

Critical Debates

Normative and Empirical Perspectives on Constitutionalism and Presidentialism

Jonathan Hartlyn

- Maxwell A. Cameron, *Strong Constitutions: Social-Cognitive Origins of the Separation of Powers*. Oxford: Oxford University Press, 2013. Figures, notes, bibliography, index, 268 pp.; hardcover \$65, paperback \$31.95, ebook.
- Roberto Gargarella, *Latin American Constitutionalism, 1810–2010: The Engine Room of the Constitution*. Oxford: Oxford University Press, 2013. Notes, bibliography, index, 298 pp.; hardcover \$74, ebook.
- Michael L. Mezey, *Presidentialism: Power in Comparative Perspective*. Boulder: Lynne Rienner, 2013. Bibliography, index, 260 pp.; hardcover \$58, ebook \$58.
- Gabriel L. Negretto, *Making Constitutions: Presidents, Parties, and Institutional Choice in Latin America*. Cambridge: Cambridge University Press, 2013. Figures, tables, appendix, notes, bibliography, index, 296 pp.; hardcover \$95, paperback \$32.99, ebook \$26.

Latin America is experiencing the most extensive and prolonged period of political democracy in its history. Even as scholars debate its nature, extent, and implications, this era has provided an opportunity for scholars to reconsider two other features that have been an important part of the region's history since independence: constitutionalism and presidentialism. A growing comparative and regionally centered literature is examining constitutionalism from independence to the present, and another one is analyzing the implications of presidentialism for stability, democratic governance, and political party systems (among others, see Elkins et al. 2009; Cheibub 2007; Samuels and Shugart 2010).

Over the past several decades, the region has experienced frequent, and sometimes extensive and profound, constitutional change, providing for expanded social and economic rights, elements of participatory and direct democracy, and a seemingly endless array of changes in electoral and political-institutional rules, though always in the context of presidentialism. And we have seen a shift from presidential impeachments and early removals or departures from office to a focus on the risks of hyperpresidentialism and excessive re-election for democratic governance, an effective separation of powers and the rule of law.

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Constitutional replacements (“refoundations”) have been advanced by politicians and social actors and have captured the imagination of voters in several countries as a key way of solving their countries’ problems. And throughout the region, the frequency of changes regarding electoral rules and presidential elections and powers has blurred the lines between ordinary politics (conflict within prescribed rules) and constitutional politics (conflict regarding rules, including which should be changed and how). Unlike past eras, however, these changes have usually occurred while maintaining (if frequently altering and sometimes considerably manipulating) the electoral rules of the game, rather than as part of changes between oscillating authoritarian and democratic regimes.

The books reviewed here examine themes related to these issues with analytical approaches that range from deeply historical and normative to more contemporary and empirical. They provide important perspectives on basic questions, such as the implications of different conceptualizations of political democracy, the evolution of presidentialism, the role and proper scope of constitutionalism, and the implications of different types of reforms for executive power. They also address questions about why constitutions have been modified so frequently in the region and what this says about the importance and potential independent impact of political institutions on socioeconomic and political processes.

PRESIDENTIALISM AND THE SEPARATION OF POWERS

In spite of all the constitutional changes in the region, there is remarkable consistency in certain institutional choices, principally with regard to presidentialism. Michael Mezey’s book argues that over this past century, countries with presidential forms of government have seen a steady enhancement in presidential power. He sees this as the result of three major factors. One is the expanding role of the state in the lives of citizens, which ironically has been facilitated by legislatures expanding the role of bureaucracy and thus enhancing executive power. The second is that an increased number of policy questions are globalized in nature, which inevitably devolves more power to the executive. Third, universal suffrage, in the context of new forms of electronic mass media, has encouraged even greater personalization of government and politics.

Mezey believes that the constitutional effort to restrain executives while simultaneously empowering them has largely been overcome by the inexorable forces he identifies. At the same time, he does provide multiple country examples both of significant differences across country cases and important short-term variations within countries over time. He argues that given the ability of strong leaders to undertake decisive action and the tendency of citizens and even other (often unimpressive) state institutions sometimes willingly to cede power to the executive, this may not necessarily be disadvantageous. He suggests that parliamentary regimes are better able to manage the risks generated by the forces he identifies, though he does not extensively analyze this theme. He also discusses potential challenges resulting from

excessive executive authority, ranging from discretionality of action and potential instability due to this personalization of power to corruption and authoritarianism. In a way that will resonate with critics of hyperpresidentialism in Latin America, he concludes by noting that popular presidents today may be like the “untamed princes” that Enlightenment philosophers addressed, though now able to rely on democratic legitimacy.

Restraining executives (whether also empowering them or not) inevitably requires effective separation of powers. Maxwell Cameron’s book is a profound and sweeping intellectual history of this concept from the time of the Greeks to the present that seeks to advance political theory rather than to test arguments through empirical analysis. Its overarching framework, described as social-cognitive, asserts that the emergence of literacy in conjunction with the continuing role of language was essential for true constitutionalism and the separation of powers to emerge.

One of the book’s core arguments is that the separation of powers—that is, when states separate executive, legislative (deliberative), and judicial functions—serves not only to constrain state agents but also to enhance state power because it helps to resolve coordination problems within the state and between the state and society. For Cameron, the separation of powers is a “necessary precondition for patterns of enduring and large-scale collective action,” though fortunately he goes on to note that “*some* of the most powerful states in human history have been constitutional ones” (10, emphasis added). Without this qualification, readers would be left to wonder about country cases such as the People’s Republic of China or Cuba, which are never addressed in the book.¹

Cameron reviews three critical turning points in the evolution of constitutional thought: the role of literate elites of the Greco-Roman era, particularly that of Aristotle, in the study of comparative politics; the Gutenberg Revolution, which contributed to the separation of church and state, transformed medieval parliaments into legislatures, and laid the groundwork for the creation of public spheres of opinion; and then the emergence of mass politics and the electronic era. Montesquieu’s fundamental contribution to the separation of powers is, of course, carefully reviewed, with Cameron emphasizing that though he was no democrat, Montesquieu (along with Locke) planted the seeds for the theory of checks and balances advanced in the Federalist Papers. Simón Bolívar’s views, more favorable to centralized executive power (sometimes characterized as “democratic Caesarism”), are also carefully examined.

For scholars of contemporary Latin America, of particular interest are Cameron’s arguments about the implications of the emergence of mass politics and of major theories about the “social question” for understanding the separation of powers and conceptualizations of democracy. He provides acute analyses of Marx, Durkheim, and Weber (who, he acknowledges, fits less easily into his scheme), as well as the arguments of Louis Althusser, Carl Schmitt, and others. By the end of World War II, there were several “strikes” against the separation of powers idea. As the great social theorists of the nineteenth century had argued, deeper social forces, and thus a diffusion of power within society, were more important for liberty under

democracy than a belief in potentially epiphenomenal institutions and legal doctrines about checks and balances. And a more empirical, positivist approach to the study of politics was necessary in a world with totalitarian challenges.

These conditions laid the foundations for the scaled-back conceptualizations of democracy by scholars such as Joseph Schumpeter, Robert Dahl, and Adam Przeworski, which focus largely on electoral procedures and ignore the constitutional and legal foundations of democracy. Here, Cameron retakes and expands on Guillermo O'Donnell's critique of those minimalist procedural definitions of democracy, which take for granted critical foundations for democracy related to the state and the rule of law that are largely not present in Latin America. Though the causal ordering across the state, social conditions, and the emergence of constitutionalism and the rule of law remains unresolved, one of the most powerful arguments Cameron makes is that the separation of powers depends on the rule of law and constitutionalism, all of which are essential for democracy. The book provides a veritable intellectual tour de force of the evolution and essential intertwining of the separation of powers, the rule of law, and democracy.

At the same time, Cameron embraces arguments by Jürgen Habermas in favor of deliberative democracy and its potential to enable collective action. He does so as part of a critique of liberal constitutionalist views of scholars such as Juan Linz and Alfred Stepan, which focus more on ensuring liberty from the state ("negative" liberty) and on constraining state abuse and thus stand in tension with popular majoritarianism. Cameron rejects what he terms a common view among progressive thinkers, that the separation of powers inevitably enables antidemocratic constraints on state power that otherwise could be employed to advance progressive ends. He embraces deliberation because of its potential to enable collective action, though this discussion remains at an abstract level. For example, he barely discusses the potential impact of political parties on the separation of powers or the risk of co-opted civil society groups for deliberative democracy.

THE EVOLUTION OF CONTEMPORARY CONSTITUTIONS IN LATIN AMERICA

Alongside this powerful analysis, historical narrative, and normative argument lie standard views about what a constitution should look like. Cameron argues that constitutions are created "prior to ordinary legislation, policy making or adjudication" and serve as a basis for action in politics (168). And the best ones are "often simple, economical, even prosaic statements" that specify the appropriate roles of the branches of government (201). Yet this is not what actual constitutions look like in many countries, particularly in contemporary Latin America, which leaves unresolved how to analyze the region's actual experience with constitutionalism.

This is a challenge that Roberto Gargarella takes up in his new, wide-ranging book. Gargarella reviews and analyzes the philosophical traditions that have undergirded constitutionalism in Latin America in order to advance a powerful critique of contemporary constitutional experiences. His fundamental argument is that in order

for democratization to advance in the region, inequality must be reduced; yet both these goals are unlikely to advance much, even with contemporary, progressive new constitutions. This is because, although these constitutions have sometimes impressively expanded sections on rights and participation, they have not modified the organization of power, the crucial “engine room,” away from the centralized, top-down forms inherited from the nineteenth century. For Gargarella, the ideal contemporary constitution would follow a radical model which emerged, if not successfully, in Latin America in the nineteenth century. It would involve an egalitarian economic structure, a political system open and responsive to popular participation, and a citizenry imbued with “civic virtue” and a willingness to participate actively in politics.

Gargarella develops this overarching argument while examining five constitutional phases in the region from independence to the present, providing examples of intellectual or political leaders, or constitutional projects or constitutions, that exemplify different approaches or models. Thus, this book usefully incorporates and builds on his previous, invaluable conceptual and historical work. It includes a discussion of the important 1917 Mexican Constitution, which for Gargarella also epitomizes what continues to be wrong about the way social rights have subsequently been incorporated into constitutions in the region; that is, in a mixed or often contradictory fashion alongside a hyperpresidentialist system of government and retaining liberal and individual rights.

In the fourth phase of constitutionalism in the region, from 1930 to 1980, the working class was incorporated into politics, and most constitutions in this period explicitly addressed the “social question.” Gargarella identifies five main constitutional variants in this period and briefly reviews examples of each, synthesizing the ideas of the principal legal thinkers behind the key texts. For example, he provides acute analyses of the populist authoritarian 1937 Constitution of Gétulio Vargas in Brazil and the 1949 Peronist constitution in Argentina, which exemplify the highly influential populist alternative, combining social rights with centralized political authority. In this period, as he notes, parts of the radical left broke with constitutionalism.

However, with the subsequent turn to democracy in the region, the left reengaged with constitutionalism. It did so in a way that supported including an expanding number of social rights into constitutional texts, thereby favoring the “judicialization of problems that were fundamentally political” and also individualizing conflicts that were collective in nature (130). Furthermore, it did so while also advocating (or in some cases tolerating) increased concentration of power in the presidency. The chapter analyzing contemporary constitutionalism is titled “Grafting Social Rights onto Hostile Constitutions”; contemporary Bolivia comes closest to what Gargarella would favor.

Gargarella critiques the often total lack of consideration of the “crossed impact” that the introduction of new social rights has on existing rights, in contrast to analyses sensitive to these issues by the “founding fathers” of Latin American constitutionalism. And though ambivalent, he ultimately favors incorporating what he terms “dormant clauses” into constitutions, given evidence that social rights embodied in earlier constitutional texts “began to awaken from their slumber” by the end

of the 1990s (144). He sees aspirational constitutionalism as a “rational and reasonable bet” on the future (147), as it can help to motivate and organize coalitions in favor of socioeconomic or cultural reforms incorporated into constitutions.

As he discusses, many of the contemporary constitutional overhauls furthered constitutional concentration of power in the executive while also vastly strengthening the sections on social, economic, and cultural rights (he reviews constitutional changes in Bolivia, Colombia, Costa Rica, Ecuador, Mexico, and Venezuela). In seeking to understand why these internal tensions were generated in the constitutional texts, he criticizes three possible answers. He rejects the notion that constitutional designers believed that the organization of power and of rights operated in separate spheres; he asserts that the components of constitutional texts are inevitably related and interdependent.

Several authors have noted that while the designers strengthened executive power in some dimensions (such as executive-legislative relations), they provided other potential controls, particularly regarding elements of direct or participatory democracy. Although some of these could be considered analogous to previous “dormant clauses,” Gargarella rejects this potentiality for assuming an egalitarian relationship between the different spheres of the constitution and not recognizing the ability of established powers to activate or deactivate the new reforms or to maintain executive predominance.²

The third argument he critiques is the one typically advanced by regime supporters, which is that concentrated executive authority is necessary in order to make progress on the new rights enshrined in the new constitution. Though hyperpresidentialism can assist with the creation and enforcement of new rights, Gargarella argues that it also normally works against rights, especially if these empower social groups that can challenge presidential authority. Therefore he would reject aspirational constitutionalism in favor of more modest constitutions if these provided for internal consistency and addressed what he calls the engine room of executive power, enabling a refocus on radicalizing and politicizing society and shifting the struggle to reduce social inequality away from a narrow focus on social rights, which gives undue power to lawyers and judges.

This book provides an incredibly wide-ranging review of major constitutional trends in the region. It does so in combination with a powerful theoretical and normative argument in favor of an ambitious constitutionalism that boldly advances egalitarianism, both by addressing socioeconomic issues, though not by simply reducing these to the language of rights, and by attacking the concentration of political power in the executive (the engine room), which has been a hallmark of Latin American constitutions since the nineteenth century. What is largely left unanalyzed is why reformers have not done more to change the region’s strongly presidentialist model (he does not discuss longer-term factors such as those Mezey discusses) and why so many constitutions have gained in length and complexity; are riddled with compromises, ambiguities and tensions; and are subject to such frequent change.

EXPLAINING CHANGES IN ELECTORAL RULES AND PRESIDENTIAL POWERS

This is more the focus of Gabriel Negretto's book. Instead of seeking to examine all aspects of constitutional evolution, however, Negretto analyzes key issues linked to Gargarella's "engine room," the evolution of electoral rules and presidential legislative and nonlegislative powers. By narrowing what he seeks to explain, which still remains complex and multifaceted, Negretto is also able to focus his explanation. He argues that the relative power of the largest party (usually the president's party) at the time of reform is the single most important factor explaining the nature of changes in these areas. He does so in the context of a broader, two-level theory of constitutional choice, which he tests by employing both cross-national quantitative analysis based on a painstakingly developed database of constitutional changes over the period 1900–2008, and comparative case studies of Argentina (1949 and 1994), Colombia (1991), and Ecuador (1998).

Negretto identifies several overall trends while highlighting contradictory movements. For example, though changes to presidential election rules since 1978 have generally made them more inclusive (shifting away from single-round plurality winners), there has been considerable instability around presidential re-election, with many countries (re)introducing more permissive rules. With regard to presidential nonlegislative powers, Negretto finds that constitutional reforms have limited presidents as Congress has gained more influence in appointments, political decentralization has increased, and presidential appointment powers in other areas have also been reduced. With regard to presidential legislative powers relating to elements such as the veto, the budget, and decree powers, however, Latin American presidents have gained increased influence over time. This latter trend, combined with more permissive presidential re-election rules, may help explain why Gargarella and others focus on the growth of hyperpresidentialism in the region even as Negretto and others find more variations across different forms of formal presidential power, with potential implications for contemporary presidents that may remain unrealized, especially if the separation of powers and the rule of law are undermined.

Negretto's theoretical approach incorporates both cooperative and distributional theories of institutional change. Those who shape new constitutions have a partisan (distributional) interest in creating institutions and rules that can give them an advantage, though they may also share some interest in ensuring that institutions perform well. Broader goals, such as political order or citizen inclusion and participation, should be particularly salient for political actors in times of performance crises and when future electoral uncertainty is high, and less so when the crisis represents a change in the distribution of partisan power. To the extent that no single party or coalition dominates constitutional design, hybrid designs reflecting sometimes unwieldy compromises are likely. Negretto argues that when parties are dominant or electorally strong and in control of the presidency, they should prefer restrictive electoral rules that favor larger parties and rules that strengthen the exec-

utive branch; if party actors designing the new rules also believe that they will have a comfortable legislative majority, they are likely to prefer a presidency with weak legislative powers, particularly with regard to agenda setting. In general, his quantitative analysis supports the argument.

Regarding nonlegislative powers, Negretto finds that contextual factors, including the strength and bargaining power of the opposition, play a significantly greater role, an argument buttressed by his comparative case studies. Two case studies, Argentina in 1949 and in 1994, represent circumstances in which a shift occurred in the balance of power of major parties (in both cases toward Peronism), and therefore in which distributional arguments (partisan interests and relative power of reformers) should play a greater role. In 1949, Perón had a comfortable majority and controlled the process, whereas in 1994, incumbent president Menem, who desired to change the constitution to permit his immediate re-election, needed to negotiate other constitutional features with the opposition.

Negretto sees constitutional reform in Colombia 1991 and Ecuador 1998, in turn, as taking place in contexts of regime crises of very different natures, leading political actors to consider cooperative solutions in response to the perceived crises, as well as their partisan interests. In Colombia, a perceived crisis of state and regime institutions led actors to agree to a more powerful and independent judiciary, more political decentralization and popular inclusion and, bucking broader regional trends, a greater role for a more responsible congress. In Ecuador, the crisis was perceived as one of ungovernability due to an excessively meddling and abusive congress, and thus the larger parties favored strengthening presidential legislative powers.

Negretto's wide empirical scope and powerful analysis confirm that constitutional reforms carried out by dominant actors are likely to lead to presidential power concentration, particularly with regard to the legislative agenda. Yet they also underscore that when constitutional change is the result of negotiation and compromise, ambiguous and inconsistent measures within hybrid constitutions result, and these also may not do much to improve the performance and quality of democratic governance. What's more, the aspects of constitutions that Negretto analyzes have continued to change so frequently in the region that the fundamental assumption that institutions matter because they are stable must be reconsidered. Instead, as Negretto argues, the question becomes which institutions matter, when, and why, and under what circumstances they might become more stable.

Taken together, these books explore critical themes in democratic theory and present numerous arguments for further consideration and analysis. In considering constitutions, presidential power, and democracy, how do we analyze, and how do social and political actors manage, the alternative risks of opening the door to a tyranny of the majority (possibly through a plebiscitarian president who can manipulate majoritarian will) and of sustaining a tyranny of powerful minorities in inegalitarian societies? How can executive power be empowered, especially if it involves implementing profound changes desired by popular majorities while controlling abuse of power for incumbent advantage? Are long-term forces or short-term dominant partisan interests inexorably enhancing executive powers, or is a fully realized

separation of powers that also enhances state capacity or a radical egalitarian democratic model possible? And can we develop better explanations about which parts of contemporary Latin American constitutions will “stick,” becoming impactful, stable institutions? These and other questions addressed in these books will continue to motivate research in this important area.

NOTES

1. Roberto Gargarella, in his book reviewed here, argues that the Cuban revolutionary government clearly viewed socialism as incompatible with the separation of powers (126).
2. The works he criticizes here include Hartlyn and Luna 2007, Negretto 2011, and Pisarello 2011.

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