, 321-22); he defined the delegation of legislative power as a ‘crime against humanity’ (ibid., 326), and as ‘slavery disguised as sovereignty’ (‘the history of congresses proves it’, he insists, ibid., 322); and he thought of representation in connection with the imperative mandate and the right to recall mandates (ibid., 321-22).

²⁶ I take the idea of ‘moral populism’ from the philosopher H. Hart, who appropriately distinguished between ‘the acceptable principle that political power’ is best entrusted when delegated ‘to majorities’, from that other principle - moral populism - according to which ‘what majorities do with that power is beyond criticism and ought never to be resisted’ See H. Hart, “Moral populism and democracy,” in *Law, Liberty and Morality* (Oxford University Press, 1988), 78.

compares it to the moral perfectionism we associated with conservatism. Moral perfectionism referred to a comprehensive, pre-defined view that served as an organizing principle of public life, and as a fundamental interpretative maxim in relation to individual rights. Moral populism, instead, seeks to regulate public life on the basis of (and in the name of) majority rule. For radicals, the definition of “rights” and their content, fully depended on what “the general will” decided in that regard.²⁷ For this republican approach (as in the case of conservatism), individual rights did not have an unconditional character: these were conditional rights -or, more precisely, rights dependent (not on the value of a religion, but) on the will of the majority.

In this sense, and for example, in the origins of constitutionalism, many republicans claimed that the good citizen, or *virtuous citizen*, should be prepared to sacrifice even his life in order to satisfy the requirements of his community. An eloquent example of this approach can be found in the radical and short-lived Mexican Constitution of Apatzingán of 1814 which, adopting Rousseauian language, defined what it implied for citizens to commit themselves to their community. Article 20 of the Constitution asserted the absolute predominance of the general will upon the will of particular, and called for the “submission of citizens to the law,” which it described as “a sacrifice of the particular intelligence to the general will.” In the same way, article 41 (which defined the obligations of citizens and the importance of obeying constituted authorities), referred to the “voluntary sacrifice of personal goods and personal life, when the needs (of the country) demanded it”.

‘Moral populism’ could also imply the adoption of initiatives in support of a particular religious faith, to the extent that these were requirements derived from the popular will. Thus, and for example, the anti-Federalist Richard Henry Lee argued (against James Madison, in 1784), that religion should act as the ‘guardian of morals’. For Lee, government had a duty to educate its citizens ‘in favor of virtue and religion.’²⁸ In contrast to conservatives who defended a religion for being the “true religion”, republicans held state support for a faith as a way to defer to the demands of the majority (this was what Henry Lee did), or -in other occasions, and following Rousseau- because they assumed that religion served as the “cement of society”- that is to say, as a binding and homogenizing element of societies at risk of fragmentation.²⁹

The above considerations help us understand why it became so common to link majoritarianism with the violation of individual rights. This worrying possibility (“the tyranny of the majority”) seemed theoretically “authorized” by the republican view, while at the same time it appeared common, rather than exceptional, in practice (as demonstrated by examples such as those of Jacobinism in France or the “black revolution”

²⁷ D. Pérez Guilhou, *Liberales, radicales y conservadores. Convención Constituyente de Buenos Aires 1870-1873* (Plus Ultra, Buenos Aires 1997), 20.

²⁸ H. Storing, *What the anti-Federalists were for* (The University of Chicago Press, Chicago 1981), 24-25.

²⁹ J. Wolff, *An Introduction to Political Philosophy* (Oxford University Press, Oxford 1996), 95.

in Haiti). However -let me insist with this- there is no necessary connection between political majoritarianism and the violation of individual rights. Moreover -and it is important to stress this point- the republicans' instrumental approach to rights implied, in certain occasions, the reinforcement of certain (other) particular rights - typically social and political rights - which were neglected by other constitutional traditions (such as conservatism and liberalism). Many republicans, in fact, considered those political and social rights as necessary preconditions of political self-government.³⁰

In any case - as we shall examine in what follows - the tensions between the republican demand for majority rule and the liberal defense of individual rights were many and very frequent: republicans usually challenged the classic list of liberal rights; the unconditionality and intangibility attributed to the Bill of Rights; the drawing of a sharp distinction between “public” and “public” morality; the unassailability associated with the sphere of privacy; etc.

In short, in the previous pages we examined the relationships and tensions that existed between the republican constitutional model, the majority principle, and the value of individual autonomy.

The liberal model: neither tyranny nor anarchy

The third constitutional tradition we will examine is the one represented by liberalism. Reviewing this third model, after having explored the two previous ones - conservatism and republicanism - greatly facilitates the task of understanding liberalism, its limits and scope. This is so, because liberal constitutionalism grew up in a permanent and tense dialogue with the two rival models, from which it always tried to differentiate itself. In what follows I shall therefore refer to the model that resisted both the abuses of authoritarian leaders (“the tyranny of one”) and the excesses of unchecked majorities (“the tyranny of the many”). For that purpose, as we shall see, liberalism took on a

³⁰ In this respect, there are many initiatives (favorable to social and political rights) that can be singled out as characteristic of early radical constitutionalism. These include, for example, the remarkable *Reglamento Provisorio de la Provincia Oriental para el Fomento de la Campaña*, issued by the Uruguayan independence leader, José Gervasio Artigas. This regulation was intended not only to ensure a profound redistribution of land (a completely exceptional measure at the time, and in the region), but also to do so on a progressive and egalitarian basis, benefiting first and foremost the most disadvantaged groups in society, including ‘free blacks,’ ‘Indians,’ ‘zambos,’ ‘native Americans,’ ‘widows with children’ and ‘Creoles’. N. Sala de Touron & J. Rodríguez, *Artigas y su revolución agraria, 1811-1820* (Siglo XXI, Mexico 1971); E. Petit Muñoz, *Artigas y su ideario a través de seis series documentales* (Universidad de la República Oriental del Uruguay, Montevideo 1956). Similarly, we can mention the strong redistributive measures demanded by Mexican radicals, particularly in the Constituent Convention of 1857 - especially through the work of Convention members such as Ponciano Arriaga, Castillo Velasco or Ignacio Ramírez, but also after the Convention. See J. Reyes Heróles, *El liberalismo mexicano* (Universidad Nacional de México, Mexico 1957); J. Sayeg Helú, *El constitucionalismo social mexicano*, 3 vols. (Edición de Cultura y Ciencia Política, Mexico 1974); F. Zarco, *Historia del Congreso Constitucional de 1857* (Instituto Nacional de Estudios Históricos, Mexico, 1957). The work of many radical politicians - such as the notable Murillo Toro, who became President of Colombia - aimed at affirming and extending the right to suffrage is also worthy of note. M. Murillo Toro, *Obras Selectas* (Biblioteca Pública, Bogotá, 1991), 93.

fundamental task of its own: to dismantle the institutional machinery that facilitated coercive imposition from government - in modern terms, to dismantle the state.

To return to the terminology we used in the previous pages, we can describe liberal constitutionalism as the view that (inversely to radical constitutionalism) promoted a strong protection of personal autonomy (i.e., through the defense of a list of unconditional rights) even at the cost of undermining collective self-government (i.e., through counter-majoritarian institutions). Liberalism's defense of individual autonomy contrasted sharply with what its two rival positions held. On the one hand, liberals contradicted conservatives' moral perfectionism, opposing their disposition to organize society around the dictates of a particular comprehensive view. On the other hand, liberals resisted any possibility of sacrificing individual autonomy in the name of the interests of the majority. In sum: neither moral perfectionism and political elitism, like conservatism; nor moral populism and political majoritarianism, like republicanism. Liberals embraced, instead, two alternative principles, which we shall name *moral neutrality* – which implied the establishment of institutional barriers against the imposition of comprehensive views - and *political balance* – which implied a commitment to a structure of “checks and balances.” In constitutional terms, this meant that liberals oriented the organic part of the Constitution to avoid abuses coming from the political branches, and employed the other part of the Constitution - the Bill of Rights – to prevent the state imposition of particular ways of life.

The most significant, consistent and influential liberal Constitution that we know is the United States Constitution of 1787, which looked very much like as an “ideal type” of liberal constitution. With its "checks and balances" scheme; its complex system of judicial review; its Bill of Rights; its distrust of popular participation, the US Constitution became the main example of liberalism constitutionalism. Currently -I submit- this alternative can be considered the dominant model in Western constitutionalism.

In Latin America, the first liberal constitutions appeared inspired by the old model of the Constitution of Cádiz, 1812. Shyly, those constitutions tried to limit the powers of the Executive; strengthened the authority of Congress; and appeared more openly committed to individual rights.³¹ Constitutions such as those of Argentina 1826; Chile, 1828; Nueva Granada 1830 or 1832; México, 1824; Peru, 1823 and 1828, Uruguay 1830 represent very moderate examples of such tendency.³²

Since the ideal of *personal autonomy* was the pivot around which the whole liberal project revolved, it is worth beginning by paying attention to it, and to the way in which liberalism sought to honor it in practice. In the American context, the discussion of this ideal occupied a fundamental place from the very moment of independence. Typically, both in the United States and in Latin America, the controversy about the place of religion

³¹ R. Breña, *El primer liberalismo español y los procesos de emancipación de América, 1808-1824* (El Colegio de México, Mexico 2006).

³² F. Safford, "Politics, Ideology..."

in public affairs was one of the first to gain public relevance, due to the insistent political pressures (conservative, above all) in defense of an official or protected belief. In the US, the dispute over this issue began with the arrival of the English settlers on the continent - settlers who, for the most part, were arriving in America to escape religious persecution. The response advocated by liberalism, in that difficult context, was one of “moral abstinence”: neither the state should interfere in the affairs of the Church, nor the Church should interfere with the policies of the state. As James Madison argued, this was to be achieved ‘by entire abstinence of the government from interference in any way whatever, beyond the necessity of preserving public order and protecting each sect against trespasses on its legal rights by others’.³³ This is what I shall call *state neutrality*: the neutral state is the one that refrains from taking sides on any particular conception of the good, and thus ensures that each individual can choose and pursue his or her own life plan. Recalling a phrase once quoted by Roger Williams, Thomas Jefferson masterfully defined this criterion defended by liberals: what was to be done was to establish a “wall of separation’ between Church and State” thus guaranteeing official neutrality vis-à-vis different beliefs.³⁴ Within this picture, constitutional rights appeared as the ‘bricks’ that constituted the ‘wall of separation’ -the Bill of Rights become thus the barrier aimed at protecting individual autonomy.³⁵

In its zeal to protect individuals' choice of life plans, liberalism came to identify the state (rather than powerful elites, or interest groups) as the main and most dangerous threat to personal freedom - the greatest source of abuses that had to be curbed. Disabling or ‘taming’ the state, then, was seen as the most appropriate way to guarantee freedom. The formula was: less state, less risk of oppression, more freedom. This is why a lucid 19th century jurist like the Colombian José María Samper, maintained that it was ‘necessary to legislate as little as possible, to renounce the mania for regulation and imitation’.³⁶ On this path towards containing the oppressive state, constitutional Bills of Rights came to play a crucial role. As the Chilean liberal Juan V. Lastarria, one of the main critics of the (conservative) Chilean Constitution of 1833, argued,

at the time of sanctioning all these rights...the Constitution must do it in an unconditional manner, as the U.S. Constitution did it; because if it does it as the rest of the modern Constitutions, by including clauses such as “but the repression of crimes committed through the use of these freedoms” or “in the manner defined by the law or a decree” then the Constitution would commit the grave mistake of leaving individual and social rights at the mercy of political power’.³⁷

³³ L. Tribe, *American Constitutional Law* (The Foundation Press, New York, 1988), 1158.

³⁴ It was Madison and Jefferson who finally shaped and succeeded in 1785 in imposing a religious liberty bill for the state of Virginia, aimed at resisting initiatives - such as those of the populist Richard Henry Lee - that proposed the levying of taxes to finance the Anglican cult.

³⁵ M. Konvitz, *Fundamental Liberties of a Free People* (Greenwood Press, Con. 1957).

³⁶ J. M. Samper, *Ensayo sobre las revoluciones políticas y la condición social de las repúblicas colombianas* (París: Imprenta de E. Thunot, Paris, 1881), 486-88. J. Jaramillo Uribe, *El pensamiento colombiano en el siglo xix* (Editorial Temis, Bogotá 1964).

³⁷ J. V. Lastarria, *Estudios políticos y constitucionales*, Santiago de Chile: Imprenta, Litografía y Encuadernación Barcelona, Santiago de Chile 1906), vols. 1 y 2, 271.

The other fundamental piece, within the liberal structure in defense of personal freedom, had to do with the other crucial part of the constitution -more specifically, with the system of *checks and balances*. The structure of “checks and balances” was designed to avoid the ‘double threat’ imposed by the conservative and republican alternatives. In relation to conservatism, the purpose was to avoid the risk of the *tyranny of one*, i.e., abuses such as those imposed by the Crown of England, Spain or Portugal on the American colonies, as well as the arbitrariness of all-powerful Executives. In relation to republicanism, meanwhile, that scheme of controls came to prevent the *tyranny of the many*, sometimes translated as anarchy - an evil widely feared and denounced, in American history.

The best, most sophisticated and influential defense of the structure of “checks and balances” was advanced by James Madison, in *Federalist Papers* n. 51. This is how Madison described the general purpose of the system:

the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.³⁸

The idea was then to endow each branch of government with the necessary means (i.e., veto powers; impeachment; etc.) to contain the encroachment of the others. Although it was a scheme of cross-checks, the fact is that the main control tools were then directed against i) potential abuses by the Executive, and ii) the foreseeable risk of legislative excesses.

To limit executive action – in other words, to restrain the political impulses of conservatism - liberals suggested a variety of measures. At times, they advised remedies such as shortening the President's term of office; preventing presidential re-election; restricting its veto powers (or facilitating the Legislature's capacity of overriding them); and limiting or eliminating the powers of ‘exception’ - to which Latin American executives had so habitually appealed. In Argentina, for example, after the experience of *Rosism* (the decades of Juan Manuel de Rosas’ authoritarian government), liberals decided not only to prohibit presidential re-election, but also to incorporate a specific (constitutional) clause against any delegation of ‘extraordinary powers’ (‘the sum of public power’) such as Rosas had demanded and obtained at the time. In Colombia, meanwhile, liberals launched, from 1850 on, an unusual anti-presidentialist onslaught. They opted, for example, to reduce the length of the presidential term (to only two years);

³⁸ A. Hamilton; J. Madison; J Jay, *The Federalist Papers* (Bantam Books, New York 1988).

limit re-elections; authorize the legislature to reject executive vetoes by simple majorities, etc. In Ecuador, since the Constituent Convention of 1845, liberals promoted the curtailment of presidential powers, and limited the Executive's term of office to four years.

On the other hand (more interestingly for the purposes of this article) we find the multiple strategies employed by liberal constitutionalism to defuse the risk of majoritarianism -in other words, to restrain the political impulses of republicanism. To this end, liberals employed a multiplicity of strategies that included, in the first place, the suppression or de-activation of already existing institutional mechanisms or institutions (i.e., town meetings in the US; *cabildos* in Latin America) that, in one or another way had favored citizen intervention in public affairs.³⁹

In addition, liberals proposed the introduction of far-reaching reforms, capable of containing (what they described as) the 'fury' of 'unchecked legislatures'. To this end, they concentrated on two main paths. On the one hand, they tried to widen the existent gap between electors and elected representatives. On the other hand, they increased the 'veto points' over the legislature. To take the first of these paths - separating representatives from the represented - liberals proposed measures such as extending the terms of legislators, or authorizing their re-election. With these initial provisions, liberals sought to oppose some common institutional demands, within radicalism, such as those referring to frequent elections and mandatory rotation. In other common cases, liberals proposed indirect elections, and favored small representative bodies within broad electoral districts. Again, through such initiatives, liberals opposed the radicals' preference for direct elections (which promised greater citizen engagement with the institutional system); large legislatures (intended to represent the truest 'picture' of the community); and spatially confined districts (which ensured closer contact and knowledge between citizens and politicians).

In relation to the second goal – surround the legislature with controls - liberals favored -first of all- the creation and strengthening of the Senate (a chamber designed to accompany and, above all, moderate the impulses of the lower House). This decision also meant rejecting the unicameral systems proposed by republicans, both in the United States and in Latin America. Similarly, liberals favored the granting of veto powers to the Executive, and guaranteed the judicial branch the power to review the validity of laws.⁴⁰ In fact, liberals considered it of crucial importance to have an independent and powerful judiciary, giving rise to the formation of what is today considered a counter-majoritarian power. However -it should be noted- the design of both the executive and legislative branches, also reflected assumptions of democratic distrust. This is what Roberto Unger called the "dirty little secret" of our institutional system, namely, a "ceaseless

³⁹ M. Jensen, *The New Nation. A History of the United States During the Confederation* (Alfred Knopf, New York 1967), 168.

⁴⁰ C. Hale, *Mexican Liberalism in the Age of Mora, 1821-1853* (Yale University Press, Conn. 1968).

identification of restraints upon majority rule”.⁴¹ In short: liberalism protected personal liberties, usually by paying the price of collective self-government.

Final words: The “empty box” of egalitarian constitutionalism

The three constitutional models -conservatism, republicanism, liberalism- examined in the previous pages leave us faced with an “empty box”, for which I have reserved the name ‘egalitarian constitutionalism’. We can speak of an ‘empty box,’ in relation to the three other alternatives, which find numerous references in the constitutional history of our countries. The “empty box” - the missing alternative – refers to a constitutional model that seeks to honor the two founding ideals of constitutionalism: personal autonomy and collective self-government.

The “presence of this absence” raises numerous questions regarding our constitutional practice. First of all: why has this alternative not gained appeal? Why is it that we don't have good examples of “egalitarian constitutionalism”? Is it (theoretically, logically, practically) impossible to hold both ideals at the same time? The fact is that, for a variety of reasons, it has proven very difficult in practice to articulate an institutional system capable of ensuring both individual freedoms and collective self-government at the same time. These reasons may have to do with inertia, lack of imagination, fear, risk aversion, etc. All these elements converge in the -astonishing- preservation of an institutional scheme that -after more than two centuries- remains the same as itself, despite its obvious flaws; despite the fact that the social and political landscape changed dramatically (we live today in numerous, heterogeneous and multicultural societies, when our constitutions were designed for small and homogeneous ones); despite the fact that the problems (the “dramas”) we confront today, are completely different from the tragedies that our societies confronted, two centuries ago; despite “democratic erosion”; etc. We can all agree, then, that a profound change is needed in an institutional system that is outdated and corroded from within. But where to direct such changes, concretely? To place ourselves in the ‘empty box’ of “egalitarianism” does not guarantee us clear or obvious answers as to what needs to be built. Against the prevailing skepticism, however, there is still much that can be said, particularly about what should not be accepted, but also - to some extent - about what should be demanded from our constitutional system. Of course, I cannot and do not have the space to develop such responses. However, I can advance some suggestions, related to the requirements of egalitarian constitutionalism.

Trying to imagine the distinctive features of this “empty box” -the egalitarian model- let me suggest the following. On the one hand, and in matters of *personal liberties* (individual autonomy), egalitarianism would be closer to liberalism. Like it, and seeking to honor the *equal moral dignity* of individuals, it would be concerned with ensuring that each individual chooses and carries out his or her own life plan (or, rather, each person in

⁴¹ R. Unger, *What Should Legal Analysis Become?* (Verso, London 1996), 72.

relationship and in dialogue with those around him or her.⁴² However -and here in contrast to liberalism- egalitarianism would refuse to consider the State as the only or main threat to personal freedoms. For this reason, it would refuse to "tie the hands" of the State or undermine its democratic authority, as the main strategy to protect those liberties. As we know, there are various ways to guarantee such freedoms, which do not require weakening democracy (i.e., from the use of police and custody forces; to the provision of material goods).

In this sense, and in matters of *collective self-government*, egalitarianism would be closer to republicanism. Like it, it would take the strengthening of democracy as the central objective of its policies. This point is extremely important, particularly if we accept - as I propose here to accept- that the prevailing constitutional structures are molded from the liberal model (beyond the conservative outbursts that seem characteristic of our time). In other terms: within a constitutional landscape that is dominated by (different forms of) liberalism, egalitarianism proposes to reinforce the democratic aspects of constitutionalism. For this purpose, it would encourage citizen intervention in common affairs; promote open and collective debates on issues of public interest (or "public morality"); strengthen "vertical accountability" (citizen control over public officials); favor the entry of new and silenced voices into the public sphere; etc. Also, and for different reasons -its belief in the equal dignity of individuals, its rejection of hierarchies, domination, exploitation; the importance it assigns to public debate and mutual persuasion; etc.- egalitarian constitutionalism would be committed to more dialogic or conversational conceptions of democracy.⁴³

In what follows, and trying to better understand the content and scope of egalitarianism, I will select some of the most common institutional reform proposals of our time, and I will show how egalitarianism would relate to them (typically, explore how and why it would oppose them). To make the comparison more interesting and productive, I shall briefly refer to current reform initiatives, derived from the constitutional models already examined, and typically made in the name of strengthening democracy. I shall examine: i) (conservative) proposals to strengthen presidential authority; ii) (radical) proposals in favor of direct popular participation; and iii) (liberal) proposals in favor of a renewed type of judicial intervention.

First of all, let us refer to proposals in favor of concentrated power, strong presidentialism -the 'unity of power'- which are increasingly influential in our time. It seems clear that such initiatives cannot but be rejected from an egalitarian perspective. Because: how can the alternative of power concentrated in one person be acceptable to an egalitarian conception of constitutionalism, which seeks to assert itself in the 'equal power of each'? Similarly: how could a conception based on the idea of democratic

⁴² J. Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy and Law* (Oxford University Press, Oxford 2011).

⁴³ R. Gargarella, *The Law as a Conversation Among Equals* (Cambridge University Press, Cambridge, 2023).

equality defend a political regime that is affirmed on the extreme inequality of decision-making power? And how is it that a vision of constitutionalism that values diversity and democratic debate could affirm a system where "one" seeks to decide about all relevant political matters (if not also about "what is right"), on behalf of all? It should be clear: *constitutional egalitarianism represents the antitheses of the old conservative constitutional project, in any of its current variants.*

And what about the alternative of, say, plebiscitarian political regimes, this is to say, regimes where the most relevant public issues are subject to popular consultation? It seems clear to me, again, that constitutional egalitarianism cannot but reject such an approach. In fact: how could the affirmation of a plebiscitary conception, which replaces rather than nurtures mutual conversation, be conceivable for a vision that values deliberation, dialogue between equals, cooperation, mutual aid and mutual correction? How can public conversation be thought to be favored - rather than dishonored - when complex questions (i.e., Brexit; the Colombian Peace Agreement) of infinite consequences are subjected to a 'yes' or a 'no' -this is to say, to binary choices that polarize opinions, deny nuances and discourage public debate?⁴⁴ Defending the "conversation among equals" as an ideal should lead us to reject, rather than demand or acquiesce in, the plebiscitary moves that are tried in so many modern democracies - consultations that confine our intervention to a margin, and to the last moment. Popular consultations are extremely dangerous tools, particularly in the context of unequal societies, where power is concentrated in the hands of the elites.⁴⁵ It should be clear: *the egalitarian project is directly opposed, also, to the current (populist) variations of the old republican constitutional project.*

For ultimately similar reasons, egalitarian constitutionalism cannot accept many of the alternatives today associated with the liberal constitutional model - that is, the currently dominant model, based on the American scheme of "checks and balances" + a Bill of Rights. In particular, constitutional egalitarianism differs from alternatives that seek to strengthen (even more) the weight of the judicial branch, within the tripartite scheme of powers. Indeed, in the current context of institutional crisis, these types of solutions further weaken the democratic side of constitutionalism, which egalitarianism seeks to strengthen. Furthermore, egalitarian constitutionalism cannot favor an institutional scheme where "the last word" (i.e., in matters of constitutional interpretation)

⁴⁴ For example: when society is asked, in a referendum, about a 'Brexit' in England, a 'Peace Accord' in Colombia, a Constitution of hundreds of articles in Bolivia, we might say that democracy is offended rather than honored. The democratic citizen - not necessarily the most politicized, not the most activist - has the right to something else, radically different: he has the right to talk about the details of that agreement; to ask for corrections; to add nuances; to point out, for example, that he 'agrees with articles 1, 2 and 3, but not with article 4, and only partially with article 5, although he would prefer a new article 6...'

⁴⁵ These "appeals to the people" often subject us to what I have called 'democratic extortion', that is, they force us to subscribe what we repudiate, in order to make possible what we defend. R Gargarella, *The Law...* In this way, the elites in power are enabled to obtain what they would not otherwise obtain (typically, their re-election, the strengthening of their own position, etc.). And - to make things even worse - they are enabled to do so by awarding themselves the "honorary medal" of democratic participation.

remains in the hands of a few. Much less so, in the context of multicultural societies - defined by "the fact of pluralism"- and marked by deep disagreements about values - marked by "the fact of disagreement".⁴⁶ Of course, we all know by now that there is no such thing as a constitutional 'last word'.⁴⁷ However, this circumstance still does not justify the leading role or the decisive weight that the judicial branch maintains, in matters of constitutional interpretation, within a democratic, divided, diverse and multicultural society.

Seeking to alleviate this kind of criticism, many authors advocated, in recent years, in favor of 'dialogic' modes of judicial intervention: in this way, they aimed at demonstrating the compatibility between judicial decision-making and (even) the most demanding conceptions of democracy.⁴⁸ For now, however, I will simply say that the fact that a certain body had the capacity and ability to act in a justified way, does not necessarily justify, much less avoid challenges to, the powers and capacities assigned to it. This is particularly so if the structure of that institution and the incentives that surround it are not appropriate to favor the potential courses of action that would justify its work (if our judges have the institutional capacity, power and motivation to expand their influence in the decision-making process, why would they prefer to limit themselves?).⁴⁹ *In sum, it should be clear that the model of egalitarian constitutionalism is, in principle, inconsistent with (even the best versions of) the old liberal constitutional project.*

In short, there is much we already know about what cannot or should not be done, in constitutional terms. There is a lot we know about the institutional places where it is not appropriate to return; and also, about the institutional horizon where we should go. Within an constitutional picture that is sometimes gloomy, the good news is the existence of widespread awareness about the seriousness of the "democratic problem" that affects

⁴⁶ J. Rawls, *Political Liberalism* (Columbia University Press, New York, 1991); J. Waldron, *Law and Disagreement*..

⁴⁷ R. Dahl, "Decision Making in a Democracy: The Supreme Court as a National Policy-Maker" (1957) *Journal of Public Law*, 279; B. Friedman, "Dialogue and Judicial Review" (1993), 91 *Mich. L. Rev.* 577.

⁴⁸ See, for example, P. Beaumont, C. Lyons & Neil Walker (eds.), *Convergence & Divergence in European Public Law* (Hart Publ., Bloomsbury 2002); R. Dixon, *Responsive Judicial Review: Democracy and Dysfunction in the Modern Age* (Oxford University Press, Oxford 2023); A. Kavanagh, *The Collaborative Constitution* (Cambridge University Press, Cambridge 2024); A. Von Bogdandy, "Pluralism, direct effect, and the ultimate say: On the relationship between international and domestic constitutional law" 3-4 *International Journal of Constitutional Law* 6, 397-413.

⁴⁹ On the other hand, the "counter-majoritarian objection" (in any of its forms) should not lead egalitarianism to defend the strengthening of the authority of Congress, as if the achievement of said objective necessarily implied the strengthening of democracy. R. Bellamy, *Political Constitutionalism* (Cambridge University Press, Cambridge 2009); M. Loughlin & N. Walker *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press, Oxford, 2008); M. Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press, Princeton); J. Waldron, *Law and Disagreement*...; This correlation (stronger Congress/stronger democracy; Congress as "the voice of the people") is unsustainable, particularly in a context like the current one, marked by "democratic erosion", the "capture" of politics, and an (irreparable, irreversible) crisis of representation. The democratic deficit affecting our institutional system should not (cannot) be solved by shifting from (the priority of) the 'judicial elite' to (the priority of) the 'legislative elite'.

our institutional system. This recognition has led, fortunately, to "trial and error" around multiple, and promising, "democratic alternatives" -I am thinking of alternatives such as "citizen assemblies"; "prior consultation" processes; "public hearings" in Congress and in the courts; new types of "jury systems", etc.

Of course, none of these innovative mechanisms can, by themselves, calm the "democratic anxiety" we experience - much less if they are merely "optional" mechanisms. Nor is it surprising that some of the most attractive institutional innovations turn out to be "colonized" or "captured"; or that interesting "bottom up" alternatives tend to transform, over time, into "top down" impositions. None of this denies, however, the value of our democratic demands; the importance of our search for alternatives; the importance of institutional experimentation. Therein lies the relevance of egalitarian constitutionalism: we urgently need to reinvigorate the democratic contents of our constitutional life.