

Grafting Social Rights onto Hostile Constitutions

Roberto Gargarella*

Introduction: The New Law Over the Old

An old metaphor used to understand legal reforms describes current law as a large and tranquil lake, and legal reforms as leaves that fall onto that lake. These reforms, like leaves, rest atop the existing law (the peaceful lake) and seem, at first, to be alien to it. For a long time, the new law and the old seem like distinct bodies and each maintains its own identity. Similarly, the leaves float on the lake, unharmed, as though they have not realized their contact with the lake. However, time passes and, little by little, the makeup of the new law changes—the leaves give in—and the interior architecture of the reform begins to lose strength. Little by little, reforms that seemed like foreign bodies to the old law begin to modify their texture to resemble that of the law on which they rest. Time passes and the reforms, like damp leaves, no longer appear to be distinct bodies. Now, the old law and the new, just like the lake and the fallen leaves, create one body.

However, are these images really appropriate for thinking about the links that are created, slowly, between old and new laws? A cursory look at this metaphor suggests a somewhat quick and nonconfrontational adaptation between the established body and the newly arrived one. The metaphor suggests that it is just a matter of time until the process ends happily, with the smooth integration of one part with the other, after both have given in and abandoned their initial resistance. However enticing this view of the way links form between current and new laws may be, a critical look at the process suggests different results.

In effect, it is important to note that the metaphorical image suggests a relationship in which the old law, as a dominant body, establishes a clear role of predominance over the body that arrives. This does not imply that reforms do not, like the fallen leaves, have some impact on the current law. Nor does it refute the more interesting observation that the mass of reforms can generate significant change in the long run, much like a multitude of leaves can have a significant impact on the lake upon which they fall. Nonetheless, nothing that has been said should prevent us from highlighting the unequal character of the link established between the dominant body and the one resting on it. It is the latter that suffers the greater impact—radically greater—and quickly adopts the former's structure. It is this special weight of the greater body, older and more vigorous, that I wish to emphasize. In

* Professor of Constitutional Theory, Universidad de Buenos Aires and the Universidad Torcuato Di Tella (Argentina). All translations in this Article are the author's unless otherwise indicated.

other words, the metaphor does not refer to a relationship between equals, but to the collision of two unequal forces where the weaker of the two will suffer the main impact.

In the following pages, I will focus on this process of unequal legal integration where, in principle, all indications suggest that existing legal practices tend to impose their force on new ones. To do this, I will consider perhaps the most important example, in terms of mixture of different legal traditions, that is offered by the Latin American region: the incorporation of social rights into the framework of constitutions that were hostile to the social demands creating those rights.

I. The Entrance of the Social Question in Latin America

The majority of Latin American constitutions, I will assume here, arose from a liberal-conservative pact, consolidated in the mid-nineteenth century—a pact that would exclude, remarkably, the most radical political sectors, which advocated for a more social constitutionalism.¹ At the beginning of the twentieth century, the serious political, economic, and social crises of the early years found immediate translation into the constitutional order.² The way in which constitutionalism attempted to dissipate these crises was by incorporating the social questions that had been marginalized in the previous century into the old constitutions.³ The beginning of this reformist wave was distinctly characterized by the approval of the Mexican constitution in 1917,⁴ which was followed by the constitutions of Brazil in 1937,⁵ Bolivia in 1938,⁶ Cuba in 1940,⁷ Ecuador in 1945,⁸ and Argentina⁹ and Costa Rica in 1949.¹⁰

Thus, what was put in motion was an attempt, perhaps slightly cautious, to graft institutions associated with the radical constitutional model onto a

1. See ROBERTO GARGARELLA, *THE LEGAL FOUNDATIONS OF INEQUALITY: CONSTITUTIONALISM IN THE AMERICAS, 1776–1860*, at 16–19 (2010) (chronicling waves of radical liberalism in nineteenth-century Latin America that ended in a compromise between upper-class liberals and conservatives).

2. See TULLIO HALPERIN DONGHI, *THE CONTEMPORARY HISTORY OF LATIN AMERICA 158–246* (John Charles Chasteen ed. & trans., Duke Univ. Press 1993) (1966) (elaborating on the political, economic, and social changes throughout Latin America in the early twentieth century).

3. See GARGARELLA, *supra* note 1, at 246 (noting that a number of Latin American countries incorporated new social rights into their constitutions in the early twentieth century).

4. Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Última reforma publicada 29 de Julio de 2010) (Mex.); see also GARGARELLA, *supra* note 1, at 246 (marking the Mexican constitution of 1917 as the starting point of constitutional reform in Latin America).

5. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] 1937.

6. CONSTITUCIÓN POLÍTICA DEL ESTADO DE BOLIVIA [BOL. CONST.] 1938.

7. CONSTITUCIÓN DE LA REPÚBLICA DE CUBA [CUBA CONST.] 1940.

8. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DEL ECUADOR [ECUADOR CONST.] 1945.

9. CONSTITUCIÓN NACIONAL [CONST. NAC.] 1949.

10. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE COSTA RICA [COSTA RICA CONST.] 1949.

body of opposite character, a product of the original liberal–conservative pact. The result of that operation was, as could have been anticipated, extremely problematic. Social rights ended up being transformed into “programmatically rights”;¹¹ in other words, social rights were considered objects to be pursued by the political branches, and not as individual or collective rights that were necessarily judicial.¹²

We find that, at least for many decades, the social rights incorporated into Latin American constitutions since the beginning of the twentieth century were not implemented by political branches of government because they did not find support—and, in fact, seemed to face rejection—from the judicial powers.¹³

This is, without a doubt, an extraordinary constitutional phenomenon that warrants an explanation. How can it be that so many constitutional articles remained dormant for so many years? From what we understand, it had much to do with the ways in which the “constitutional graft” happened. In what follows, I will try to reflect on the problems created through “grafting,” such as that which took place when social rights were incorporated into Latin American constitutions.

II. Three Questions for Constitutional Theory

The operation of constitutional grafting—in this case, the attempt to incorporate a radical social profile into a liberal–conservative model—creates significant questions for constitutional theory. In the face of these complexities, I will explore three of the many questions that are possible. The first relates to the impact that such grafts have on the constitutional structure; the second to the ways in which to execute “translations” amongst different constitutional models (and “languages”); and the third to the phenomenon of “dormant clauses,” which remain judicially inactive for decades.

11. “Programmatically rights” are rights that are “aspirational” in nature and are not directly operative through the courts. Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, 59 U. CHI. L. REV. 519, 527–28 (1992).

12. See Roberto Gargarella, *Theories of Democracy, the Judiciary and Social Rights*, in COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES 13, 26 (Roberto Gargarella et al. eds., 2006) (“In Latin America, judicial abstinence in relation to social rights has been justified by the argument that references to social rights in the constitution are directed at the political branches . . .”); see also R. Shep Melnick, *Federalism and the New Rights*, 14 YALE L. & POL’Y REV. (SYMPOSIUM ISSUE) 325, 327 (1996) (stating that programmatic rights are enforced through the creation of public programs rather than through private action). *But see, e.g., id.* (“[Programmatically rights] are the product of both congressional enactment and extensive judicial interpretation . . .”).

13. See Christian Courtis, *Judicial Enforcement of Social Rights: Perspectives from Latin America*, in COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES, *supra* note 12, at 169, 179 (discussing the traditional lack of judicial responsiveness regarding certain social rights).

A. *On the Possibilities of a Successful Constitutional Graft: Internal Impact and Crossed Impact*

The first question that I will deal with leads us to look at the impact of constitutional reforms within the internal dynamic and organization of the reformed constitution.

There are at least two types of influences that it makes sense to distinguish and examine, given that all constitutions contain two parts: a dogmatic part that includes a declaration of rights, and an organic part that divides and organizes power. On the one hand, it is logical to focus attention on the way the reform inserted in a certain section of the constitution (for example, the section organizing power) impacts the internal structure of that same section. This is the “internal impact.” On the other hand, it also makes sense to explore the way in which the reform inserted in a certain section of the constitution (for example, a reform in the area of rights, or a reform in the area of the organization of power) impacts the other section. This is the “crossed impact.” In what follows I will be exclusively concerned with the impact that reforms in the rights sections tend to have over the section dedicated to the organization of power.

The impact of reforms to the organization of power can vary based on many factors, including the degree to which the reform in question is comprehensive, whether the reform operates on a more consolidated or less consolidated structure, and whether the reform can transcend the text of the constitution. Of the multiple possible forms, here I will address one of the most typical forms taken by Latin American reforms with crossed impact. As anticipated, it relates to reforms carried out in the area of rights—through the introduction of social rights—and the impact of these on the organic section of the constitution.

One way to begin thinking about the possible impact of these constitutional reforms is through a series of persistent reflections that were carried out about the subject, now years ago, by Argentinian jurist Carlos Santiago Nino.¹⁴ Nino was interested in calling attention to the paradoxical reality that followed the then-habitual modifications of Latin American constitutions—modifications that were destined to expand the list of existing rights in order to annex new social rights. The Argentinian jurist detected a problem in these reforms, which were unquestionably made by groups that were more advanced or progressive and more favorable to social change. The problem had to do specifically with the crossed impact of these changes—in this case, the impact of the introduction of these new social rights on the organization of power.¹⁵ For Nino, it was clear that, upon the

14. Interviews with Carlos Santiago Nino, Dir., Ctr. for Int'l Studies, in Buenos Aires, Arg. (1985–1993). The comments throughout this section are based primarily on these interviews.

15. See CARLOS SANTIAGO NINO, *THE CONSTITUTION OF DELIBERATIVE DEMOCRACY* 12 (1996) (“In studying both existing constitutions and the ideal constitution, it becomes apparent that there is a possibility that substantive claims which are a priori valid may conflict with the results of

incorporation of new social rights, progressive forces would fall into a paradoxical position. Contrary to what these forces hoped, by acting in this way they transferred additional powers to the judicial branch¹⁶—the branch furthest from electoral or popular control and, in Jeffersonian terms, the least republican of the branches.¹⁷

In the face of this paradox, Nino questioned the rationality and appropriateness of introducing new social rights aimed at strengthening the power of the people and the capacity for action and decision by society's most marginalized groups. Was this the hoped-for result of similar constitutional reforms? Or was it that they, in reality, threatened to undermine even further the power of disadvantaged groups? It can be said that the doubts raised by Nino revealed, above all, the lack of reflection by many constitutional activists motivated to defend the rights and interests of those who are worse off.

Of course, Nino may or may not have been right in calling into question the ultimate progressive character of the expansion of social rights. Perhaps, in certain contexts (e.g., in the face of a radically corrupt legislative branch), it could make sense to strengthen the judiciary in this way. Most importantly, it could make sense to include such rights at a constitutional level, given what that can symbolize as a gesture oriented at the empowerment of the most forgotten or downtrodden groups (independent of what this recognition might mean in terms of the distribution of constitutional power). However, of interest now is what reflection about the case does to encourage us to think about the analysis of constitutional reforms. Through his inquiries, Nino helped us see that the traditional reforms carried out in the dogmatic section do much more than expand the existing list of rights. Whether intended or not, this type of reform is not neutral on the subject of the organization of power. As such, and in order to evaluate its impact, we need to look beyond the boundaries of the demarcated section on rights, asking ourselves about the impact of the reform on the distribution of power among the different branches of government.

In the case examined here—that of social rights—the idea would be that today, given the mode in which we think about rights and act in relation to them, making the rights section any more robust would imply a transfer of

legitimate procedures. In other words, rights recognized as belonging to the liberal dimension of constitutionalism may conflict with the results of democratic procedures that constitute the participatory dimension of constitutionalism.”)

16. As Jeremy Waldron maintained in a recent work about social rights, the introduction of these social commitments in the form of rights is a quite obvious extension “to tilt matters decisively towards judicial rather than legislative or executive processes.” Jeremy Waldron, *Socioeconomic Rights and Theories of Justice* 28 (N.Y. Univ. Sch. of Law, Pub. Law & Legal Theory Research Paper Series, Working Paper No. 10-79, 2010). Normally, “administration or enforcement” of rights is delegated to the judicial branch. *Id.*

17. Letter from Thomas Jefferson to John Taylor (May 28, 1816), in THOMAS JEFFERSON: POLITICAL WRITINGS, 206, 208 (Joyce Appleby & Terence Ball eds., 1999) (comparing the republican features of the government, and calling the judiciary “seriously anti-republican”).

power to the judicial branch.¹⁸ This would not require the judicial power to take active measures in the implementation of these rights or to flex its muscles before the political branches of government. The inactivity of a majority of judges in this respect does not deny the existence of their potential to put such rights in practice, something that in fact has occurred.¹⁹ Judges may enforce rights unexpectedly in the face of any demand.

As a result of this type of analysis, it is possible that a certain constitutional reform may not be desirable given the redistribution of power it will generate within the constitutional structure, or given that it could be carried out in another way considering the foreseeable internal tensions a new institution will cause.

Having said this, let us think about the internal impact of reforms—that is, the way in which a reform to one section impacts the internal structure of that same constitutional section. As an example, think of the introduction of a constitutional court or magistracy council within constitutions already endowed with a designated judicial organization under the authority of a supreme court. When reflecting on this type of reform and evaluating its efficacy, it is not enough to pay attention to the way in which the new institution is organized or how it works. That is, it is not enough to ask important questions such as whether it will be adequately staffed or financed. It is also particularly important to ask how the new judicial institution will interact with the other constitutional institutions that comprise the extant framework.

Certain questions turn out to be particularly revealing and promising in this respect. For example, what institution previously carried out the functions that the new institution—call it X—will now carry out? What institution will have its operative capacity or decisional authority affected by X's arrival? These inquiries are important in principle, much beyond what practice may reveal their answer to be. The point is that when it comes time to promote a reform in the organic part of the constitution, the main

18. See NINO, *supra* note 15, at 196 (noting that “the democratic process cannot be the last resort for the protection of individual rights, since the main function of rights is to contain majoritarian decisions,” and therefore, mechanisms such as judicial review exist outside the political process to protect those rights); Megan J. Ballard, *The Clash Between Local Courts and Global Economics: The Politics of Judicial Reform in Brazil*, 17 BERKELEY J. INT’L L. 230, 234 (1999) (explaining that Brazil’s 1988 constitution “grants novel individual and social rights and strengthens the judiciary’s capacity to protect these rights,” but that this, combined with other factors, allows “socially oriented judges to impair the government’s efforts to embed Brazil more firmly in the global economy”); Craig Scott & Patrick Macklem, *Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution*, 141 U. PA. L. REV. 1, 147–48 (1992) (offering international human rights and Indian constitutional jurisprudence as examples of how the judiciary can protect interests underlying social rights).

19. See, e.g., Horacio Javier Etchichury, *Argentina: Social Rights, Thorny Country: Judicial Review of Economic Policies Sponsored by the IFIs*, 22 AM. U. INT’L L. REV. 101, 110–11 (2006) (noting that Argentinian “judges can . . . exercise their constitutional review powers to enforce social rights,” and providing as an example a 2000 decision that upheld a lower court’s order for the national government to “grant timely and appropriate medical treatment”).

resistance to newly arrived institution X can come from within the existing constitutional structure. That is to say, it is foreseeable that the organic reform may be affected by resistance from an existing entity or individual—for example, from a public official—that is directly impacted by the introduction of the change in question. It is not unforeseeable, in this sense, that the more institutions and public servants are affected by the change, the greater resistance the newly adopted institution will have to face.

A good illustration of this phenomenon can be found in the example of the so-called train wreck in Colombia, which pitted the old Colombian supreme court against the Constitutional Court introduced by the constitution of 1991.²⁰ Both institutions maintained for years—and still maintain—a relationship of rivalry and tension, which started with the birth of the latter and which has yielded persistent disputes over power as well as a noxious competition between the two courts.²¹ A similar example is offered by Argentina and the tensions that have arisen between the old supreme court and the magistracy, which was introduced by the 1994 constitutional reform.²² Beyond the design problems of each of these institutions and the fact that conflicts might have been minimized had their competencies been more clearly delineated, the truth is that the types of conflict that resulted were foreseeable from the moment that contemplation of the new institutions began. This is true even though events clearly suggest that such conflicts were not actually foreseen. The failure to anticipate these conflicts suggests how little attention is paid to what I call the internal impact of reforms.

1. Convergences and Tensions Between Different Constitutional Models.—In the preceding pages, I have examined different ways in which a constitutional reform tends to impact the underlying constitutional structure that is itself undergoing reform. However, the examples I held up as related to particular constitutional reforms—the introduction of a magistracy council and the expansion of the list of rights—can and should be made more general. This is due to the knowledge we have accumulated in relation to the existence of different constitutional models.

In effect, I have already made reference to different models of constitutional organization, which I call—following the language of the

20. See Everaldo Lamprea, *When Accountability Meets Judicial Independence: A Case Study of the Colombian Constitutional Court's Nominations*, 10 *GLOBAL JURIST* 1, 16 (2010), available at <http://www.bepress.com/gj/vol10/iss1/art7> (referring to conflict between the supreme court and the Constitutional Court as a “train wreck” or “*Choque de Trenes*”).

21. Felipe Saez, *The Judiciary*, in *COLOMBIA: THE ECONOMIC FOUNDATION OF PEACE* 897, 897–905 (Marcelo M. Guigale et al. eds., 2003) (discussing the establishment of the Constitutional Court, the activist role it assumed, and resulting tensions with the supreme court).

22. See, e.g., Alejandro M. Garro, *Judicial Review of Constitutionality in Argentina: Background Notes and Constitutional Provisions*, 45 *DUQ. L. REV.* 409, 417–18 (2007) (describing common criticisms of the magistracy council in the decade following its creation including the slow process of selection, removal of judges, and the political influence of the president in the selection process).

era—conservative, radical, and liberal. We know that in the constitutional history of the Americas, there have been constitutions of a conservative tone (e.g., Chile in 1823;²³ Chile in 1833;²⁴ Colombia in 1843;²⁵ Ecuador in 1869²⁶), a radical tone (e.g., Pennsylvania in 1776,²⁷ Apatzingán in 1814²⁸), and a liberal tone (e.g., Colombia in 1853,²⁹ Colombia in 1863³⁰). Additionally, many constitutions have displayed a “mixed” tone (of particular relevance are liberal–conservative constitutions such as those of Argentina in 1853,³¹ Mexico in 1857,³² and Paraguay in 1870³³).

Here we should consider briefly the likelihood of success of constitutional reforms oriented at modifying the structure of the existing constitutional model. Clearly, the case of reforms that introduced social rights in the old constitutions of the Americas is especially interesting in this

23. See Roberto Gargarella, *Towards A Typology of Latin American Constitutionalism, 1810–60*, 39 *LATIN AM. RES. REV.* 141, 143–44 (2004) (“[M]oral perfectionism was clearly embodied in the [Chilean] Constitution of 1823 . . . 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 [I]ndividual rights were contingent upon their accommodation within the higher or preeminent a priori principles.”).

24. *Id.* at 144–45 (noting that the Chilean constitution of 1833 was conservative and included significant presidential authority including the ability of the president to suspend the constitution and most civil rights).

25. *Id.* at 145 (noting that the 1843 Colombian constitution “was written by extreme conservatives”).

26. See PETER V. N. HENDERSON, GABRIEL GARCÍA MORENO AND CONSERVATIVE STATE FORMATION IN THE ANDES 240 (2008) (characterizing the 1869 constitution as authoritarian and indicative of a shift away from classical liberalism in Latin America).

27. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 83–85 (1998 ed. 1998) (discussing the revolutionary movement in Pennsylvania and the ascendance of political outsiders who in 1776 “captured control of the convention that wrote the most radical constitution of the Revolution”).

28. See Gargarella, *supra* note 23, at 146 (“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.”).

29. See DAVID BUSHNELL, *THE MAKING OF MODERN COLOMBIA: A NATION IN SPITE OF ITSELF* 108 (1993) (treating the 1853 constitution that established universal male suffrage as an achievement of the country’s Liberal party despite their initial reservations).

30. See JORGE P. OSTERLING, *DEMOCRACY IN COLOMBIA: CLIENTELIST POLITICS AND GUERRILLA WARFARE* 68 (1989) (reporting that the 1863 constitution was “federalist, ultraliberal, and totally lay in character”).

31. See THEODORE LINK & ROSE MCCARTHY, *ARGENTINA: A PRIMARY SOURCE CULTURAL GUIDE* 63 (2004) (recognizing that the same constitution established Roman Catholicism as the state religion but also promised religious freedom); WILLIAM SPENCE ROBERTSON, *HISTORY OF THE LATIN-AMERICAN NATIONS* 237 (1922) (stating that the 1853 constitution “was an attempt to harmonize two tendencies which had struggled for domination—the federalistic and the centralistic”).

32. See HALPERIN DONGHI, *supra* note 2, at 128–29 (describing the creation of Mexico’s 1857 “reform” constitution).

33. See FED. RESEARCH DIV., LIBRARY OF CONG., *PARAGUAY: A COUNTRY STUDY* 161 (Dennis M. Hanratty & Sandra W. Meditz eds., 2d ed. 1990) (describing the constitution of 1870 as “more democratic than the two previous constitutions,” but emphasizing the great authority afforded to the president).

sense. Here we speak of the introduction of reforms to the liberal-conservative constitutional model that were originally excluded from said compact, that is, the introduction of radical or republican reforms. The question can be discussed in a more general sense. Specifically, what possibility is there of successful reform when the aim is to modify, in this way, the constitutional structure in force? More precisely, what possibility is there of successfully grafting institutions belonging to a certain constitutional tradition onto a constitutional body organized according to the parameters of a different or opposing tradition?

One possible way to begin the aforementioned reflection would be to examine some of the facts that we know regarding the different constitutional traditions in the region. So far, I have referenced conservative, radical, and liberal constitutional models. The first, as we know, can be defined by its combination of political elitism and moral perfectionism (the model that, in Latin America, signified power concentration in the executive as well as religious imposition).³⁴ The radical model can be characterized—in sharp contrast with the conservative model—as a Rousseauian model distinguished by political majoritarianism.³⁵ The liberal model—which sought to mediate between the other two models—stands out for its defense of a balanced political system (versus the excesses of strong presidents and concentrated majorities) and its assertion of the religious neutrality of the state.³⁶

Taking this panorama into account—and this is what I am interested in highlighting—it is possible to recognize the existence of areas of partial convergence and conflict among the different models. We have known of such agreements and disagreements throughout our study of history, but we are able to anticipate and explain them by paying attention to the areas of conflict and existing tensions between these various schemes. The intersections range from the common anti-majoritarianism of liberals and conservatives,³⁷ to the shared rejection of liberal neutrality on the part of conservatives and radicals,³⁸ to the habitual resistance that liberals and radicals jointly

34. See Gargarella, *supra* note 23, at 142–46 (noting that conservative constitutions are characterized by moral perfectionism, often rooted in Catholicism, and political elitism that included a concentration of power in the executive branch and in a senate populated by wealthy citizens).

35. See *id.* at 142 (characterizing the radical model as one “anchored in political majoritarianism”).

36. See *id.* (characterizing the liberal model as one that “emphasize[s] the limitation of powers and moral neutrality”).

37. Compare BUSHNELL, *supra* note 29, at 108 (documenting the fears of nineteenth-century Colombian liberals regarding universal male suffrage), with Gargarella, *supra* note 23, at 142 (characterizing conservative constitutional models as elitist).

38. See, e.g., Gargarella, *supra* note 23, at 142 (explaining that while conservatives favor moral perfectionism and radicals favor moral populism, liberals prefer moral neutrality).

presented when faced with the religious authoritarianism so common in Latin America.³⁹

In short, the possibility of a successful transplant is increased when the institutions being introduced are part of the constitutional model in force (e.g., institutions with a liberal character over a constitutional scheme that is also liberal). For example, one might introduce a new comptroller's office, say, "Auditor General of the Nation" or "Tribunal of Accounting," within an existing checks-and-balances scheme. The likelihood of success is also increased when the institutions that are introduced form a part of a distinct constitutional model, but in areas where both models are compatible. This could occur, for example, with the introduction of liberal reforms that tend to limit the power of controlling authorities within a conservative institutional scheme when the reforms are seen as clearly hostile to a radical political majoritarianism. To illustrate this by example, one might examine a case where the judiciary is given the power to conduct constitutional review and to invalidate laws deemed unconstitutional, an option considered typically countermajoritarian. Such a constitutional change could be well received both by a liberal constitutionalism and a conservative one, if both are suspicious of legislative power and especially if the conservatives suspect that the government may have a particular influence in the nomination of members of the highest court.

Meanwhile, the most difficult grafts would occur in connection with efforts to merge institutions belonging to different constitutional models in areas where they tend to conflict. Introducing social rights into a liberal-conservative scheme would be one example of this, given that social constitutionalism was expressly rejected by both liberals and conservatives during constitutional conventions in the nineteenth century. Moreover, social constitutionalism requires an institutional framework that challenges the current order, and is characterized by institutions more responsive to popular demand. An institution of this sort is a far cry from the models that either liberals or conservatives would be willing to support.

Another example of interest to Latin America would be institutions designed to emphasize mechanisms for direct democracy within a constitutional model hostile to civic participation. Once again, here we can anticipate that tensions will run high as a result of attempting to combine institutions whose aspirations are contradictory in principle. Moreover, we might predict for such cases that the president in power will boycott or undermine those attempting to implement reforms that would affect the president's authority.

39. See Otto Maduro, *Christian Democracy and the Liberating Option for the Oppressed in Latin American Catholicism*, in *THE CHURCH AND CHRISTIAN DEMOCRACY* 107-09 (Gregory Baum & John Coleman eds., 1987) (identifying anticlerical attitudes and support for laicism with both liberals and even more radical elements on the left).

Ultimately, recognizing the existence of differing constitutional traditions and analyzing their areas of connection and tension can be helpful when attempting to discern whether a given right will transplant successfully.

B. Translations Between Different Constitutional Models

The second problem I identify—typical of the method used when attempting to incorporate social rights into Latin American constitutions—is related to issues of what I will call “translation.” To examine this type of issue, I begin with the understanding mentioned above: that it is not easy to accomplish “blending” between different constitutional models. Nonetheless, as I have pointed out, said blends are facilitated in areas where different models intersect. For example, conservative and liberal constitutions often have countermajoritarian leanings, and this makes them, in many ways, compatible.⁴⁰ Additionally, this suggests that a number of institutional arrangements can be well supported by both constitutional structures.

The translation problem appears when I attempt to reconcile institutions associated with areas where the models in play conflict. For example, as I have stated, liberals and conservatives have celebrated relatively successful constitutional pacts (successful, at least, in terms of the stability they have reached). We also know that there are many areas of accord between the two models, and that these areas have made it possible for those pacts to enjoy success. For instance, the two models share a common commitment to a list of restricted rights,⁴¹ an emphasis on the protection of property rights,⁴² and an institutional scheme with a countermajoritarian outline.⁴³ Nevertheless, liberals and conservatives disagree profoundly in other aspects. For example, they differ sharply regarding what powers they consider it necessary to transfer to the executive branch. The conservatives consistently supported an extreme concentration of political power, while the liberals commonly fought against this, certain that such a concentration threatened their entire constitutional structure.⁴⁴ Here we have a grave problem in translation. In the case of a majority of Latin American countries, the issue

40. See Roberto Gargarella, *The Constitution of Inequality: Constitutionalism in the Americas, 1776–1860*, 3 INT’L J. CONST. L. 1, 11 (2005) (arguing that the many Latin American constitutions of the early to mid-1800s reflected “conservative tendencies [that] were manifested in a countermajoritarian drive that advocated the concentration of power in the executive”); Gargarella, *supra* note 23, at 150 (stating that the liberal model involves the implementation of “countermajoritarian measures”).

41. See Gargarella, *supra* note 23, at 143–51 (discussing the different rights restrictions supported by the liberal and conservative models).

42. GARGARELLA, *supra* note 1, at 193 (“Clearly, liberals’ strong commitment to property rights creates ample space for agreement between liberals and conservatives: they both took the support of property rights as one of their priorities.”).

43. See *supra* note 40 and accompanying text.

44. See Gargarella, *supra* note 23, at 144 (positing that conservatives historically favor centralized political power to enforce a moral code); *id.* at 149 (explaining that liberals equated centralized political power with tyranny).

was whether one could incorporate the fundamental conservative demand for a greater concentration of power within the liberal, American-type constitutional scheme that was being adopted, along with its system of checks and balances. This was a significant translation problem that was resolved, in most cases, by “unbalancing the checks and balances”⁴⁵ through the ceding of additional powers to the executive branch. These powers converted the executive into a *primus inter pares*. In principle, this peculiar graft was very problematic—a poorly made translation—and, according to some (though I do not insist upon it here), it came to be a cause of the frailty that accompanied the system from that moment on. This ceding of power to the executive became the Achilles’ heel of a scheme that was, in terms of stability, generally successful.⁴⁶

Having said this, we can return to the example cited in the prior subpart, referring to the introduction of social rights. We have here another case, more serious in appearance, of a failed blending between schemes. To begin this analysis, it is worth noting that many of the essential compromises of a particular constitutional model are often interrelated; that is, they need each other (for this reason I speak about models in general terms). Schematically, we could say that the following are found within the fundamental building blocks of the radical model: (1) a political organization that is open and responsive to participation by the people; (2) a rather egalitarian economic structure; and (3) citizens endowed with “civic virtue,” which in this case means, primarily, that they are motivated to actively participate in politics.⁴⁷ These pieces were linked together and mutually dependent on one another. The objective was collective self-government, and this required a virtuous citizenry.⁴⁸ To this end, political institutions were created that were open to,

45. See Bert A. Rockman & Eric Waltenburg, *The American Constitution, the State, and Executive Prerogative*, in *CROSSING BORDERS: CONSTITUTIONAL DEVELOPMENT AND INTERNATIONALISATION* 81, 100 (Florian Grotz & Theo A.J. Toonen eds., 2007) (discussing how executive power in the United States has grown since the Constitution was adopted).

46. See GARGARELLA, *supra* note 1, at 221–22 (describing how compromises between liberals and conservatives ensured political stability but led to the “gradual corrosion” of the liberal system of checks and balances, a tendency toward more concentrated power and stronger executives, and the engulfment of liberals by their conservative allies); cf. JUAN J. LINZ, *THE BREAKDOWN OF DEMOCRATIC REGIMES: CRISIS, BREAKDOWN, & REEQUILIBRATION* 72–73 (1978) (hypothesizing that the “zero-sum character” of presidentialism—as opposed to parliamentary systems, in which outcomes can be divided—introduces pressures into Latin American democracies to create constitutional safeguards against executive power, and that these safeguards “lead to constitutional conflicts that weaken the system, endanger its legitimacy, and frustrate presidents who feel that they have a direct, popular, plebiscitarian mandate”).

47. See Gargarella, *supra* note 23, at 146 (discussing the radical commitment to wide public participation in government and the consequent strengthening of the house of representatives, the most “popular branch of power”); *id.* at 148 (noting the revisions to the status quo involved in the radicals’ program, which included a substantial division of land, and noting the radicals’ “concern with the ‘cultivation’ of a virtuous citizenship”).

48. See Gargarella, *supra* note 40, at 3 (stating that the radical model was defined by “egalitarian impulses” that achieved “expression through a strong commitment to collective self-government”).

and encouraged, political participation. At the same time, radicals proposed to organize the economy in a way that encouraged the generation of collectivist behaviors and discouraged purely self-interested behavior.⁴⁹ The absence of any of the pieces threatened to put the entire structure at risk. For example, if the general scheme was maintained, but the political framework was such that it closed off participation by the people, the institutional scheme would invite social unrest, and thus plunge the entire system into crisis. Similarly, if the institutions remained open to and supportive of participation by the people, but within a context of profound inequality, they risked undermining the entire participatory process that they otherwise attempted to encourage. Those most affected by the existence of inequality in this context would have great difficulty dedicating their energies to politics instead of ensuring their immediate subsistence.

The problem that arises upon the constitutional incorporation of social rights is in the same vein as the problems mentioned above. Any of the radicals who advocated higher social engagement in the constitutional order during the nineteenth century would have seen what was done in the twentieth century—namely, the inclusion of a list of social rights in liberal-conservative constitutions—as uninteresting, if not simply offensive.⁵⁰ For those who felt as Artigas of the Banda Oriental did,⁵¹ or, better yet, as Ponciano Arriaga, the president of Mexico's 1857 constitutional convention did⁵²—that the constitution ought to be “the law of the land” (which is to say, that constitutional reform should be accompanied by a profound reform that redistributed land ownership)—the mere incorporation of a list of social rights would have sounded nothing short of ridiculous. What relevance would said list of written rights have when the aforementioned men were working toward bringing about socioeconomic changes that included, but at the same time largely transcended, the drafting of a constitution?

The difficulties inherent to this operation (the introduction of social demands from radicals into constitutions that were not sympathetic to them) were many. Primarily, such modest constitutional reforms were not accom-

49. See LINZ, *supra* note 46, at 38–39 (describing the radical position that economic equality was an indispensable precondition of self-government); see also Gargarella, *supra* note 23, at 148–49 (discussing radical proposals in various Latin American countries involving substantial redistributions of land).

50. See Gargarella, *supra* note 23, at 147–48 (noting that radicals subordinated individual rights to a defense of the “will of the majority,” and that “the radicals’ concern with the ‘cultivation’ of a virtuous citizenship further reinforced the idea that their project was incompatible with autonomous individual choice”).

51. See *id.* at 148 (noting that like José Artigas, who proposed a plan for land redistribution, the radicals called for a “substantial revision of the status quo, proposing, for example, a radical redistribution of land”).

52. See *id.* at 149 (“Central to the [constitutional] debates, then, was land redistribution, so much so that the president of the convention, Ponciano Arriaga (*‘el liberal puro’* [*‘the pure liberal’*]), 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’* [*‘the law of the land’*].”).

panied by additional measures that were capable of sustaining the radicals' old claims. This is not to say that the liberal-conservative leadership should have transformed its constitution into a radical one, nor that they should have assumed that giving in to radical demands was necessary before they could give life to a radical scheme. Further, this does not suggest that the pieces of one constitutional model must all fit together in only one fashion, nor that they are unable to arrange themselves in different ways, or with other pieces, if they are to take on a life of their own. Instead, the point is that each constitutional model incorporates a certain internal logic that is far from arbitrary. Keeping this in mind, the radicals might reasonably argue that it was difficult to sustain the social reforms that they had proposed at the time, if at that moment they did not count on a mobilized society ready to defend the strong measures of change promoted. The constitution, they might add, was capable of modestly collaborating in said task; nonetheless, it happened that those in charge of the reform had not taken any conclusive steps in that direction—just the opposite.

Indeed, it is almost impossible to imagine any success for the radical reconstruction proposals that were presented, when, ever since the new constitutional conventions, not only had the social mobilization required by the reforms not been encouraged, but concentrated power remained—supported by the political and social elite who were hostile to the progress of radical initiatives.⁵³ In institutional terms, was it conceivable, for example, that the judiciary would be the vanguard in the social battle over expanded social rights when it operated within a framework where the citizenry's access to the courts was extremely closed off? It is difficult to imagine a less favorable institutional context for this feature of social content to flourish.

The last point that will be made regarding the failure in principle of this grafting operation (perhaps the most important point of all) has to do with the way in which the liberal-conservative leadership decided to incorporate the social demands that radicals had been advocating for decades. The method chosen was to translate these potent, vigorous, and radical social demands into the liberal language of rights.⁵⁴ In this manner, the radicals' demands, which largely exceeded the constitutional text, were reduced to an especially limited constitutional formula. Transformed into social rights, the demands were now tightly bound, practically immobile, and sat within a narrow and stifling mold that had almost nothing in common with the pattern that the radicals, in their time, had used to make sense of—and give permanence to—their political and constitutional demands.

53. I have previously discussed the victory of liberal thought over radical reforms. *See generally* Gargarella, *supra* note 23, at 149 (noting that liberal theory “had a decisive influence on the development of American constitutionalism” and was attractive compared with radical or conservative alternatives).

54. *See id.* (suggesting that liberals distinguished their platform from the radical position by proposing an equilibrium of power, basic rights, and the protection of individual autonomy).

What was left in the end was such a weak attempt at constitutional change that some might even call it a mere act of demagoguery or hypocrisy, that is to say, a way of committing through a series of actions known to be difficult to undertake due to innate shortcomings.

C. *Dormant Clauses*

The desolate outlook described above calls for an important clarification that could be very useful to reflect on a more general concept encompassing the constitution, rights, and legal reforms: the concept of “dormant clauses.” To briefly summarize, in the previous pages we determined that it is important to take into account the methods of carrying out constitutional reform. Constitutional reforms commonly involve modification of a text that establishes long-lasting institutions. Existing institutions or constitutional practices will not be expected to be neutral in the face of new institutional additions. They can aid or, more commonly, resist the arrival of such changes, if the implemented reforms are not taken seriously. Of course, there is no magic formula that will allow us to predict what must be or must not be done in such situations, but criteria exist that allow us to anticipate when a certain reform is off to the wrong start. The special example of social rights illustrates the material difficulties (and political irresponsibilities) that tend to accompany the difficult process of constitutional reconversion.

In the end, we are talking about a case of an addition that was (foreseeably) considered to be a failure at the outset. Such affirmation is supported by a long-standing consensus that pointed to the many decades during which social rights fell into a constitutional slumber, cast aside on the desks of judges throughout all of Latin America who considered those rights as merely programmatic or not directly operative.⁵⁵

A situation like the one described can help strengthen a common position that tells us that these new constitutions, as generous as they might be regarding the rights they affirm, turn out to be “pure poetry”—text that is disengaged from its application in real life. But even then, for some, the inclusion of such clauses at a constitutional level is a negative decision for the existence of the constitutional text given that the repeated—if not inevitable—failure to meet those social mandates ends up undermining the authority and legitimacy of the constitution.⁵⁶ Could it be that the incorporation of such social clauses was an error? Could it be that Latin Americans

55. See *supra* note 13 and accompanying text.

56. See Carlos Rosenkrantz, *La pobreza, la ley y la Constitución* [Poverty, Law and the Constitution], in *EL DERECHO COMO OBJETO E INSTRUMENTO DE TRANSFORMACIÓN* [THE LAW AS AN OBJECT AND INSTRUMENT OF TRANSFORMATION] 241, 246 (Seminario en Latinoamérica de Teoría Constitucional y Política ed., 2003) (arguing against the inclusion of economic rights at a constitutional level given the concern that courts' failure to accomplish great redistributions of wealth would undermine their power and central role in democracy).

erred in their overwhelming alignment with the cause of constitutionalizing social rights?

The first doubts in the face of these questions arise when we note that toward the end of the twentieth century, those legally relegated social rights began to awaken from their slumber. The same judges who time and time again refused to recognize judicial suits to enforce or implement these constitutionalized social rights, began to open their doors and accept suits they had previously rejected.⁵⁷ This striking and notable situation begs us to ask an additional question: Why had social rights, after lying dormant for such a long time, slowly awakened almost half a century later?

The explanations for these changes are diverse: the growing internalization of the law;⁵⁸ the increasing weight of exigent international human rights treaties;⁵⁹ the development of a complex and dense dogmatic reflection on this subject matter (critical of the status quo);⁶⁰ the emergence of larger suits (channeled outside the political entities, disfavored by a disappointing practice);⁶¹ and the implementation of legal reforms (in particular, clauses pertaining to legal standing) destined to facilitate access of the most disadvantaged to the tribunals.⁶² All of these elements, among others, combined to provide structure to a changing reality where social rights no longer necessarily appeared as second-rate rights.

57. See Courtis, *supra* note 13, at 170 (showing increasing willingness among Latin American judges to enforce social rights).

58. See, e.g., Ariel E. Dulitsky, *La aplicación de los tratados sobre derechos humanos por los tribunales locales: un estudio comparado* [The Application of Human Rights Treaties by Local Tribunals: A Comparative Study], in LA APLICACIÓN DE LOS TRATADOS SOBRE DERECHOS HUMANOS POR LOS TRIBUNALES LOCALES [THE APPLICATION OF HUMAN RIGHTS TREATIES BY LOCAL TRIBUNALS] 33, 74 (Martín Abregú & Christian Courtis eds., 1997) (discussing the growing tendency in Latin America toward openness to international law given constitutional recognition of international norms and dialogue between local courts and international monitoring bodies).

59. See Courtis, *supra* note 13, at 169 (describing the “widespread ratification of international human rights treaties” as one of two important developments in the field of human rights enforcement).

60. See Javier A. Couso, *The Changing Role of Law and Courts in Latin America: From an Obstacle to Social Change to a Tool of Social Equity*, in COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES, *supra* note 12, at 61, 64 (“[P]rogressive Latin American jurists turned a critical eye, both on themselves as a disciplinary community, as well as on the other central actors in the legal drama . . .”).

61. See, e.g., José Reinaldo de Lima Lopes, *Brazilian Courts and Social Rights: A Case Study Revisited*, in COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES, *supra* note 12, at 185 (describing the use of the class action suit in Brazil against mostly private providers of health and education services).

62. See, e.g., CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 86 (Colom.) (“Every person has [recourse to] the action of *tutela* to claim before the judges . . . the immediate protection of their fundamental constitutional rights . . .”); *id.* art. 87 (“Any person may come to the judicial authority to make effective the compliance with a law or administrative act.”); *id.* art. 92 (“Every natural or juridical person may solicit from the competent authority the application of penal or disciplinary sanctions derived from the conduct of public authorities.”); COSTA RICA CONST. art. 48 (“Every person has the right to the recourse of habeas corpus . . . and to the recourse of *amparo* to maintain or reestablish the enjoyment of other rights conferred by this constitution . . .”).

In the face of this new context, judges began recognizing that they had diverse alternatives to the dichotomy that had dominated until then: implementing or not implementing a right (e.g., a suit for access to housing).⁶³ Judges could opt to give orders to the other branches, making it clear that the other branches were violating the constitution, and suggesting different options that could be considered; request public hearings to collectively discuss how to resolve situations of complex litigation; or define time frames in which the political power ought to find solutions to all the problems under review, among other remedies.⁶⁴

And here again, an important fact arises that is worth noting. The countries that appear to fall the furthest behind in this slow march toward public recognition of social rights appear to be those that, for one reason or another, more strongly resisted the incorporation of those social demands into the bodies of their constitutions. Examples that stand out include the austere Chilean constitution,⁶⁵ and most notably the United States, whose Constitution is completely silent on the subject of social rights, and has been described as a truly “negative” constitution.⁶⁶

One wonders how irrational that initial proposition was, decades ago, to incorporate rights into a constitution that did not appear amenable to the novelties being added. Is it not appropriate to speak of a failed graft? Is it that, contrary to what I suggested just a few paragraphs ago, the constitutionalization of social rights ended up being a victorious strategy in the long term?

The answer, one could say, is nuanced. In light of everything, it is clear that those involved in a constitutional reform like the one described (defending the incorporation of social rights into the constitution) became involved for very diverse, and at times contradictory, reasons. Without a doubt, there were constituents who undertook the task with the goal of easing what they saw as a growing social conflict; others did so thinking textual changes would never produce practical results; others participated due to

63. See Gargarella, *supra* note 12, at 27 (arguing against judicial abstinence from enforcing rights, and suggesting that “other equally or even more attractive theories of democracy require judges to deal with social rights in a completely different manner”).

64. For further discussion of the need for diverse options for judicial enforcement of social rights, see Siri Gloppen, *Courts and Social Transformation: An Analytical Framework*, in *COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES*, *supra* note 12, at 35, 51–56.

65. See Mark Ensalaco, *In with the New, Out with the Old? The Democratizing Impact of Constitutional Reform in Chile*, 26 *J. LATIN AM. STUD.* 409, 416–17 (1994) (noting that the Chilean constitution of 1980 included few limits on state sovereignty and a “vague obligation to respect ‘essential rights which emanate from human nature’”).

66. Judge Posner has called the United States Constitution a charter of negative rather than positive liberties. The men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them. The Fourteenth Amendment, adopted in 1868 at the height of laissez-faire thinking, sought to protect Americans from oppression by state government, *not to secure them basic governmental services*. *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983) (emphasis added) (citations omitted).

mere hypocrisy or populism. At the same time, there were traditional participants who believed in what they were doing and trusted the collective strength of the constitutional changes. Whatever the rationales, one could say that a constitutional modification like the one mentioned took place, for the most part, with a certain irresponsibility considering the magnitude of the purpose sought. Of course, it was not easy to foresee all the implications that would result from the type of reform that was proposed. Meanwhile, it was clear that a sufficient level of intellectual reflection had been achieved that could have helped avoid problems like the ones that resulted from the reforms in this case.

But what is there to say about the dormant clauses mentioned? First of all, let us clarify that today is not the era of consolidated social rights; instead, it is the beginning of a phase where, typically, more judges are open to the idea of hearing suits to implement social rights (or at the very least, not predisposed to discard nonenforceable rights).

With that said, it would be worth referencing some general points that are particularly important in the discussion of constitutional reform. First of all, it makes sense to recognize that, beyond what has been pointed out, some reforms can be worth the struggle, even when the initial response to the reforms is not favorable. Such a gamble could result in a sense of constitutional duty adopted by the community—a duty that is, symbolically, far from a minor legal change. Some have begun to speak, in that sense, of an *aspirational constitutionalism* as a way to account for this different manner of thinking about the constitutional question: a constitution should not be seen as just a catalog of rights and duties, but also as a tool to demonstrate the utopia or ideal sought to be reached.⁶⁷

Second, the incorporation of certain ambitious constitutional clauses could be a safe bet on the future, in pursuit of a change in current sociopolitical conditions that block the development or the consolidation of the new commitments. Moreover, it could be an intelligent way of intervening in time, starting to create the conditions for turning diverse coalitions into dominant ones. In this way, the modified constitution could serve to enact changes in the incentive structure of the principle actors involved in the relevant reform. For example, by recognizing that their demands are backed by constitutional sources, certain individuals could begin working together in pursuit of their rights or certain groups could begin to mobilize socially for the same.

67. See Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence Through Negative Models*, 1 INT'L J. CONST. L. 296, 299 (2003) (“*Aspirational Constitutionalism* refers to a process of constitution building (a process that includes both drafting and interpretation by multiple actors) in which constitutional decision makers understand what they are doing in terms of goals that they want to achieve and aspirations that they want to live up to. It is a fundamentally forward-looking viewpoint.”).

Finally, I would make a point in favor of the gamble for certain dormant clauses—that is to say, the gamble in introducing new constitutional clauses that, it would appear, are not in a condition to prosper and develop in the short term. What is at play here is none other than what appears to have been locked into the whole idea of “universal rights” from their origins. Perhaps, at the time when universal rights were first invoked, some people invoked them with the sole purpose of advancing their own interests, without comprehending the effect on others, or in any case, focused primarily on securing benefits for themselves. However, the universal invocation in favor of the adoption of rights holds extraordinary power given those abuses that it explicitly authorizes. Those who insist—but not in a selfish manner—on the importance of universal rights, do so backed by the consensus that usually surrounds the idea that this “has to do with a demand for something that we all deserve” (who could oppose such a claim?). It could be, as usual, that not everyone is in the same position to take advantage of the benefit sought in the moment that a request is granted. It could be that some individuals benefit much more than others, even when the benefit is characterized as universal. However, the law tends to get its revenge in such situations. It tends to be the case that, as time goes on, original social conditions vary substantively, and those who were not initially in a position to take advantage of what others enjoyed, are suddenly positioned to demand their share. Ultimately, the gamble on clauses that, in principle, could turn out to be dormant clauses is not rare and is certainly not irrational. Instead, it is all too common and is deeply entrenched in the history of modern rights.

Of course, none of this completely dissolves objections like the ones examined above. It could be preferable to have a constitution that is more austere than baroque or unnecessarily overloaded. It makes sense not to demand too much of the constitution, so as not to generate undue risk of loss of authority within it. Nothing justifies, above all, the degree of irresponsibility, ignorance, or disengagement displayed by many who participated in constitutional reform. Despite that, the things that have been pointed out here could be useful to show that the gamble on clauses that we know will not take effect immediately could be a very rational and reasonable bet—a way to show confidence in the future and, above all, the remarkable power that the nucleus of constitutional rights holds: rights that come to life after some time, like leaves that once again look like leaves, when the water that appeared to be drowning them has subsided.