RESEARCH REPORTS AND NOTES

TOWARDS A TYPOLOGY OF LATIN AMERICAN CONSTITUTIONALISM, 1810–60

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Abstract: This paper presents a typology of different constitutional conceptions, which are designed to help us classify the constitutional conceptions and debates that appeared in Latin America during the nineteenth century and to compare the opposing ideas that were present at the time. Three broad categories of constitutional projects are defined: (1) conservative models, characterized by the defense of political elitism and moral perfectionism; (2) majoritarian or radical constitutions that sought to reach out to the popular sectors and anchored themselves in a form of moral populism; and (3) the individualist or liberal constitutions. This analysis explores the ideas and principal architects of these various constitutional initiatives for a number of Hispano-Latin American nations for the 1810–60 period, when the basic features of their constitutions were shaped.

During the nineteenth century, Latin American countries enacted more than a hundred constitutions. This over-production of constitutions might belie that these were serious attempts to build new institutions, but instead were either superficial statements, or an expression of overarching power—in effect, a symbolic gesture made by tyrants seeking to create a certain level of legal legitimacy for their regimes. Despite this first impression, these constitutions were rarely whimsical. The various documents express differing constitutional conceptions of how to organize the "basic

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structure" of society.[1] In a fundamental way, the nineteenth century represents Latin America's founding period as the enduring forms of the region's contemporary constitutions were established during that time. In the debates that surrounded their adoptions we can find the origins of many of the legal debates and discussions that continue today.

In this Research Note, I present a typology of different constitutional conceptions in order to help classify the legal frameworks that appeared during this founding period as well as to compare and contrast the opposing ideas present in their making. My discussion mainly refers to the 1810–60 period, when the basic features of these constitutions were shaped, and focuses primarily upon seven Hispanic-American countries: Argentina, Colombia, Chile, Ecuador, Mexico, Peru, and Venezuela. These countries merit particular attention, not least because of the richness and broader influence of their constitutional discussions.[2]

In the study of these constitutional endeavors and frameworks it is helpful to start by making an important distinction between what are normally considered their two main parts. The first—the "declaration of rights"—establishes the rights and obligations of the people. The second part relates to the "organization of power," and refers to the distribution of functions and capacities between different branches of government. This facilitates the unpackaging of the different constitutional models which I have come to classify into three types. *Conservative* models are those characterized by their defense of political elitism and moral perfectionism; *majoritarian*, or *radical*, models are those constitutions anchored in political majoritarianism and an implicit defense of moral populism; while *individualist*, or *liberal*, constitutions emphasize the limitation of powers and moral neutrality.

These different constitutional models are, however, only "ideal types" such that we should not expect to find their exact or "pure" expression in any particular document. Indeed, constitutions in most American countries represented a mixture of one or more of the elements from the aforementioned models such that some constitutions were more conservative, or liberal, or radical than others. However, in early Latin American history we find some paradigmatic constitutions that do, in fact, quite closely resemble the ideal types. These will help us to better understand the ideological underpinnings that were sanctioned or proposed during the period. I will analyze each model in turn below.

1. I borrow the term from John Rawls. In his opinion, this "basic structure" would include the most important institutions of society, in charge of distributing the fundamental rights and duties and dividing the advantages that derive from social cooperation. (Rawls 1971, chap. 1).

2. I do not discuss the important—but exceptional case of Brazil. In Brazil, independence was followed by the establishment of an empire that lasted for most of the century.

THE CONSERVATIVE MODEL

Moral Perfectionism: Preventing the Loosening of Moral Bonds

A prime example of Latin American constitutional conservatism is embodied in a claim made by Gabriel García Moreno when he assumed the presidency of Ecuador in 1869. In his inaugural speech he stated that

> [el primer objeto de mi administración es el de] poner en armonía nuestras instituciones políticas con nuestra creencia religiosa; y el segundo, investir a la autoridad pública de la fuerza suficiente para resistir a los embates de la anarquía. (Romero and Romero 1978, 115)

García Moreno thus summarizes the two main objectives that I associate here with conservatism. He explicitly asserts that his executive powers are directly committed to defend a particular conception of the good—in this case, the Catholic creed—and that he will confront forcefully any who seek to obstruct that mission. The first of these two commitments, moral perfectionism, assumes that there are certain objectively defined and valued conceptions of the "good" and that these conceptions must prevail socially, even independent of popular opinion. Thus, conservatives commonly justify the use of the state's coercive powers in defense of their prejudiced views. One of the best Latin American examples of a moral perfectionist is Juan Egaña, the noted Chilean legal theorist whose work became enormously influential both in Chile and abroad. In retrospect, his ideas, and those of his son Mariano Egaña, are often considered to be responsible for the legal and political stability that came to distinguish Chile's political life from the beginning of the 1830s. Egaña's moral perfectionism was clearly embodied in the Constitution of 1823 (written during Ramón Freire's presidency) by the creation of a "conservative senate" in charge of controlling "national morality and habits" as well as overseeing the creation of a strict "Moral Code," both of which aimed at regulating the moral life of Chile's inhabitants, sometimes down to the smallest details. The "Code," also written by Egaña, defined, among other things, the relationship between parents and children, how national festivities should be celebrated, and what national dances, music and clothes should look like. It also established strict penalties for so-called crimes such as gambling, drunkenness, dueling, atheism, and satire (Egaña 1836; Collier 1967, 268). In addition, the code regulated the use of alcohol, provided for strict procedures of conduct for private and public ceremonies, and created prizes for those considered to be the best citizens (Collier 1967, 269).

Beyond the code's more picturesque details, however, it is important to recognize the impact such morally perfectionist views had upon the design of constitutional rights. Conservatives set themselves against the typical view of human rights as being something fundamental and unconditional, and instead held that rights depended upon, and should

serve, other more important causes. Conservatives assumed the existence of a preexisting and often divine moral scale, with intrinsically valuable principles that the state always had to protect and promote. They assumed that the defense and cultivation of these values would guarantee personal and social order, whereas their violation would threaten both. In addition, it was assumed that any attack upon, or inadequate defense of the moral foundations of the country, would result in the debasement of the entire society. Thus, individual rights were contingent upon their accommodation within the higher or preeminent a priori principles.

Another important example of this view comes from Ecuador's government. During the second half of the nineteenth century, president García Moreno was particularly impressed by Chile's conservative Constitution of 1833. Seeking to emulate this document, the Ecuadorian constitution declared the Catholic religion the official faith of the country to the "exclusion" of all others. Article 2 proclaimed that the expression of thoughts would be totally free from censorship so long as these respected "religion, morality, and decency" (Efrén Reyes 1942; Borja y Borja 1951), and in a similar vein, a person's right to association was recognized so long as he or she respected "religion, morality, and public order" (art. 109). In Colombia, too, article 16 of the Constitution of 1843 proclaimed that the Apostolic Roman Catholic religion was "*el único culto apoyado y mantenido por la República*," and we also find very similar propositions appearing in Bartolomé Herrera's constitutional proposals of 1860 as well as within two of the most important constitutional conventions of the time: those of Mexico in 1857, and Argentina in 1853.

Political Elitism: The Impossibility of Democracy in a Society That is "Full of Vices"

The examples presented thus far demonstrate the elitist character of such 'perfectionist' models. Such models, maintained the philosopher Thomas Scanlon, have a "strong tendency towards elitism," placing "a greater emphasis on the needs and interests" of a few, against the needs and interests of all others (1975, 171). Conservatism therefore combines an ontological position that there are certain objectively valuable conceptions of the good life, with an elitist epistemological position that maintains that the majority of the people are not adequately prepared to realize those valuable conceptions of the good life. In constitutional terms, such assumptions implied the defense of a centralized power structure that was capable of overcoming the primary parliament's social conflicts of the day. Therefore, conservatives usually supported the creation of a strong presidency, wanting a national authority with the means to prevent "internal disorders," which were perceived to be widespread after the independence revolutions. Conservatives also wanted this

authority to be capable of making political decisions without any interference from the popular sectors. Thus, they defended centralist regimes; created very weak parliaments; supported the creation of a strong, and often aristocratic senate (as well as a judiciary detached from the people); and sustained a powerful army.

The most common of these conservative political strategies was bolstering the president's political powers and vesting him and his office the following: control over interventions in the political affairs of the states; broad powers of veto; broad legislative capacities, often including the power to directly dissolve congress; judicial power of pardons and amnesties; a decisive role in the selection of judges and ambassadors; the capability of dealing and negotiating with other nations; a discretionary capacity for designating and removing ministers; control over the armed forces; and, the capacity to declare war as well as to sign peace treaties. In addition, they sought to ensure a long mandate for the president, allowing reelection and making him unaccountable for the acts of his administration. The executive office was invested with "extraordinary powers" during "internal or external crises"; and, when necessary, possessed the power to declare a state of siege. These were fulsome powers indeed.

Perhaps the staunchest defender of this strong presidential structure in Latin America was Simón Bolívar. Bolívar was deeply shocked by Venezuela's 1811 constitution that, among other things, provided for a tripartite executive. In his message to the Congress of Bolivia, inaugurating the constitutional convention that would ultimately end with the adoption of the 1826 Bolivarian constitution, Bolívar underscored a proposition that he had defended throughout his adult life—that of a life-term and unencumbered presidency (Bolívar 1951). Bolívar was not alone in defending the concentration of powers in the hands of the executive. In 1860, the cleric Bartolomé Herrera also made reference to similar goals. The Chilean Constitution of 1833, which with little modification remained in force until 1925, also favored presidential authority—the president was allowed two consecutive five-year terms and was endowed with significant emergency powers, including the suspension of the constitution and most civil rights (Vanorden Shaw 1930, 118–19).

The model of a strong executive was adopted in Ecuador, most pointedly in its 1869 constitution as well as in most Bolivian constitutions, from the one written by Bolívar in 1826, to those of 1831, 1834, 1843, and 1851. In Colombia, these ideas influenced the constitutional projects of 1826, 1828, and 1830 (note, all inspired by Bolívar's ideas), shaping the important Constitution of 1843 (that was written by extreme conservatives José Eusebio Caro and Mariano Ospina) and the 1886 constitution, which represents one of the most important examples of this conservative model. In Peru, the constitutions of 1826 and 1839 allowed for the

delegation of "all necessary powers" to the president in case of crisis; while that of 1860 also provided for further strengthening of the authority of the executive.

Within this context, the senate was always expected to play an important role in controlling the "ambitions" and "excesses" of the lower-house. The requirements of advanced age and considerable wealth were normally preconditions for becoming a senator, and their frequently indirect election and extended mandates exceeding those of the lower-house members of the popular branch gave senators the upper hand. For the conservatives, the senate was the ideal institutional tool for the articulation of elitist assumptions, and thus became the expression of the "principal interests" of the country and the voice of those who had an overarching stake in the society.

In Peru, Bartolomé Herrera proposed that the senate should be composed of the clergy, the military, the sciences, the administration, the landowners, the mining and commercial interests, and the judiciary. Similarly, the Argentinean Constitution of 1819 and Lucas Alamán's constitutional project of 1834 in Mexico, envisioned the members of the senate composed of representatives of the church, the military, and the university (Alamán 1997; see also the Chilean constitutions of 1822, 1823, and 1833). Bolívar, true to form, in 1819 proposed the creation of a hereditary senate, largely since he felt that the high qualifications necessary to become a senator could not be left to the outcome of elections.

THE MAJORITARIAN MODEL

Radicalism: Honoring the "General Will"

Although nineteenth-century Latin American history does not provide us with many well-designed radical model constitutions, we do find many constitutional initiatives that are clearly associated with it. The constitution that probably best fits the radical ideal is Mexico's 1814 Constitution of Apatzingán, written by the revolutionary priest José María Morelos y Pavón. In general terms, José Artigas' institutional proposals can also be linked to this view, as can most of the initiatives that came from the Chilean Sociedad de la Igualdad, and from some of the Mexican *liberales puros* during the 1850s. The main influence of the radical view, however, did not come from what the radicals actually did, but from what they threatened to do. Their proposals represented what their adversaries most feared, forcing the latter to create new institutions capable of preventing what they perceived as more or less imminent popular rebellions.

Constitutionally speaking, the radical project favored the establishment of republican and federal governments, a wider popular participation in politics, and the institutional prevalence of the most popular branch of power, the house of representatives. Their strong defense of

the house normally implied a hostility towards the senate, an institution normally deemed aristocratic, as well as a rejection of a powerful executive. Instead of the prevailing ideas of "checks and balances," which they perceived as inadequate, the radicals defended a system of strict separation of powers. Moreover, they defended the creation of large, heterogeneous representative bodies and believed, as the Ecuadorian Juan Montalvo put it, that "*grandes ideas sociales*" required the approval of "*un cuerpo augusto y numeroso*" (Roig 1984, 231–32). Any other model would be unable to properly recognize and integrate all differing viewpoints within a society. Another significant part of the radicals' political framework related to the idea of strengthening relations between the representatives and the people, in sharp contrast, of course, to that of their opponents who sought to separate the people from their delegates. Not surprising, many radicals rejected indirect election of representatives and opposed bicameral legislatures which, in their opinion, meant acquiescence to the "division" of the popular will which they saw as paramount and indivisible. Any attempt seeking its fragmentation was to be resisted and rejected.

An early defense of a unicameral legislative body appeared in Mexico in the 1814 Constitution of Apatzingán which followed the French revolutionary constitutional model of a single-chamber congress. An important feature of the discussions at the constitutional convention of 1857 was the proposed suppression of a second legislative chamber (Reyes Heroles 1957). In Peru, too, the idea of a unicameral legislature was popular from the early period of the country's constitutional history and was evident in the various constitutions of 1823, 1855, and 1867.

An obvious counterpart to these moves to strengthen the powers of congress was the restriction of the authority of the judiciary and, above all, to limit the powers of the executive. In Latin America—just as had occurred in the United States—radicals identified a strong executive with that of a monarchy, and for many the creation of a powerful executive was tantamount to the return to an earlier model of domination. Not surprisingly, therefore, they sought to reduce the functions of the executive and its powers over the army, subordinating its mandate to the legislature and limiting its tenure. In Mexico, the Apatzingán constitution of 1814 as well as Artigas' early constitutional proposal of 1813 not only contained restrictions upon the military and upon the powers of the executive, but also reduced its mandate to a one-year term.

Radicalism and Rights: Cultivating Virtue

On the matter of rights, majoritarians always had a problem. Undoubtedly the harsh experiences of the initial years of the revolution, when radicals played a significant role—thereby contributing to their bad

image—was one reason; but the fact remained that the radical doctrine was not very well prepared to counter such attacks and criticism. Clear tensions existed between the defense of majority claims on the one hand, and the defense of individual rights on the other. However, radicals preferred to defend the "will of the majority" first, and relegated individual rights to a subordinate level. For many, the triumph of the radicals implied the triumph of populism and the end of all individual rights. In addition, the radicals' concern with the "cultivation" of a virtuous citizenship further reinforced the idea that their project was incompatible with autonomous individual choice.

The 1814 Constitution of Apatzingán provides a good example of the risks associated with the radical proposals. After declaring that law was the expression of the general will aimed at obtaining common happiness (art. 18) and affirming legal equality (art. 19), the constitution showed its populist underpinnings. In article 20 it stipulated that all citizens should obey the laws even if they personally disapproved of them. This statement did not seek to challenge one's freedom or one's reason: it merely represented "un sacrificio de la inteligencia particular a la voluntad general." Meanwhile, article 41 defined the profound duties of revolutionary citizens, stating that the citizens' duties to their country included a complete submission to the laws, the absolute respect for its authorities, their immediate disposition to contribute to the public expenses, and their "sacrificio voluntario [sic] de los bienes y de la vida cuando las necesidades lo exijan" (art. 41: 383).

The revolutionaries' blind defense of the general will was the product of their belief in the infallibility of popular decisions, as Ignacio Rayón argued in article 6 of his *Elementos* (one of the most important intellectual pieces written in order to shape and justify the constitution), "ningún otro derecho a esta soberanía puede ser atendido, por incontestable que parezca cuando sea perjudicial a la independencia y felicidad de la nación" (Churruca Peláez 1983, 89). Similarly, in his influential paper "Sentimientos de la Nación," Morelos ratified the absolute supremacy of the will of Congress (see also Artigas' references to the moral prerequisites of the good republic, and the importance of recreating citizenry in Río de la Plata [Frega 1998; Street 1959]).

Finally, it's important to recognize that the radicals' program did include a substantial revision of the status quo, proposing, for example, a radical redistribution of land. Here, for example, one finds the very progressive *Reglamento Provisorio* advanced by José Artigas who, through his *reglamento provisorio de la Provincia Oriental para el fomento de la campaña,* set in motion an important plan for land redistribution (Street 1959). In Ecuador, Juan Montalvo famously campaigned for a redistribution of land, drawing his claims from the writings of the classical republicans (Roig 1984). In Chile, the two most important leaders of the Sociedad de la

Igualdad, Santiago Arcos and Francisco Bilbao, defended similar measures (including, in Arcos' case, a proposed agrarian reform aimed at creating a class of small landowners). In Colombia, Murillo Toro, who would later become the president of Colombia on two occasions, was one of the main advocates of land reform (Molina 1973). In Mexico, too, the constitutional debates of 1857 were unprecedented, including for the first time a series of proposals relating to land redistribution. Central to the debates, then, was land redistribution, so much so that the president of the convention, Ponciano Arriaga ("*el liberal puro*"), summarized the reformists' position when he stated that the entire constitution should be seen as the legal expression of land reform: the constitution, he said, is "la ley de la tierra" (Zarco 1957, 388–89; Sayeg Helú 1972).

THE LIBERAL MODEL

Liberalism and the Organization of Power: A System of "Checks and Balances"

Ultimately, liberal theory had a decisive influence on the development of American constitutionalism. Compared with the radical and conservative alternatives, it soon appeared as an attractive option. The liberals showed the differences that separated their view from the two other models—most succinctly, the need to prevent the evils of both "tyranny" and "anarchy." With the liberals in power, they promised, neither of these horrendous scenarios would come to pass. First, they argued that they would prevent the discretionary use of power and, in particular, any attempt to use the legislature as an instrument in the hands of dominant groups. Second, they promised that their government would put an end to the "moral dictatorship" that certain religious groups wanted to impose upon the entire society. Translating those claims into institutional terms, the liberals proposed to ensure both the equilibrium of powers that they believed their opponents sought to destroy as well as certain basic rights that the radicals or conservatives did not recognize or simply dismissed.

Underlying such goals was a basic commitment to each person's individual autonomy and the right to choose freely. For the liberals, nothing was as dangerous to individual liberties as the coercive powers of the state. Not surprisingly, therefore, liberals directed most of their efforts to the task of limiting the state: only a state with very limited functions and strictly controlled by independent agencies seemed compatible with the idea of individual freedom.[3] As noted Colombian liberal intellectual José María Samper defined it, they

3. See also the writings of the Colombian intellectual Florentino González (Molina 1973, 86) or the Argentinean Juan Bautista Alberdi (1920, vol. IX [2], 155–56).

began to defend an *individualist, anti-collectivist and anti-state* position (Samper 1881, 486–88).

Liberals tried to weaken the powers of the legislature, and in particular the powers of the house of representatives, which they assumed to be the most threatening institution given its numbers and the support that it could easily obtain from the wider populace. Liberals promoted the creation of a strong senate, conceded "veto powers" to the executive, and fostered the development of judicial review. All these *counter-majoritarian* measures, they believed, would make it impossible for the house of representatives to impose its oppressive control over society.

If the main task of individualists became that of limiting the excesses of the majority group, then the second was to constrain the potential abuses of the executive. In order to achieve this, they suggested many different mechanisms: limits upon the president's term of office, no reelection, restrictions upon his powers of veto or congress's ability to override it, and the elimination of the executive's so-called extraordinary or exceptional powers—a frequent feature in Latin America. An extreme example here is the Venezuelan Constitution of 1811, which "dissolved" the single executive creating a plural one, composed by three members—an example followed by Peru in 1823. The executive branch was divided in three, reducing its military and legislative capacities, and its powers of veto were suppressed. In Colombia the powers of the executive were constrained under the Río Negro Convention by reducing the presidential mandate to only two years.

For the liberals, the organization of the judicial system was very important, and they were probably the only group who seriously considered how best to organize this particular branch. As Mexico's José María Luis Mora asserted: "In a wisely constituted nation which has adopted for its government the representative system, the effective independence of the judicial power is the complement to the fundamental laws and the guarantee of public liberties" (Hale 1968, 93).

Moral Neutrality: A "Wall of Separation"

In order to ensure individuals' interests, liberals tried to "shield" individuals' lives. They wanted—as Thomas Jefferson stated—to build a "wall of separation" that clearly divided the individual from the state. The model of a state defended by liberals, usually referred to today as the "neutrality principle," implied one in which individuals were allowed to live according to their principles. In broad terms, the neutrality principle for liberals held that the state should not take sides in favor of any particular conception of the good. In Latin America the main

tensions that appeared here were those that arose between the church and the national authorities. However, it is worth noting that the liberals' defense of religious neutrality was soon translated into a different and broader claim, one against any kind of state interventions against an individual's personal convictions.

This helps us gain a better understanding of the constitutional propositions tied to individualism. Among these is the enactment of a Bill of Rights to ensure the protection of the people's most basic rights. In short these were seen to be the "bricks" that gave shape and strength to the liberal "wall of separation." As the notable Victorino Lastarria stated: "The State has for its object the respect of the rights of the individual: there is the limit of its action" (García Calderón 1918, 238). Notably, the first Venezuelan Constitution of 1811 not only abolished the existing *fueros* (immunity) but also proclaimed legal equality between all races, and in Argentina similar attempts were made through the work of the Asamblea del Año XIII. In Mexico, these disputes were even more intense, such that during the first half of the century, Mora and Vice-President Valentín Gómez Farías both made substantial contributions to the struggle against privileges—sometimes even in spite of their own social positions. Although by the mid-1850s most Latin American countries had effectively abolished slavery and titles of nobility the task of establishing legal equality was still at a very early stage. In particular, the church and the military continued to enjoy substantial benefits (such as the *fueros*) that were denied to all other groups. But the liberals' campaign for legal equality and religious neutrality represented only one part of their fight to affirm basic individual freedoms such as the freedom of the press, freedom of association, freedom of education, and the establishment of jury trials and, only in some cases, broader political rights.

In Perú, the fight for such basic freedoms was fundamentally in the hands of liberals, particularly those that formed part of a second generation of like-minded thinkers that included, among others, Pedro and José Gálvez, Manuel Ureta, Benjamín Cisneros, and Ricardo Palma who successfully enacted two famous constitutions: those of 1856 and 1867. In Argentina, the Assembly of 1813 advanced many such liberal initiatives, thereby becoming an example for many Latin American countries, and the struggle for rights perhaps achieved its highest point in New Granada, where the liberal group of *gólgotas* pushed the executive to embrace a number of rights in the constitution as a way of blocking the conservatives' return to power. Also in New Granada, the liberal 1858 constitution went as far as to include the people's right to "traffic in arms and munitions" (art. 11: 4) and the right to "express thoughts in print without any responsibility whatsoever" (art. 56: 4).

CONCLUSIONS

This overview is an attempt to organize and characterize the different constitutional conceptions present in Latin America during the nineteenth century. While fundamentally descriptive, the review raises several important questions for further research. First, it raises the question about why the radical project was relatively ineffectual during this period—specifically, why it generated so many initiatives but almost no constitutions. In short, why were these ideas ultimately not embraced, failing, as they did, to inspire confidence within the dominant elites. Secondly, and in a similar vein, why did the liberal project struggle to create a lasting basis of stability—at least compared to the conservatives. Ultimately they failed to produce a fully liberal constitution, either in terms of the organization of powers (branches), or in terms of the distribution of rights.

Finally, it will be important to continue to explore why Latin America failed to pursue alternative and more egalitarian constitutional models, not least since constitutional ideas and projects either posed restrictions upon individual rights or sought to undermine majority opinions that existed widely throughout the region at the time. Generally speaking, constitutions that were more concerned with individual rights tended to be clearly counter-majoritarian; while those that were more respectful of the majority, showed little respect for individual rights. Thus, we do not find projects that sought to do both: namely to ensure respect for individual rights while also honoring the majority will on public issues. Of course, it might be argued that these two elements fundamentally contradict each other, at least during this formative period of nineteenth-century Latin American constitutions. But such an argument assumes that the respect for rights necessarily opposes the majority will. It also assumes that it is either undesirable or impossible to distinguish between personal and public issues, much less provide solutions to the respective problems. Every society must deal with these questions, and it is possible to conceive a constitution that leaves individual problems in the hands of individuals and collective problems in the hands of the majority group. This paper has focused on what Latin Americans created in nineteenth-century constitutional terms; future research might usefully focus on an analysis of what they failed to create, and why.

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