Constitutionalism in the Americas: A Bicentennial Perspective

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CONSTITUTIONALISM IN THE AMERICAS: A BICENTENNIAL PERSPECTIVE†

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INTRODUCTION

The bicentennial of the United States Constitution has inspired numerous professional and academic discussions of its influence on the republics of Latin America. This emphasis on the Constitution as an inter-American document is entirely appropriate, because, by

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1. For example, the Inter-American Bar Association’s 26th conference had as its central theme, Los Doscientos Años de Constitucionalismo en las Américas (“Two Hundred Years of Constitutionalism in the Americas”). The proceedings of the conference will be described in a future issue of the University of Miami Inter-American Law Review. Puerto Rico, whose unique status makes it an heir to both Latin American and Anglo-American legal traditions, sponsored an inter-American forum entitled Human Rights: Two Hundred Years of Constitutional Experience in the United States and its Influence on Latin America. All seven of the papers presented at the forum are to be published in a special issue of the Revista del Colegio de Abogados de Puerto Rico.
any method of assessment, the influence of the United States Constitution in Latin America has been great. The texts of most Latin American constitutions contain many provisions derived from the document drafted in Philadelphia in 1787. For example, the Argentine Constitution begins:

We, the representatives of the people of the Argentine Nation, meeting in General Constituent Congress by the will and election of the provinces, in order to establish a national union, insure justice, consolidate domestic peace, provide for the common defense, promote the general welfare, and secure the benefits of liberty for ourselves, our posterity, and all people of the world who wish to live on Argentine soil; invoking the protection of God, source of all reason and justice; do ordain, decree, and establish this Constitution for the Argentine nation.  

The Mexican Constitution contains the following guarantee: “No person shall be deprived of life, liberty, property, possessions or rights without a trial by a duly-created court in which the essential procedures are observed, in accordance with laws issued prior to the Act.”

The Venezuelan Constitution provides, “The enunciation of rights and guarantees in this Constitution shall not be construed as denying other rights which, being inherent in the human person, are not expressly mentioned herein.”

Although these and other textual similarities are significant, they are only the most obvious, but not necessarily the most important, indicia of the role played by the “Constitution of Philadelphia” in the development of Latin American constitutionalism. If Latin America’s use of the United States Constitution had been just a matter of rote copying, the results would have been juridically uninteresting and practically unsuccessful. As Juan Bautista Alberdi, the father of the Argentine Constitution, wrote:

All constitutions change or succumb when they are but children of imitation; the only one which does not change, the only one which moves and lives with the country, is the constitution which that country has received from the events of its history, that is to say, from those deeds which form the chain of its existence, from the day of its birth. The historical constitution, the work of deeds, is the living union, the only real and permanent [constitution] of each country, which survives experi-

2. CONSTITUCIÓN preamble (Argen.).
3. CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS [Const.] art. 14 (Mex.).
4. CONSTITUCIÓN art. 50 (Venez.).
I. PRELIMINARY CONSIDERATIONS

Any discussion of Latin American constitutionalism is likely to meet with the objection that constitutions in that part of the world are suspended, replaced, and ignored so often that constitutionalism there is either illusory or cosmetic. The answer to this objection is threefold. To begin, many Latin American countries have enjoyed significant periods of constitutional government. Costa Rica has one of the most respected constitutional systems in the world. Mexico's current constitution, which dates from 1917, has proved to be quite durable. Argentina experienced seven decades of uninterrupted constitutional government in this century and the last. Governments in Venezuela and Colombia have changed hands in orderly fashion for nearly thirty years. During most of the twentieth century, Uruguay served as a model of constitutional stability; and Chile's current situation is an obvious departure from its long tradition of constitutional democracy. The tendency is to forget the successes of Latin American constitutionalism because they are not as sensational as its failures.

Second, even during periods of dictatorship, Latin American constitutions retain considerable vitality because of the tenacity of lawyers who continue to assert constitutional principles, and the ingenuity and courage of judges who apply constitutional norms in spite of the suspension and subordination of constitutional guarantees by authoritarian rulers. These qualities are manifested in cases such as Sánchez Sorondo, which was decided by Argentina's Supreme Court of Justice in 1968, while the country was under a military government. The military junta, which had taken power in June, 1966, promulgated an "Act" and a "Statute" of the Argentine Revolution. These declarations subordinated constitutional guarantees to the announced goals of the revolution. In 1967, the military government

5. J.B. Alberdi, Bases y puntos de partida para la organización política de la República Argentina 11 (1852).
issued a decree prohibiting the publication of the newspaper Azul y Blanco. The publisher sought judicial relief from this decree, arguing that it violated the constitutional guarantee of freedom from prior censorship. The government argued that since the newspaper had openly opposed the objectives of the revolution, the revolutionary Act and Statute, rather than the Argentine Constitution, controlled. In affirming the lower court’s decision in favor of the newspaper, the Supreme Court of Argentina said:

5. If art. 14 of the National Constitution prohibits prior censorship, it is proper to conclude that it certainly does not permit the outright closing of a publication.

6. The purposes announced in the... Act of the Revolution are not inconsistent with this conclusion, [since the Act of the Revolution] ratifies safeguarding the essential liberties recognized by the Constitution: (1) by fixing as a General Objective the support of “our spiritual tradition inspired in the ideals of liberty and human dignity that are the heritage of western and Christian civilization,” and (2) by fixing as a Special Objective in the ambit of internal politics, the restoration in the country of the “concept of authority, in the sense of respect for law and the command of true justice, in a republican regime in which the exercise of the obligations, rights, and individual liberties are in full force.”

In Brazil, the military officers who took power in March, 1964, promulgated a series of “Institutional Acts,” which purported to subordinate Brazil’s constitution to the substantive provisions of the Institutional Acts, and to prohibit judicial review of any “Complementary Acts” which might be promulgated by the military in order to implement the Institutional Acts. In S.A. Metalúrgica Santo Antonio v. Estado de Minas Gerais, the Supreme Federal Tribunal (Tribunal) deftly paid lip service to the Institutional Acts while reaching the conclusion that Complementary Acts were subject to judicial review. “The precept of a Complementary Act is not, with due respect, a constitutional precept. The former complements the latter, but is not its equal or equivalent...” The Tribunal then concluded that to allow the application of unconstitutional Complementary Acts would violate the Institutional Acts, which subordinate the Constitution only to the Institutional Acts themselves. The lesson that

7. Id. This translation is from K. Karst & K. Rosen, Law and Development in Latin America 220 (1975).
9. Id.
emerges from these and other cases is that constitutions do not necessarily disappear when dictators come to power.

Third, and most important, the cynics overlook the fact that a residual spirit of constitutionalism exists in Latin America which, even in the worst of times, causes lawyers and laymen to think of the constitutional order as the normal and proper state of affairs, and to view the dictatorship of the moment as but an unfortunate exception. This spirit is much more than just a desire for constitutional government; it is an awareness that the constitution is at all times the juridical and political point of reference and standard of judgment, as well as the legal and political goal. A member of the Supreme Federal Tribunal of Brazil, less than five months after the 1964 military coup, expressed this spirit very well in his opinion concurring in the issuance of a writ of habeas corpus freeing a university professor who had been arrested by the military authorities for shouting a political slogan:

I would ... like to recall here a great Brazilian writer, Eduardo Prado, who said that the history of Brazil has been such that one never knows where revolution begins and legality ends ... . And in this natural confusion of our history, ... I prefer to remain with the Constitution; though during many years it may not be in force, it is [in force] for us, for a judge can reason only within the law. Accordingly, I am proudly obliged to recognize liberty of thought and academic freedom.¹⁰

This deep sense of constitutionalism explains the persistent demands for the restoration of the rule of law, and the success of so many Latin American countries in reestablishing democratic constitutionalism in the 1980s.

II. HISTORICAL AND PHILOSOPHICAL INFLUENCES

To appreciate the contribution which the United States Constitution has made to Latin American jurisprudence as well as the corresponding contribution which Latin American jurists have made to the development of United States constitutional ideas, an examination of the reasons why the United States Constitution was attractive to Latin Americans, the problems created by their adoption of provisions derived from the United States Constitution, and the methods developed by Latin American republics to adapt United States constitutional principles to their own situations is appropriate.

¹⁰. Sérgio Cidade de Rezende, H.C. No. 40.910, 5 Os Grandes Julgamentos do Supremo Tribunal Federal 7 (Braz. 1964).
A. The Influence of the American Colonial and Revolutionary Experience

For over three hundred years, the lands which were to become the republics of Latin America were colonies of Spain and Portugal. The colonists of Spanish and Portuguese America had little experience with self-government. Statutes and regulations of the New World colonies were promulgated in the mother country by royal councils. In those matters in which there was no special legislation for the colonies, the laws of Spain or Portugal applied. The interpretation of all statutes was expressly reserved to the Crown. The viceroys and captains-general who exercised political and military authority in the colonies were almost always persons born on the Iberian peninsula who, upon completion of their terms of office, returned there. The audiencias—judicial-administrative bodies which functioned in the most important colonial cities—were likewise composed of peninsulares who left the colonies after the completion of their official duties. In most large cities there were cabildos, or municipal councils, composed of the landowners in the area; however, these met only occasionally, dealt with purely local issues, and had no final authority in matters of interest to the Crown. This absence of effective indigenous political institutions made it natural, and necessary, for the statesmen in the newly independent Latin American nations to look abroad for governmental models. Although Latin America's liberators lacked experience in self-government, they were familiar with classical and contemporary political theory, and were well aware of legal and political developments in Europe and North America.

In the first quarter of the nineteenth century, when most of Latin America won its independence, the United States was a young but established country. Like the new nations of Latin America, it had endured a long period of colonial rule under a European monarchy and had fought a successful war against its mother country in the name of liberty. The affinity created by similar colonial and revolutionary experiences was reinforced by philosophical attitudes prevalent when the Latin American republics were writing their

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11. For an overview of Spanish colonial administration in America, see, for example, C. Gibson, Spain in America 90-100 (1966); concerning Portuguese Administration of Brazil, see, for example, P. Jacques, Curso de Direito Constitucional 46-50 (10th ed. 1987). For a more positive summary of colonial administration in Latin America, see Clark, Judicial Protection of the Constitution in Latin America, 2 Hastings Const. L.Q. 405, 406-13 (1975).

constitutions. Those who led the wars of independence in Latin America, and who drafted its constitutions, had been raised in the tradition of the Enlightenment, with its emphasis on reason and its belief that human beings, by the use of reason, could construct political institutions so in harmony with the natural laws of the universe that the inevitable result would be the ideal civil society. A crucial element of Enlightenment thought was the belief that man was naturally free, and that liberty was both the consequence and condition of the ideal society.¹³ For those in the early nineteenth century who thought in such terms, the young but successful United States of America seemed to be the ultimate application of human reason to the task of civil government. The mutually reinforcing influences of Enlightenment thought and the North American Revolution are apparent in the following passage from a letter written in 1783 by the Venezuelan patriot Francisco de Miranda, as he was about to set sail for the United States:

"All these beginnings, for so far that is all they are, all these seeds which, with no little labor and cost, I have been planting in my mind during my thirty years, would of course be fruitless and unprofitable without the experience and knowledge that one acquires by visiting in person and assiduously examining the great book of the universe. This means its wisest and most virtuous societies, their laws, government, agriculture, civilized ways, military science, navigation, arts and crafts, and the like. This and this alone can ripen the fruit and complete in some degree, the great task of creating a man of solid worth.¹⁴"

The matter is stated even more forcefully by the Jesuit Father Juan Pablo Viscardo y Guzmán, writing from exile in Italy in about 1790:

"[I]n whatever aspect our [i.e., Spanish America's] dependence upon Spain is considered, one will see that every obligation impels us to terminate it . . . We owe that to ourselves because of the indispensable obligation to preserve the natural rights granted by our Creator—precious rights which we cannot alienate—rights which no one can wrest from us without committing a crime. Can man renounce his reason, or can this be taken from him by force? Personal liberty is not less essentially his property than reason. The free enjoyment of these natural rights is the inestimable heritage which we ought to transmit to our posterity . . . . The valor with which the English colonists in America fought for the

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¹⁴. Letter from Francisco de Miranda to Cacigal (1783), reprinted in M. Picón-Salas, supra note 12, at 151-52.
liberty that they gloriously enjoy shames our indolence. There is no longer any pretext to excuse our resignation; and, if we longer endure the vexations which overwhelm us, people will truthfully declare that our laziness has merited them; our descendants will burden us with imprecations, when, champing the bit of slavery,—a slavery which they inherited—they remember the moment in which we did not wish to become free.  

Not surprisingly, two decades later, with Latin America's wars of independence in progress, patriots such as Mariano Moreno (who led the revolution which liberated Buenos Aires from Spain) and José María Morelos (one of the leaders of the Mexican independence movement) openly acknowledged that the United States Constitution was a major source of inspiration to them.

Later in the nineteenth century, when the Argentines were writing their constitution, the Mexicans were rewriting theirs, and the Brazilians were replacing their imperial constitution with a republican one, Positivist philosophy was exerting tremendous influence on Latin American thought. Positivism was a sociological science based on the premise that history was progressing toward a thoroughly rational and humane stage. Positivists believed that this process would be both manifested in and accelerated by the adoption and use of the most "advanced" or "progressive" models in government, commerce, and other fields of human activity. In the words of Harold Eugene Davis, an authority on Latin American political thought, "[O]rderly progress was the key idea in positivist social thought." In the late nineteenth century, when Positivism was in fashion in much of Latin

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16. Moreno's plan of operations for the United Provinces of the Rio de la Plata included the following plea: Let me say here that at times accident is the mother of events; for, if a revolution is not directed aright, if intrigue and ambition destroy public spirit, then the state will relapse into the most horrible anarchy. My fatherland, what changes you may suffer! Where, Oh noble and grand Washington, are the lessons of your politics? Where are the rules which guided you in the construction of your great work? Your principles and your system would be sufficient to guide us—lend us your genius so that we may accomplish the results which we have contemplated!
17. H. Davis, supra note 16, at 97-134.
18. Id.
19. Id. at 98.
America, "scientific" indicators pointed to the United States as the most progressive of societies. It was a short step to the conclusion, which many Latin American Positivists made, that the United States Constitution was the most advanced model for orderly, progressive government.

Enlightenment and Positivistic thought had their greatest appeal to a small but politically influential group in Latin America: urban intellectuals and merchants with close ties to freemasonry. On the other hand, many devout Catholics saw no need for new philosophies to explain the nature of government or society and, being aware of the anti-Catholicism which had characterized most of the English colonies, were skeptical of ideas associated with the Protestant and deistic North. To these Catholics, the writings of the French nobleman Alexis de Tocqueville provided important assurance that the United States' political system was not inimical to their faith. De Tocqueville's *Democracy in America* was read widely by educated Latin Americans of all persuasions, and was an important source of their understanding of United States institutions. Alexis de Tocqueville was a practicing Catholic. He was also a constitutionalist whose evaluation of the democratic experience of the United States, while not uncritical, was decidedly favorable. He wrote at length about the relationship between religion and democracy, and he concluded that the constitutional system of the United States was not only compatible with, but indeed congenial to, religion in general and Catholicism in particular. Although the definitive historical research has yet to be done, it is reasonable to infer that the writings of de Tocqueville were instrumental in disposing Latin American Catholics to view the United States Constitution in a favorable light.

The convergence of historical and philosophical influences impelled Latin American statesmen to draw upon the United States Constitution as a structural model for their national institutions. They adopted republican forms of government and, like the United States, divided governmental power among three coequal branches. They rejected the European, or parliamentary, system, in which the executive is dependent upon a legislative majority, in favor of the United States, or Presidential, model. The largest Latin American countries (Brazil, Mexico, and Argentina) followed the United States in adopting federal forms. Like the United States Constitution, Latin

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20. 1 A. DE TOQUEVILLE, DEMOCRACY IN AMERICA (H. Reeve trans. 1899).
21. Id. at 304-20; 2 A. DE TOQUEVILLE, supra note 20, at 20-31.
American constitutions are rigid and supreme; that is, they cannot be amended by ordinary legislative procedures, and their provisions prevail over all other juridical norms.

B. The Influence of Revolutionary France and the Civil Law Tradition

The United States was not the only foreign country which inspired Latin America’s founding fathers. The same historical and philosophical forces which made the United States experience attractive also made the French Revolution appealing. Consequently, the French “Declaration of the Rights of Man and of the Citizen”22 inspired many guarantees written into Latin American constitutions.23 But the Reign of Terror and other excesses tended to limit the appeal of French constitutionalism. Thus, while Latin Americans subscribed to some French formulations of human rights, they were less enthusiastic about France as a governmental model. The Spanish historian Salvador de Madariaga, comparing the democratic revolutions of the eighteenth century, has said that the United States Revolution was the more productive of the two, because to Latin Americans, it inspired fewer fears.24

The greatest European contribution to Latin American law is, of course, the civil law. If historical experience and philosophical inclination made the United States Constitution attractive to Latin Americans, those same forces made the civil law tradition irresistible. For three centuries, Spain and Portugal’s American colonies had lived under civil law systems. At the very time that those colonies were fighting to win their independence, the civil law was being given new vitality in Europe. The five Napoleonic Codes promulgated between 1804 and 181125 were hailed as modern, rational, and progressive. Thus, the civil law of the European continent, Roman in its origin and French in its contemporary manifestation, became the basis of most Latin American law and legal institutions. Upon achieving independence, the Latin American republics enacted civil, criminal, commercial and procedural codes which differed very little from their

22. The Declaration of the Rights of Man and of the Citizen (Fr. 1789) was reaffirmed by the French Constitution. LA CONSTITUCION [CONST.] preamble (Fr.).
25. The five Napoleonic Codes and the years of their promulgation include: the Civil Code (1804), the Code of Civil Procedure (1807), the Commercial Code (1808), the Penal Code (1811) and the Code of Criminal Procedure (1811).
French counterparts. As time went by, the Latin American nations revised these codes, or adopted new ones, to reflect the distinct needs and policies of each country; however, these new codes remained, in style and content, civil law codes in the continental tradition.26

Even more important than the codes themselves was the fact that the civil law tradition permeated Latin American legal culture. Latin American lawyers and judges learned, spoke, and thought in civil law terms. The result was a pyramid whose apex (that is, the constitution) was constructed in large part of materials from the United States and designed in the style of the English common law, but whose base was transplanted wholly from the European continent. To enthusiasts of the Enlightenment and Positivism (as most nineteenth-century Latin American jurists were), this duality was not seen as a problem because, so the theory went, the most rational and most progressive ideas and models would necessarily prove to be harmonious, however diverse their temporal origins. Moreover, it was widely believed that the new systems of law would, by force of their inherent rationality and manifest advantages, result in a spontaneous respect for the rule of law. However, these expectations were soon disproved by events.

III. CONSTITUTIONALISM, CAUDILLISMO, AND CONFLICTING LEGAL TRADITIONS

The first decades of Latin American independence proved to even the most sanguine that constitutions are not self-enforcing. After a brief, euphoric interlude, democratic governments collapsed. The ensuing chaos was halted only by the emergence, almost everywhere, of the caudillos, military and civilian strongmen who ruled in dictatorial fashion, routinely exceeding constitutional limitations on their own power and disregarding constitutional guarantees of the rights of others. In Mexico, Antonio López de Santa Anna ruled in crude and capricious fashion on eleven separate occasions between 1822 and 1855. In Argentina, Juan Manuel de Rosas fashioned a network of alliances with rural landowners which enabled him to rule the country with brutal efficiency from 1829 until 1852. Similar situa-

26. The first important Latin American codification was the Chilean Civil Code, drafted by Andrés Bello between 1846 and 1855. Other important codes include the Argentine Civil Code, CÓDIGO CIVIL, drafted primarily by Dalmacio Vélez Sarsfield between 1863 and 1869, and the draft Civil Code for Brazil, CÓDIGO CIVIL, prepared by Teixeira de Freitas between 1856 and 1865. This latter code, while never adopted, served as a model for the civil codes of a number of countries, including Brazil.
tions existed almost everywhere else in the region. If constitutional government was to be more than a lofty aspiration, ways would have to be found to enforce constitutional guarantees.

In this respect, the example of the United States had only limited utility. The United States Constitution was an extension of the common law tradition; constitutional provisions presupposed the existence and operation of common law rules and practices. This was demonstrated most poignantly in *Marbury v. Madison*, in which the Supreme Court made clear that any litigant who believed himself to be injured by governmental conduct which was contrary to the Constitution could raise the constitutional issue as part of his claim or defense in an ordinary lawsuit before any court having jurisdiction. Thus, any court, state or federal, of general or limited jurisdiction, might declare unconstitutional an act of Congress or of a state legislature, or an action of a federal or state executive. This principle, when combined with the common law principle of stare decisis, meant that a decision of the United States Supreme Court would have the practical effect of rendering an unconstitutional statute or action invalid *erga omnes*.

Such an approach did not fit comfortably into the civil law systems of Latin America. From Roman times through the eighteenth century, the civil law had little tradition of judicial control over governmental action. The Roman *iudex*, or judge, was a private person appointed on an ad hoc basis to decide a particular case. He would not necessarily be called upon in the future to decide other cases. He was not expected to, and usually did not, possess any special knowledge of the law. He was to hear and weigh the evidence, and to apply such legal principles as were contained in the formula, or set of instructions, given to him by a magistrate. The Corpus Juris of Justinian, which was the vehicle by which Roman law was transmitted to medieval and modern Europe, includes language which, by the close of the eighteenth century, was interpreted so as to lessen judicial power even further. It reads, *"non exemplis sed legibus iudicandum est"*, which, translated and placed in context, means the following:

27. For a summary of "the age of the caudillos," see G. Pendle, A HISTORY OF LATIN AMERICA 125-37 (1963).
28. 5 U.S. (1 Cranch) 137 (1803).
30. "Not by the facts of the case, but by the law must judgment be made," is the translation offered by BLACK'S LAW DICTIONARY 950 (5th ed. 1979). However, this fails to capture the signifi-
No judge or arbiter should suppose that he must follow opinions that he considers wrong and still less the decisions of eminent prefects or other notables (for if something was not decided well, it ought not to be extended so as to produce error by other judges, since decisions should be rendered in accordance not with examples, but with the laws), even if the opinions in question are advanced in judicial inquiries of the most eminent prefectures or highest magistracy of any kind; but we order all our judges to follow the truth and the paths of law and justice.\(^{31}\)

In spite of this limited conception of the judicial function, by the end of the Middle Ages judges in most of western Europe constituted a permanent and learned class. In some places, most notably in the Parlement of Paris, seventeenth- and eighteenth-century judges played a significant part in the development of the law, consulting with each other and recording their own decisions in unofficial precedent-books.\(^{32}\) However, the judges of pre-revolutionary France also had become a distinct political and social class, known as much for their defense of the \textit{ancien régime} as for their judicial creativity. In the words of the legal historian John P. Dawson:

Irremovable and irresponsible, wielders of great and undefined power, they [i.e., the French judges] also claimed to represent the national interest. By their dogged defense of a privileged class—the nobility of which they became the leaders—they foreclosed all hope of moderate reform, ensured that the [revolutionary] wave would engulf them all, and earned for themselves a nation’s wrath.\(^{33}\)

The leaders of the French Revolution began immediately to subjugate the judiciary. Judges were expressly prohibited from making law and, for a time, were even required to refer questions of statutory interpretation to the legislature. Montesquieu’s theory of the separation of powers, an important part of late eighteenth-century French thought, was applied strictly so as to prohibit the courts from interfering with the legislature or the executive, and the Justinian maxim \textit{non exemplis} \(^{34}\) received unprecedented emphasis as a limitation on the judicial function.\(^{35}\)

Thus, the civil law entered the nineteenth century with a pro-

\(^{31}\) C.7.45.13 (529 A.D.) (emphasis added).
\(^{32}\) J. DAWSON, \textit{supra} note 29, at 263-373.
\(^{34}\) \textit{See supra} note 30 and accompanying text.
foundly antijudicial bias which manifested itself in a number of important and interrelated doctrines: judicial decisions are not a source of law; the judiciary must not assume legislative functions; and judges must not decide cases by following the decisions of other judges. Latin American jurists, educated in the legal tradition of post-revolutionary France, understandably took a narrow view of the judicial function.\textsuperscript{36} Judicial review, as practiced in the United States, seemed to run counter to the central tenets of the civil law. A judicial decision declaring an act of the Legislature unconstitutional was an unwarranted interference with legislative prerogatives and, when coupled with the Anglo-American principle of stare decisis, violated the rule of non exemplis and effectively made judicial decisions a source of law.

The conflict between legal traditions is illustrated by the following example: Article 133 of the Constitution of Mexico\textsuperscript{37} establishes constitutional supremacy in language almost identical to that found in the Supremacy Clause of the United States Constitution.\textsuperscript{38} The Mexican version reads:

The Constitution, the laws of the Congress of the Union that emanate therefrom, and all treaties that have been or shall be made in accordance herewith . . . shall be the supreme law of the Union. The judges of each state shall comply with the said Constitution, laws, and treaties, . . . anything in the constitutions or laws of the states notwithstanding.\textsuperscript{39}

In \textit{Marbury v. Madison},\textsuperscript{40} the United States Supreme Court reasoned that the Supremacy Clause of the United States Constitution makes it not only permissible, but necessary, for every court in the country to declare a statute unconstitutional whenever, in the course of any suit, a conflict arises between a statute and the federal Constitution. One might expect that Article 133 of the Constitution of Mexico would have led to a similar exercise of judicial review by every court, federal and state, in that country. Although arguments were made to that effect, the rule in Mexico is that Article 133 does not confer upon the

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\textsuperscript{37} \textit{Const.} art. 133 (Mex.)

\textsuperscript{38} \textit{U.S. Const.} art. VI.

\textsuperscript{39} \textit{Const.} art. 133 (Mex.)

\textsuperscript{40} 5 \textit{U.S.} (1 Cranch) 137 (1803).}

courts any general power of judicial review. One contemporary Mexican jurist has described the second sentence of Article 133 as "obscure and incongruous, . . . out of place in our system." Given the fact that Mexico's legal system is rooted in the civil law, this conclusion is not surprising.

To many it seemed that the Latin American republics were in a constitutional dilemma from which they could extricate themselves only by either foregoing the enforcement of constitutional guarantees or undermining the civil law foundations of their legal systems. But the dilemma did not cause the Latin Americans to abandon their experiment with the United States Constitution, nor did it lead them to repudiate their civil law heritage.

IV. LATIN AMERICAN SOLUTIONS

A. The Mexican Amparo

The way by which Mexico solved the dilemma is interesting and instructive. After a year of monarchical government under Agustín de Iturubide, Mexico, in 1824, adopted a republican constitution patterned after that of the United States. The constitution established a federal republic with a national government consisting of three branches, with a bicameral National Congress (Congress) composed of a Senate, in which each state was equally represented, and a House, in which representation was based on population. The President was chosen by an electoral college and, as was the case in the United States prior to the adoption of the twelfth amendment, the candidate with the second largest number of electoral votes became Vice President.

Appalled by the dictatorship and disorder of the early years, Mexico experimented with a variety of institutions and procedures designed to enforce constitutional guarantees. Mexico's constitution gave its supreme court jurisdiction over violations of the constitution itself, in accordance with procedures to be established by statute; however, since no procedural statute was enacted, the supreme court did not exercise jurisdiction over constitutional questions. The constitution also gave Congress exclusive power to decide questions of constitutional interpretation, and although the Congress used this

41. J. PADILLA, SINÓPSIS DE AMPARO 58 (1985) (quoting Dr. Felipe Tena Ramírez).
42. U.S. CONST. amend. XII provides that the President and Vice President shall be elected separately.
43. CONST. of 1824, art. 137 (Mex.).
power to invalidate some state statutes, no effective control was exercised over the national government. In 1836, Mexico adopted a new constitution which established a fourth branch of government, called the *Supremo Poder Conservador*, a commission whose duty it was to safeguard the constitution. It was empowered to, inter alia, nullify acts of the executive, legislative, and judicial branches which were contrary to the constitution. The *Supremo Poder Conservador* acted on only four occasions, none of which involved constitutional matters. After five years, it was abolished. However, the search continued for a workable means of enforcing the constitution.

In 1837, de Tocqueville’s *Democracy in America* became available in Mexico, and was read with great interest. His description of judicial review, as practiced in the United States, appealed to many Mexican jurists. One such person, Manuel Crescencio Rejón, drafted a constitutional provision for his native state, Yucatan, which granted to judges the power to protect all persons in the enjoyment of their constitutional and legal rights. In 1847, this idea was incorporated into the national constitution, and has been an important part of Mexican constitutionalism ever since. The proceeding by which the judicial protection is extended is called *amparo*, the Spanish word for protection. *Amparo* is a federal proceeding which may be brought by any person who believes that his constitutional rights are being violated by a public official, even when the official is acting within the scope of authority conferred by statute or regulation. If the judge, after hearing, determines that a constitutional right of the petitioner is being violated, the judge orders the official, or the official’s superiors, to cease the violation and to take such steps as may be necessary to restore the petitioner to the full enjoyment of the right in question. *Amparo* combines the principles of a rigid constitution and judicial

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44. *Id.* arts. 164, 165. For information concerning the invalidation of state legislation by the National Congress, see II *LEGISLACIÓN MEXICANA* 89-223 (M. Dublan & J. Lozano eds. 1876).
45. The powers of the Supremo Poder Conservador were enumerated in Article 12 of the Second Constitutional Law of 1836.
46. 1 A. DE TOCQUEVILLE, supra note 20. See *supra* text accompanying notes 20-21.
48. At the time it adopted Rejón’s *amparo*, Yucatan had separated itself from Mexico. After a few months, the secession ended and the state resumed its place in the union.
49. Acta de Reformas, art. 25 (1847) (amending Constitution of 1824); *CONST.* of 1857, arts. 101, 102 (Mex.); *CONST.* art. 107 (Mex.).
50. For an excellent survey of the origin and development of *amparo* and its contemporary procedural aspects, see Fix Zamudio, *supra* note 47.
review, derived from the United States, with the limitations on judicial power characteristic of the civil law. This combination, or accommodation, is made by what is called the "Otero Formula," for Mariano Otero, the lawyer who drafted the 1847 constitutional amendment which both guaranteed and defined *amparo*. It reads:

The federal courts shall protect any inhabitant of the Republic in the exercise and preservation of those rights granted to him by this Constitution and by laws enacted pursuant hereto, against attacks by the Legislative and Executive powers of the federal or state governments, limiting themselves to granting protection in the specific case in litigation, making no general declaration concerning the statute or regulation that motivated the violation.  

Mexico's present constitution guarantees and limits *amparo* in similar terms. Thus, *amparo* enables courts to enforce the constitution by protecting individual rights in particular cases, but prevents the courts from using this power to make law for the entire nation. Today *amparo* is the most important procedural device in the Mexican system, and it has served as a model for many other Latin American countries.

**B. Argentine Judicial Review**

During the Rosas years (1829-1852), Argentina was held together by a series of treaties among the various provinces, and by the power of the dictatorship. After the overthrow of Rosas in 1852, a Constituent Congress was convened in the city of Santa Fe. The delegates were strongly influenced by Juan Bautista Alberdi, a Comtean Positivist and admirer of the United States Constitution, who had fled from the repression of the Rosas regime and was living in Chile. The influence of Alberdi's thought on the *constituyentes* meeting in Santa Fe is difficult to overstate. Alberdi saw strong similari-

52. Mexico's present constitution was promulgated in 1917. The Otero Formula is embodied in Article 107, which reads, in pertinent part: "The judgment (in *amparo*) shall always be such that it affects only private individuals, being limited to affording them redress and protection in the particular case to which the complaint refers, without making any general declaration as to the law or act on which the complaint is based." CONST. art. 107 (Mex.).
55. C. Colautti, *ANTECEDENTES DE LA CONSTITUCIÓN ARGENTINA* 33 (no date).
ties between the Argentina of 1852 and the United States of 1787. He saw in the United States Constitution, and in the constitutions of the several states (particularly California and Massachusetts), useful guides to unity, liberty, and progress.56

When Rosas fell, Alberdi composed a constitutional blueprint for Argentina called Bases y puntos de partida para la organización política de la República Argentina.57 The constitution drafted by the Constituent Congress, which entered into effect in 1853, is so much like the United States Constitution that Argentine jurists seriously debated whether their country had not adopted, by implication, the constitutional jurisprudence of the United States Supreme Court.58 While the answer to this question is, strictly speaking, "No," it soon became evident that the influence of North American constitutional ideas went beyond textual similarities.

In 1888, the Argentine Supreme Court declared unconstitutional an act of the National Congress.59 In an opinion reminiscent of Marbury v. Madison,60 the court said:

[I]t is elementary in our constitutional system that the courts have the power and the duty, in actual cases before them for decision, to examine the statutes, comparing them with the text of the Constitution, to verify whether they are or are not in conformity with the latter, and to refrain from applying them if they are in opposition to it.61

Despite several coups, intermittent periods of military rule, and the occasional subservience of the judiciary to authoritarian governments, the principle of judicial review has survived as an integral part of Argentine jurisprudence.62 In 1966, when the country’s military government issued a decree-law purporting to deprive the courts of the power to declare statutes, decrees, or ordinances unconstitutional in summary proceedings, the Argentine Supreme Court declared the decree-law itself unconstitutional. The court said, in pertinent part:

Whatever be the procedure through which a justiciable question is

56. J.B. ALBERDI, supra note 5, passim.
57. Id.
60. 5 U.S. (1 Cranch) 137 (1803).
61. Elortondo, 33 Fallos at 184.
presented for judicial decision, no one can subtract from the sphere of action of the Judicial Power in its inalienable prerogative and obligation—emanating directly from . . . [the Supremacy Clause] of the National Constitution—to respect the Fundamental Law and, in particular, the personal guarantees recognized in its first part. [It must not be forgotten] . . . that article 100 [of the Constitution] expressly provides that "the Supreme Court and the lower courts of the Nation have jurisdiction over and decide all cases dealing with matters governed by the Constitution . . . ."

Consequently, there is no obstacle in the present case . . . to this Tribunal's examination and definitive resolution of whether the administrative decision based on . . . decree 280/64 . . . is contrary to the text and spirit of the National Constitution . . . .

A contemporary expert on Argentine constitutional law, Dr. Miguel Angel Ekmekdjian, explains judicial review in his country in terms which reveal both the influence of the United States and the civil law foundations of Argentine law:

[I]t is appropriate to note that the control of constitutionality is a necessary principle which follows from that other essential element of the Rule of Law: The supremacy of the Constitution. In effect, if we accept that the Constitution is the primary basis of the juridical order of the State . . . it is obvious that we must adhere to the conclusion expounded by Marshall in the famous case "Marbury vs. Madison" in the sense that the other norms which make up the juridical order of the state, must be adjusted to . . . [the Constitution], in its form and in its substance, since, were it otherwise, they would not be valid norms. This axiom fits Kelsen’s well-known depiction of the juridical order of the state, as synthesized in his pyramid [of the hierarchy of laws].

C. Habeas Corpus

One common law institution which has fit easily into the constitutional systems of Latin America is the writ of habeas corpus. The first Latin American country to adopt the writ was the Empire of Brazil, which at the time was influenced more by the example of the British constitutional monarchy than by the United States. In Mexico, the attractiveness of habeas corpus was due primarily to the constitutional experience of the United States. Mexico did not adopt habeas corpus, but rather used it as a model in fashioning the writ of

amparo,⁶⁶ which is considerably more comprehensive than habeas corpus. Impressed by both the United States and Mexican examples, most other Latin American countries adopted both habeas corpus and amparo: the former to protect against unlawful governmental interference with physical liberty, and the latter to protect all individual rights not protected by habeas corpus.⁶⁷ That amparo was established in Argentina not by express constitutional provision, nor by statute, but by decision of the Argentine Supreme Court is indicative of Argentina's relatively expansive view of judicial power.⁶⁸

D. The Brazilian Writ of Security

Brazil abolished the monarchy in 1889 and two years later adopted a republican constitution which was patterned after the United States Constitution, both structurally and in regard to matters of human rights.⁶⁹ To enforce their constitutional declarations of rights, the Brazilians expanded habeas corpus by statute and judicial decisions. By 1920, habeas corpus protected all clear and certain constitutionally guaranteed rights.⁷⁰ Many persons saw this broad use of habeas corpus as an abuse of the Great Writ,⁷¹ and as part of the constitutional reform of 1926, habeas corpus was limited to the protection of freedom of movement.⁷² Since civil law judges do not have the equity powers enjoyed by common law judges, this limitation of habeas corpus left Brazil without an effective means of protecting those constitutional rights not involving freedom of movement. To fill the void, in 1934, Brazil established a new procedural remedy, the mandado de seguranca (literally, "writ of security"), a summary pro-

⁶⁸. Amparo was established by a four-to-one decision of the Argentine Supreme Court in Siri, 239 Fallos 459 (1957), and has been defined in a series of subsequent cases, the most important of which is Samuel Kot, S.R.L., 241 Fallos 291 (1958). Both cases are translated in K. Karst & K. Rosenn, supra note 7, at 161-65. Since 1966, amparo has been regulated to some extent by statute. For a discussion of habeas corpus and amparo in Argentina, see H. Quiroga Lavie, supra note 62, at 516-50.
⁷¹. Blackstone calls habeas corpus "the great and efficacious writ, in all manner of illegal confinement." 3 W. Blackstone, Commentaries *131.
ceeding to protect “clear and certain rights” not protected by habeas corpus. The United States Bill of Rights and United States Supreme Court decisions are frequently used as guides for interpreting Brazilian constitutional guarantees in both habeas corpus and writ of security cases. At times this provokes lively debates in Brazil’s Supreme Federal Tribunal over the relevance of the United States constitutional experience:

Minister Pedro Chaves: [replying to a colleague who had cited with approval Sweezy v. New Hampshire] . . . I am always sad to hear Your Excellency invoking American culture, which is absolutely diverse from our culture, ways, and habits.

Minister Victor Nunes: . . . If I invoke the example of a more developed country, it is because it serves us as a model. . . .

Minister Hermes Lima: Will the cultural difference permit a person to be saddened in the United States by the lack of liberty and not permit a person to feel the same thing in Brazil? Will the cultural difference authorize the lack of liberty in Brazil?

The relevance and utility of United States precedents in any Latin American legal system can be determined only by each country, in light of its own institutions and traditions. But the debate itself is ample proof that United States constitutional ideas have great and obvious appeal.

E. The Costa Rican Action of Unconstitutionality

One of the most interesting and successful mergers of diverse jurisprudential transitions has occurred in Costa Rica. Like most of its neighbors, Costa Rica has adopted both habeas corpus and amparo. In the tradition of the civil law and of the Mexican amparo, the Costa

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73. The Constitution of 1934 provided that the writ of security was available to protect any “certain and incontestable” right. CONSTITUIÇÃO FEDERAL [C.F.] of 1934, art. 113, no. 33 (Braz.). The present constitution provides that the writ of security protects rights which are “clear and certain.” C.F. art. 153, para. 21 (Braz.). The significance of these different formulations is discussed in Tourinho, Direito líquido e certo, expressão atécnica, 1984 FORUM: REVISTA DO INSTITUTO DOS ADVOGADOS DA BAHIA 25-37 (Número Especial).

74. See, e.g., Vieira Netto, H.C. No. 45.232, 44 Revista Trimestral de Jurisprudência [R.T.J.] 322 (Braz. 1968) (opinion of Minister Cavalcanti); Sérgio Cidade de Rezende, H.C. No. 40.910, 5 Os Grandes Julgamentos do Supremo Tribunal Federal 7 (Braz. 1964) (opinions of Ministers Lins and Nunes).

75. Sérgio Cidade de Rezende, H.C. No. 40.910, 5 Os Grandes Julgamentos do Supremo Tribunal Federal 7 (Braz. 1964) (citation omitted) (ministerial responses to colleague who had cited Sweezy v. New Hampshire, 354 U.S. 234 (1957)).

76. Both habeas corpus and amparo are guaranteed by Article 48 of the Costa Rican Constitution. CONSTITUCIÓN art. 48 (Costa Rica).
Rican habeas corpus and amparo do not lie against legislative acts. When official conduct is authorized by statute or regulation, relief will not be granted, even when it appears that the statute or regulation itself might violate the constitution. Costa Rica's constitutions have been influenced strongly by the Argentine Constitution of 1853, and for a time Costa Rica experimented with diffuse judicial review; that is, every court had the power to declare legislative acts unconstitutional. However, because Costa Rican law accorded no precedential value to judicial decisions, court judgments concerning the constitutionality of statutes lacked both uniformity and permanence, and the situation was regarded as highly unsatisfactory.

The Costa Rican solution was not to adopt a rule of precedent, but to limit the power of judicial review of legislation to a single court, the Costa Rican Supreme Court, and to a single form of action, the action of unconstitutionality. The action of unconstitutionality may be brought only by a person who is already a party to a lawsuit which involves a statute whose constitutionality is disputed. The litigant files a petition of unconstitutionality in the Costa Rican Supreme Court, identifying the pending lawsuit, the allegedly unconstitutional statute, and the constitutional provision allegedly violated. The court thereupon orders the suspension of proceedings in the underlying lawsuit and in all other pending cases in the country which involve the challenged statute. The petitioner and the Public Ministry submit briefs, and the parties to the other suspended suits are invited to do so as well. The court decides the matter on the briefs, without oral argument. If two-thirds of the members of the court vote to declare the statute unconstitutional, that statute may not be applied in any case then pending or thereafter commenced. The erga omnes effect of the Costa Rican Supreme Court decision does not proceed from any general theory of binding precedent, but from an express constitutional grant of special (and limited) power to that court:

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77. The enumeration of factors to be considered by the court in habeas corpus cases precludes an attack on the constitutionality of legislation in a habeas corpus proceeding. See Ley de Hábeas Corpus (No. 35 de 23 de nov. de 1932) art. 9°. Article 3(a) of the Amparo Law expressly provides that amparo does not lie against legislative dispositions. Ley de Amparo (No. 1161 del 2 de junio de 1950, as amended) art. 3(a).

78. See R. HERNÁNDEZ, LAS LIBERTADES PÚBLICAS EN COSTA RICA 63-76 (1980).

79. Interview with Ulises Odio Santos, President of the Supreme Court of Justice of Costa Rica, in San José, Costa Rica (June 20, 1984).

80. The power to declare statutes and executive decrees unconstitutional is given to the Costa Rican Supreme Court by Article 10 of the Costa Rican Constitution. CONSTITUCIÓN art. 10 (Costa Rica). The procedure is prescribed by Articles 962-969 of the Code of Civil Procedure.
Dispositions of the Legislative Power or of the Executive Power which are contrary to the Constitution shall be absolutely null. . . .

The Supreme Court, by vote of not less than two-thirds of all its members, has the power to declare the unconstitutionality of dispositions of the Legislative Power and decrees of the Executive Power. 81

The action of unconstitutionality is an interesting blend of civil law and common law influences. In the twentieth century, a number of European civil law countries, seeing a need to enforce their constitutions, established centralized systems of judicial review by giving to a single court (usually called "the constitutional court") the exclusive power to decide constitutionality. (This centralized form of judicial review is frequently called the "Austrian system," because it originated in the Austrian Constitution of 1920. 82) Concentrated judicial review involved less of a departure from traditional civil law notions of the judicial function than did the diffuse system of judicial review developed in the United States. For this reason, the Austrian system appealed to those who saw merit in judicial review but who did not believe that it should be a general attribute of judicial power. To further insulate judicial review from ordinary adjudication, most centralized systems require or permit review of legislation in the abstract, usually within a certain period of time after the statute or regulation in question is promulgated. Thus, most contemporary European judicial review is separated from the run of adversary litigation. 83

Costa Rica's action of unconstitutionality combines the civil law practice of concentrated judicial review with the traditional common law requirement that there be an actual "case or controversy." In the words of a prominent Costa Rican jurist:

[C]ontrol of the constitutionality of laws is exercised only by means of the so-called "incidental route" which was copied . . . from the Argentine system which, in turn, was taken from the North American system.

This means that there must always be a pending lawsuit awaiting resolution in order for a party to bring a complaint of unconstitutionality before the [Supreme Court] . . . .

. . . The Supreme Court itself, on numerous occasions, has held that it cannot make "declarations in the abstract," because the existence of a

81. Constitución art. 10 (Costa Rica).
82. See M. Cappelletti, Judicial Review in the Contemporary World 71-72 (1971).
83. In recent decades, some European countries (such as West Germany) have established procedures for constitutional adjudication "incidenter" (that is, in connection with a dispute in a concrete case), as well as "principaliter" (that is, in an action brought solely to test the constitutionality of a statute). See id. at 72-79.
concrete, pending judicial case is necessary for the Court to be able to exercise such control. 84

CONCLUSION

While the foregoing examples are not intended to provide a comprehensive account of the influence of the United States Constitution on the development of Latin American legal institutions, they illustrate the nature and extent of that influence. Mexico, Argentina, Brazil and Costa Rica all draw upon constitutional ideas derived from the United States and apply those ideas, in measured fashion, to their respective civil law systems. These Latin American countries apply constitutional ideas in different ways, each corresponding to their distinctive national traditions; but the motivating force in each instance is the desire to limit power and secure liberty. Through this process of selective borrowing, Latin American jurists have enlarged and enriched the United States Constitution by demonstrating, over the years, the applicability and adaptability of its principles to peoples of different cultures and histories. In this way, they have made the United States Constitution part of the common patrimony of all the Americas.

The editors and staff of the University of Pittsburgh Law Review are pleased to dedicate this issue to the Honorable Joseph F. Weis, Jr., in recognition of his accomplished career as a practitioner and jurist. The remarks of the eminent contributors who have joined in this tribute illustrate the degree to which this distinguished jurist has influenced others through his personality as well as his legal scholarship. The Law Review wishes him well in his continued participation as Circuit Judge, Senior Status.
The Law Review is pleased to announce the Editorial Board for Volume 50.

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