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CONSOLIDATING DEMOCRACY IN LATIN AMERICA: LAW, LEGAL INSTITUTIONS AND CONSTITUTIONAL STRUCTURE*

Tom Farer**

INTRODUCTION

After near death experiences, each its own grisly tale, elected governments are reappearing throughout Latin America.¹ What distinguishes this moment is not so much their mere existence, since elected governments were also the norm in certain earlier periods, but the character of their elections. Most of the recent elections in Latin American countries were verified by respected international observers. Thus, they differ markedly from the electoral charades conducted, for instance, by the Somoza family in Nicaragua for four decades, or, over much the same period, by the armed forces of El Salvador.²

Another distinguishing feature of the extant elected regimes is their relative freedom from ideological competition.³ Faith in Communist models appears utterly shattered except in surviving covens of the Peruvian Maoists who kill under the banner of Sendero Luminoso.⁴ While

* A similar version of this essay has been published in *DEMOCRACY, MARKET ECONOMIES AND THE LAW: LEGAL, ECONOMIC AND POLITICAL PROBLEMS OF TRANSITION TO DEMOCRACY* (Werner Ebke and Detlev Vagts eds., 1995).

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1. See Irwin P. Stotzky, *The Fragile Bloom of Democracy*, 44 U. MIAMI L. REV. 105, 106 (1989).

2. See ROBERT PASTOR, *CONDEMNED TO REPETITION: THE UNITED STATES AND NICARAGUA* (1987); see also REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS IN EL SALVADOR, ORGANIZATION OF AMERICAN STATES (1978).

3. See Keith S. Rosenn, *The Success of Constitutionalism in the United States and its Failure in Latin America: An Explanation*, 22 U. MIAMI INTER-AM. L. REV. 1, 27-30 (1990) [hereinafter *Success of Constitutionalism*].

4. See SCOTT PALMER, *TERRORISM IN CONTEXT* (1994).

authoritarian populist or reactionary paradigms were not liquidated, for the moment they seem enfeebled as competitors for the mantle of legitimacy.

Still a third notable feature of the new wave of elected regimes is their commitment to mutual support, a commitment formalized in 1991 by the Declaration of Santiago,⁵ adopted by the General Assembly of the Organization of American States. Breaking with a strong tradition of hostility toward intervention to shape political developments in Western hemisphere states, the Latin members of the Organization initiated this call for the mutual defense of elected governments and the concomitant adoption of procedures for concerting action to reverse unconstitutional seizures of power.⁶

The Declaration is a sign of unparalleled belief in the importance of democratic government, as well as a symbol of uneasiness about its prospects—an uneasiness amply justified by subsequent events in Haiti, Peru, Guatemala, and Venezuela, to name the most disturbing cases.⁷ Politicians and intellectuals in the Western hemisphere concede that in most countries democracy is not yet “consolidated” or “stabilized.” Some persuasively argue that in perhaps as many as half of the countries with elected governments, true democracy is not even in place.⁸ I share that view.

The most widely acknowledged definition of democracy is probably still the one enunciated by Joseph Schumpeter in his classic work, *Capitalism, Socialism, and Democracy*.⁹ According to Schumpeter, democracy is an institutional arrangement in which the power to decide is determined by a competition for the people's votes.¹⁰ This is democracy as the political analogue of a liberal economic system. As producers compete for consumer preference manifested in purchases, politicians compete for consumer preference manifested in votes.¹¹ In order to satisfy the liberal individualist values that animate and justify it, the competition must be fair. Students and practitioners of antitrust law will attest that the concept of “fair competition” is far from easy to define, and

5. AG/RES. 1080 (XXI-0/91), approved June 4, 1991.

6. AG/RES. 1080 (XXI-0/91), approved June 5, 1991.

7. Rosenn, *supra* note 3, at 28-30.

8. See Larry Diamond, *Democracy in Latin America: Degrees, Illusions, and Directions for Consolidation*, in BEYOND SOVEREIGNTY: COLLECTIVELY DEFENDING DEMOCRACY IN THE WESTERN HEMISPHERE (T. Farer ed. 1995).

9. JOSEPH SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* (1947).

10. *Id.* at 269.

11. *Id.*

even more difficult to apply in complex societies where resources and skills are very unevenly distributed. Initial success achieved through luck, skill, or undetected (inadequately sanctioned) predation translates into market power which thereafter tilts the field of play.

On the demand side, election monitors can determine whether present power holders distort the expression of preference by inhibiting access to the voting booth or miscounting the votes. On the supply side, they can identify the gross barriers to entry or changes in market shares. They have no mandate, however, to rule elections unfair, either on the grounds of grossly false advertising by the winners—concerning their own resumes and programs—or on the grounds that the winners exploited previously acquired advantages in wealth, celebrity, and prestige arising from the occupation of public and private offices. They have no mandate to take these considerations into account because to do so would challenge the legitimacy of electoral systems in many of the *established* democracies.

This is only the first, and arguably the lesser, difficulty in construing and applying Schumpeter's dictum. The second difficulty concerns not the character, but the result of the competition. What is the competition? Is it a competition for the power to decide all issues that bear on the electorate's concerns, or only those which are properly subject to political resolution, that is, resolution by the public authorities? Who but the electorate is entitled to decide on the allocation of issues between the public and private realms? Or does democracy, by its nature, presume a sphere of life beyond the reach of official power, even if some of the activities which occur there have broad social consequences?¹²

In capitalist societies, the decisions of investors and corporate managers generally do more to shape quotidian life for most of the electorate than do the decisions of elected officials, or the persons who work under their direction.¹³ Additionally, in many capitalist democracies,

12. See Donald Kommers, *German Constitutionalism: A Prolegomenon*, 40 EMORY L.J. 837 (1991) (discussing how democratic polities differ significantly in their view of the proper reach of government action including regulation of and intervention in nominally voluntary transactions). The social capitalist ideology of a democratic state like Germany legitimates considerably more public action on behalf of community interests than the *laissez faire* capitalist ideology of the United States.

13. The exceptions to this rule in normal periods are people rich enough to insulate their lifestyle from the consequences of private decision-making in the economic sphere and the very poor who depend for their survival on public transfers of goods and services. Perhaps we should add those professional criminals who organize their lives around coerced transfers.

constitutional provisions shield property from less than fully compensated takings and thus preclude public action to alter the distribution of capital. Moreover, certain key public institutions, particularly the central banks, are insulated in varying degrees from direct political control.¹⁴ Nevertheless, because constitutions can be changed, albeit by weighted majorities, and because the private economy, at least in theory, can be comprehensively regulated or its impacts partially offset, most of us find capitalist arrangements comfortably compatible with, in fact a necessary condition for, Schumpeterian democracy. What neither this, nor any other conception of democracy, can accommodate is a system in which the symbolic power of elected officials is blunted by the raw power of people with guns—a system like the one traditionally found in many Latin American countries where the military institution, acting for itself and allied civilian elites, defines the limits of decision by elected officials.

The perceived exigencies of the Cold War encouraged some Western officials virtually to equate democracy with elections.¹⁵ Elected anti-communist governments, which behaved in ways indistinguishable from frankly authoritarian ones, were conventionally described merely as “flawed.” The passing of the Cold War removed the strategic incentives to prevarication. Now a consensus prevails to the effect that fair elections, rooted in a formally democratic constitutional structure, are a necessary, but insufficient, condition for declaring a regime democratic. There seems equally broad agreement that another condition for earning the label of “democracy” is generalized respect for civil liberties. Two reasons support factoring civil liberties into the governing definition. The first reason, which is instrumental, is that fair elections require respect for civil liberties all of the time, not just during the pre-electoral period. The other reason stems from a wider idea of what democracy connotes—an idea which fuses Schumpeter’s procedural definition with a more classic one which emphasizes the output or the consequences of democracy, above all a wide sphere of individual autonomy.

The fairness of elections, the protection of civil liberties, and the real decision-making power of elected officials are all obviously matters of degree. In terms of these and other defining features, countries with elected regimes are located along a broad continuum. Qualitative distinc-

14. See WILLIAM GREIDER, *SECRETS OF THE TEMPLE: HOW THE FEDERAL RESERVE RUNS THE COUNTRY* (1987).

15. See THOMAS CAROTHERS, *IN THE NAME OF DEMOCRACY: UNITED STATES POLICY TOWARD LATIN AMERICA IN THE REAGAN YEARS* (1991).

tions are, nevertheless, unavoidable to the extent that governments, acting alone or in concert, are determined to invest resources for the defense and promotion of democratic regimes. Three of the most learned students of the democratic phenomenon—Larry Diamond, Juan Linz and Seymour Martin Lipset—urge a distinction between democracies and “semi-democracies.” Semi-democracies are:

those countries where the effective power of elected officials is so limited, or political party competition is so restricted, or the freedom and fairness of elections so compromised, that electoral outcomes, while competitive, still deviate significantly from popular preferences; and/or where civil and political liberties are so limited that some political orientations and interests are unable to organize and express themselves.¹⁶

Conceding that “there has been tremendous democratic progress in Latin America and the Caribbean over the past decade,” Diamond still concludes that only eleven of the twenty-two Latin countries in the hemisphere should fall within the democratic category; and of the eleven, as many as six are much closer in character to semi-democracies than to the fully-institutionalized democracies of North America and Western Europe.¹⁷ While some observers might be a little more generous in their labeling, virtually all serious students of Latin American political systems recognize that most fail to deliver a high level of protection for civil liberties, fail to guarantee anything approximating the rule of law, and fail to provide all sectors of the society a reasonable opportunity to participate in the formation and implementation of public policy. Many of the post-authoritarian elected regimes in other parts of the world, particularly Eastern Europe, the former Soviet Union, and Africa, share these defects.¹⁸ Inevitably feeding on themselves, chronic performance failures underscore, as well as help to explain, the fragility of the latest democratic trend.

The formal title of the conference at which a draft of this paper was presented was “Legal Problems of Transition to Democracy.” I construed the intention behind the title as identifying the ways in which “law” may burden or facilitate the transition from authoritarian to elected governments, and the ways in which it can contribute to deepening their roots and enhancing their democratic character.

16. 4 DEMOCRACY IN DEVELOPING COUNTRIES: LATIN AMERICA xvii (Larry Diamond et al. eds., 1989).

17. Diamond, *supra* note 8, at 14-15 (of prepublication manuscript).

18. John Elster, *Constitutionalism in Eastern Europe: An Introduction*, 58 U. CHI. L. REV. 447, 639-42 (1991).

By "law," our conveners doubtless intended to include both what H.L.A. Hart called the "primary rules" governing quotidian behavior in civil society, and the secondary rules which indicate how, when, and by whom the primary rules are to be recognized, construed, and enforced.¹⁹ Also included in the conveners' conception of "law," I am sure, was the legal culture, that complex of often half-articulated, half-conscious ideas about the nature, meaning, place and importance of law, lawyers, legal discourse, and institutions in the organization and function of a particular country's life.

Law, so conceived, is bound to be more than a dependent variable. At the same time, its actual or potential role in the problematic transitions now occupying the stages of Eastern Europe, Africa, and Latin America is powerfully constrained by the larger culture, and by the historical experience and political, economic, and social structures of the various national actors. Like Tolstoy's unhappy families, each country has its own peculiar features. Still I think certain region-wide generalizations are possible. Certainly with respect to Latin America, I will not be the first to try to identify them.

I. THE PROBLEMATIQUE OF LAW IN LATIN AMERICA

Latin American states possess at least eight distinct characteristics which set them apart from North America and Western Europe. One feature of Latin American states often remarked upon is the tendency to concentrate power.²⁰ It is concentrated first in the central government, in the capital city, and then within a single individual in that government, the President, whether for life or for an elected term. A second feature of Latin American states, standing in ironic contrast to the first, is a flaccid state bureaucracy, which is easily colonized by well organized social forces, in part because it lacks self-respect and an animating sense of the state as having its own purposes.²¹ A third characteristic of Latin American politics is the failure of political parties in most countries to serve as effective rationalizers of political life by aggregating the demands of the various sectors of the population and converting

19. H.L.A. HART, *THE CONCEPT OF LAW* (1962).

20. CLAUDIO VELIZ, *THE CENTRALIZING TRADITION IN LATIN AMERICA* (1980); see Alejandro Gatto, *Nine Years of Transition to Democracy in Argentina: Partial Failure or Qualified Success?* 31 COLUM. J. TRANSNAT'L L. 1 (1993)

21. See JOEL MIGDAL, *STRONG SOCIETIES AND WEAK STATES* (1988) (providing a penetrating discussion of state-society relations in what we used to call, for purposes of summary reference, the Third World).

those demands into political programs, which, if implemented, would actually promote the demanded ends. Instead, Latin American political parties have served as vehicles for personalistic, paternalistic rule, in the first place by the chief executive and secondarily by local bosses, or "Caciques," dispensing government favors.²²

A fourth distinct characteristic of Latin American states is the officer corps, a military institution, with a tradition of alienation from civil society, of legal impunity, and of imagining itself the ultimate interpreter and guardian of the nation's essence.²³ A fifth feature of Latin American states is the frequent recourse by the Executive to states of emergency and a concomitant suspension of those portions of the constitution which protect individual rights.²⁴ A sixth characteristic is a notably unequal distribution of wealth.²⁵ The seventh distinguishing feature of Latin American states is a high degree of state involvement in the economy.²⁶ Finally, the eighth feature that sets Latin American states apart from their Western European and North American counterparts, related in varying degrees to all of the other features, is the weakness of the rule of law.²⁷

Whatever else it may connote, the rule of law requires the state to extend its largesse and apply its sanctions effectively, in a manner consistent with published norms, and without reference to the social status and political connections of the persons affected: In other words, treating like cases alike, and defining like cases in accordance with the broad principles and policies which theoretically animate the rule at issue.

22. POLITICAL PARTIES AND DEMOCRACY IN CENTRAL AMERICA (Louis Goodman, et al. eds., 1992).

23. See KAREN REMMER, *MILITARY RULE IN LATIN AMERICA* (1989); ALAN ROUQUIE, *THE MILITARY AND THE STATE IN LATIN AMERICA* (1989).

24. See, e.g., REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS ON COLOMBIA, ORGANIZATION OF AMERICAN STATES (1980) (commenting critically about the extent to which the use of states of emergency as tools of governance had become chronic).

25. See JOHN SHEAHAN, *PATTERNS OF DEVELOPMENT IN LATIN AMERICA* 23 (1987). The World Bank estimates that the share of income going to the poorest twenty percent of the region has decreased in Latin America. This is the only region where this has happened. There is a "striking difference" between East Asian and Latin American countries. The former experienced "high average growth and low inequality," while the latter experienced "slower or negative growth and higher inequality." *Lessons from the East?*, 5 HEMISFILE 4-6 (1994).

26. *Lessons from the East?*, *supra* note 25, at 8.

27. See Keith Rosenn, *The Protection of Judicial Independence in Latin America*, 19 U. MIAMI INTER-AM. L. REV. 1, 23-31 (1987).

Reality is a personalistic politics based upon the exchange of favors in states where the state has many favors to exchange, where bureaucracies are bloated and bureaucrats underpaid and underappreciated, where judges are often seen as a species of bureaucrat, where the military resists the jurisdiction of the civil authorities, where class differences are sharply defined, and where many constitutional restraints on the power of public officials are thought to operate only in periods of tranquility. This is not a context highly favorable to the rule of law: The German *Rechtsstaat* or the Spanish *Estado de Derecho*.

Where the rule of law does not prevail—that is, where the rules of behavior solemnly proclaimed by elected officials do not with fair consistency predict the outcome of social and economic transactions, and do not in fact regulate the behavior of the judiciary, the bureaucracy, and the police, in their relations with the citizenry—democracy is nominal, because its crankshaft is broken. One could, therefore, summarize the whole problematique of law in the transition to democracy in terms of the means and obstacles for establishing the rule of law. Against this background, one can easily see the importance attached by many observers to an issue that plagues transitions no less in Eastern Europe than in Latin America, the issue of whether, how, and whom to punish for the abusive acts of harsh predecessor regimes.

II. AMNESIA, AMNESTY, PUNISHMENT: WHAT IS JUST?²⁸

While the issue haunts transitions in both Latin America and Eastern Europe on the whole, it does so in antithetical ways. In some Eastern European countries the supposedly unshakable communist regime simply disintegrated and its opponents occupied the rubble.²⁹ In others, the loss of faith, will, and cohesion drove the regime to negotiate arrangements

28. This subject has excited a whole cottage industry of ratiocination. See generally Jaime Malamud-Goti, *Transitional Governments in the Breach: Why Punish State Criminals?*, 12 HUM. RTS. Q. 1 (1990); John L. Moore, Jr., *Problems with Forgiveness: Granting Amnesty under the Arias Plan in Nicaragua and El Salvador*, 43 STAN. L. REV. 733 (1991); Aryeh Neier, *What Should Be Done About the Guilty?*, N.Y. REV. OF BOOKS, Feb. 1, 1990, at 32; Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L. J. 2537 (1991); Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CAL. L. REV. 451 (1990).

29. See Elster, *supra* note 18, at 451 (offering Romania after Ceaucescu as an example of a complete takeover).

which led quickly to its unconditional displacement.³⁰ In both types of cases the successor governments acquired the unmistakable power to punish the officers of the old regime and their collaborators as well. That power is precisely what the successor regimes of Latin America have lacked.

In all but one of the leading Latin American cases, a still largely unified and unrepentant military institution dictated, more than it negotiated, the timing and conditions of its return to the barracks from which it had sallied to seize the state and remake society in its preferred image.³¹ These military institutions left no doubt of their dispositions and their ability to return if newly elected democrats threatened either their members, or their conception of the national interest. Only the Argentine military suffered the collapse of unity and will which leads to disorganized retreat. However, despite being responsible for a military debacle in the Malvinas War, an economic disaster, and a notorious reign of terror, Argentina's military soon recovered a unity of purpose sufficient to reassert traditional claims of impunity.³²

Victims of state terror and their kin, broadly backed by domestic and international human rights organizations, appealed to the nascent democratic leaders for help in vindicating their horribly abused rights. Some also attempted to seize the legal initiative by bringing civil suits against their erstwhile torturers. As one would anticipate, these efforts played out differently in each of the relevant countries. It suffices for our purposes to note that only in Argentina did the democratic state, brushing aside an amnesty the military rulers had granted themselves, prosecute and convict officers for violations of human rights.³³

The prosecution in Argentina came in the wake of a mammoth inquiry commissioned by the government and carried out by private citizens of high prestige.³⁴ This inquiry exposed in searing detail the extermination campaign conducted from 1976 to 1979 by the armed forces against persons suspected of complicity with the country's clandestine revolutionary groups.³⁵ By the time the government of President Alfonsín had completed the trials of a few of the most senior officers from the mili-

30. See *id.* at 452-54.

31. See Garro, *supra* note 20, at 16 (contrasting Argentina's struggle for democracy with those of other Latin American states).

32. See Geoffrey P. Miller, *Constitutional Moments, Precommitment, and Fundamental Reform: The Case of Argentina*, 71 WASH. U. L.Q. 1061, 1070-72 (1993).

33. Garro, *supra* note 20, at 12.

34. *Id.* at 15.

35. *Id.*

tary regime, it was confronted with the threat of armed resistance from a military establishment which was sufficiently reunited to defend its own.³⁶ Consequently, the government felt compelled to call a halt to further prosecutions, and even to provide the officer corps with protection from prosecution.³⁷ To that end, the government secured passage of a statute called the "full stop" law, which required any additional indictments to be brought within sixty days of its passage.³⁸

This effort to close the books on the "Dirty War" by suddenly snapping into place a very brief statute of limitations failed in its purpose. Thousands of people surged forward with complaints and the judicial system responded with hundreds of new indictments.³⁹ In the face of this failure, and a barracks uprising by certain junior officers, President Alfonsín pushed through the Congress a statute popularly known as the "due obedience" law.⁴⁰ This statute established an irrefutable "presumption," with some exceptions, that military officers who followed orders had carried them out under a state of coercion without any possibility to inspect, oppose or resist them.⁴¹ Unlike its "full stop" predecessor, this law essentially achieved the government's pragmatic objective of barring the prosecution of officers below the highest command level, hence bringing the fleeting era of criminal trials to an end.

During the height of its essay in state terror, Uruguay exceeded all other Latin American countries in the percentage of citizens detained and tortured.⁴² Uruguay's post-transition civil-military confrontation erupted not from an effort to prosecute, which President Sanguinetti never even appeared to contemplate, but after judges in civil suits against officers issued orders for them to appear for judicial interrogation.⁴³ When the Minister of Defense, a high-ranking military officer, ordered military personnel to refuse to honor subpoenas requiring court appearances, the Sanguinetti government drove a blanket amnesty

36. *Id.* at 16 (indicating that Argentina's prosecutions were terminated in response to threats of armed resistance from a reunited military).

37. *Id.* at 15.

38. *Id.*

39. *Id.*

40. *Id.* at 16.

41. *Id.*

42. See LAWRENCE WESCHLER, A MIRACLE, A UNIVERSE 87-88 (1990) (stating that between 1970 and 1985, over 10% of Uruguay's population went into exile and of those remaining, one in 50 was detained at one time or another, and one in 500 received a long prison sentence for political offenses).

43. *Id.* at 167.

through Congress.⁴⁴ After a bitter campaign, the law was upheld in a referendum forced by its opponents.⁴⁵

The post-Pinochet government of Chile is located somewhere between the Sanguinetti government's by-no-means-uncoerced decision to wall off the past, and Argentina's policy of detailed exposure of human rights delinquencies and prosecution of the highest officers of the armed forces. Chile's post-Pinochet government has not challenged the law passed by the Pinochet dictatorship amnestying almost all acts committed by the armed forces during the first five years after their seizure of power.⁴⁶ The post-Pinochet government did, however, prosecute the one crime specially exempted from the amnesty: the assassination of former Chilean Foreign Minister, Orlando Letellier, and an American associate, carried out in Washington D.C., by agents of Pinochet's intelligence services on the orders of its director.⁴⁷

In addition to prosecuting this assassination, the government also secured compensation for victims of Pinochet's state terror system.⁴⁸ Finally, like its Argentine counterpart, Chile's democratic leaders tried to at least preserve the truth by commissioning an inquiry and endorsing the resulting detailed account of human rights delinquencies committed by the armed forces under General Pinochet's leadership.⁴⁹ The post-Pinochet government did these things while coexisting with a military institution over which General Pinochet continued to preside by edict of the transition constitution he imposed and an upper legislative chamber in which unelected Senators appointed by Pinochet, together with elected conservative party members, formed a minority sufficient to block constitutional change.⁵⁰

44. *Id.*

45. *See id.* at 83-236; *see also* AMERICAS WATCH, CHALLENGING IMPUNITY: THE LEY DE CADUCIDAD AND THE REFERENDUM CAMPAIGN IN URUGUAY (1989).

46. *See* Jose Zalaquett, *Balancing Ethical Imperatives & Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations*, 43 HASTINGS L.J. 1425, 1436 (1992).

47. *Id.*

48. *Id.* at 1435.

49. *See* Garro, *supra* note 20, at 11-12 (discussing the Argentinean inquiry into military human rights violations); Jon M. Van Dyke & Gerald W. Berkley, *Redressing Human Rights Abuses*, 20 DENV. J. INT'L L. & POL'Y 243, 249-51 (1992) (detailing Chile's inquiry into human rights violations by the Pinochet regime); *see also* THE INTERNATIONAL LEAGUE FOR HUMAN RIGHTS, THE LONG ROAD TO JUSTICE: A REPORT ON THE LETELLIER-MOFFIT CASE (1991).

50. *See* Garro, *supra* note 20, at 12 n.26.

In addition to their impact on Argentina, Uruguay, and Chile, amnesty and truth-telling were integral components of the U.N.-brokered peace accord that finally brought El Salvador's civil war to a close.⁵¹ They are also currently part of the formula which may bring a kind of peace to Guatemala.⁵² Finally, amnesty, without a detailed accounting, also lubricated the end of civil conflict in Nicaragua.⁵³

The Central American cases, like the very recent South African one, are unique in at least one respect. While their delinquencies may have differed greatly in extent, intensity, and duration, both parties to the negotiation—if not their leaders, then at least some of their functionaries—were apparently indictable for violation of human rights or humanitarian law.⁵⁴ Thus there was a certain element of reciprocity or balance in the surrendering of claims to justice. It is true that amnesties in Argentina have benefitted surviving members of the subversive organizations as well as the armed forces. The revolutionaries, however, were not connected to the democratic parties that voted the amnesties; and the amnesties are not proxies for the many persons bereaved not because their children, spouses, parents or siblings were part of the subversion, but because they were friends of those who were, they served as their defense lawyers, they criticized the armed forces, or they were in the wrong place at the wrong time. Unlike the FMLN or the ANC, the Government of Raul Alfonsin and many of the members of civil society who sought vindication came to the table with clean hands.⁵⁵ They required no absolution and received none.

Undeterred by the growing ubiquity of general amnesty in formulas for the peaceful settlement of internal conflicts, legal scholars in the transnational human rights movement have almost uniformly condemned them.⁵⁶ These scholars have even criticized the more limited measures that democrats in Chile and Argentina have adopted to appease their abusive predecessors.⁵⁷ They have raised three related legal issues. Do the principal global and regional human rights treaties simply oblige states to refrain from human rights violations or do they also create affirmative obligations to defend, reinforce and vindicate rights? If there

51. See generally Moore, *supra* note 28 (comparing the roles of amnesty in the peace processes of El Salvador and Nicaragua).

52. *Id.* at 747.

53. *Id.*

54. See Zalaquett, *supra* note 46, at 1427-30.

55. Garro, *supra* note 20, at 16.

56. See generally Neier, *supra* note 28; Orentlicher, *supra* note 28.

57. Orentlicher, *supra* note 28, at 2538-40.

are affirmative obligations, does their satisfaction require the state to prosecute whenever rights have been violated? Are conventional obligations also entrenched in customary international law so that the obligations are in fact universal?

The case for affirmative obligations, developed in the now extensive literature, is very persuasive. Even before considering contemporary human rights declarations, conventions, and attendant scholarly discourse, one might presume the existence of some sort of affirmative obligation on the part of the state despite the radically altered character of its government. After all, one of the truisms of international law is that states, as distinguished from their transient governments, are the bearers of international rights and duties. Moreover, the notion of an affirmative obligation is an old one, extending back before the emergence of human rights law to the antecedent law of state responsibility for injury to aliens.⁵⁸ For example, the U.S.-Mexico Claims Tribunal, established on the eve of World War II to liquidate, through arbitration, the accumulated disputes of decades, found Mexico responsible where local prosecutors in Mexico had failed to move against a Mexican national who, according to abundant eye witness testimony, had murdered an American citizen.⁵⁹

Whether the affirmative obligation includes prosecution is an issue at least slightly more subject to reasonable doubt. In finding the government of Honduras responsible for the disappearance and presumed murder of civilians carried out by a special unit of the armed forces organized by its former commander-in-chief, the Inter-American Court of Human Rights spoke in terms of a governmental obligation to prosecute and punish those responsible for grave human rights violations.⁶⁰ This case may be distinguished, however, because the Honduran Government did not initially concede the violations, made no previous effort to investigate the facts alleged by the original petitioners in the case, never displayed a disposition to compensate the relatives of the disappeared or to adopt strong remedial measures, and never attempted to justify its

58. See Richard Lillich, *The Current Status of the Law of State Responsibility for Injury to Aliens*, in *INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURY TO ALIENS* 1, 2-3 (Richard Lillich ed., 1983) (discussing the notion of the state's affirmative obligation in relation to aliens).

59. *Laura M.B. Janes Claim (U.S. v. Mex.)*, 4 U.N. REP. INT'L ARB. AWARDS 82 (U.S. and Mex. Gen'l Claims Comm'n 1927).

60. *Velasquez Rodriguez Case*, Judgment of July 29, 1988, Inter-Am. Ct. H.R., ser. C: Decisions and Judgments, No. 4 ¶¶ 64, 174, *reprinted in* 28 I.L.M. 291 (1989).

passivity as necessary for the consolidation of democracy in Honduras.⁶¹

Disputes over the existence, character, and extent of an obligation to prosecute go beyond the question of what international law requires to the broader issue of whether attempts to prosecute will normally enhance the democratic prospect. The human rights community has argued that truth telling and compensation to victims or their families are very important, but not enough.⁶² According to the human rights community, prosecution is not only required by the letter of international law, but is a powerful instrument for consolidating nascent democracies, above all because it affirms the rule of law.⁶³ Conversely, the failure to prosecute reaffirms the traditional impunity of the military, makes the elected government an accomplice to a grave violation of the idea of *un estado de derecho*, and generally reinforces cynicism about the legal system and about elected government.⁶⁴ Thus, the fragile child poisons itself.

Human rights advocates do not simply dismiss as irrelevant the military establishment's threats or the claimed healing effects of pardons for past sins. They argue, however, that in appropriate circumstances, pardons or amnesties *after conviction* can accommodate both concerns.⁶⁵ The legal, moral, and prudential misdemeanor, they argue, is amnesty before trial, before the facts are formally established in a proper legal proceeding.⁶⁶ They condemn the short-circuiting of the legal process.⁶⁷

Members and supporters of the concerned democratic governments, ground between the Scilla of still powerful military establishments and the Charybdis of their erstwhile allies in the human rights communities, have for the most part pleaded *force majeure* as mitigating, if not formally exculpating, their placatory restraint.⁶⁸ In its arguments before the Inter-American Commission on Human Rights, and the larger hemispheric public, however, the government of Uruguay bluntly challenged the case against it on procedural and substantive grounds.⁶⁹ Uruguay's ar-

61. *Id.*

62. *See generally* Orentlicher, *supra* note 28.

63. *See generally id.*

64. *See generally id.*

65. *See generally id.*

66. *See* Garro, *supra* note 20, at 16 (criticizing Argentina's "nunca mas" tribunals); *see also* WESCHLER, *supra* note 42, at 167 (noting Uruguay's failure to investigate those military officials who received amnesty).

67. *See generally* Orentlicher, *supra* note 28.

68. WESCHLER, *supra* note 42, at 153-87.

69. Interviews with members of the staff of the Inter-American Commission on

gument amounts to the claim that governments enjoy a broad margin of appreciation in deciding how best to fulfill their legal commitments.⁷⁰ As long as they proceed in good faith along lines that are not plainly futile, no external body has the right to question their method.⁷¹ The best means for preventing future violations of human rights is the consolidation of elected government. In the judgment of Uruguay's government, amnesty was important for consolidation.⁷²

Either to reinforce this line of reasoning or as a separate strand of argument, Uruguay's representatives invoked the referendum vote upholding the amnesty, arguing that notions of sovereignty insulate direct expression of majority preference from external review. On its face, the claim is meretricious. Political and civil human rights belong by definition to individuals and serve to protect individuals from the acts and omissions of the state, howsoever constituted. The minority rights provisions in the International Covenant on Civil and Political Rights directly contradict any notion that the majority will, unlike dictatorial fiat, can trump individual rights.⁷³ Similarly, in the American Convention on Human Rights declare certain rights non-derogable, implying that whatever the breadth and intensity of majority interest, it cannot trump all individual claims.⁷⁴ Thus if the referendum has any relevance at all, it is as evidence of the government's good faith in concluding that amnesty was an important, possibly a necessary, condition of continuing progress toward a fully democratic state.

On the amnesty issue, the rule of law has come face-to-face with Latin realities. Latin America must now decide how to alter the past realities that made democratic government partial and precarious in those

Human Rights. See generally WESCHLER, *supra* note 42 (providing a moving account of the debate about amnesty and prosecution within Uruguay).

70. See WESCHLER, *supra* note 42, at 230-35 (outlining Uruguay's response to criticism regarding its handling of human rights violations).

71. *Id.*

72. *Id.*

73. International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) *entered into force* March 23, 1976. Article 27 of the Covenant reads as follows: "In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language." *Id.* art. 27.

74. American Convention on Human Rights, art. 4, ¶ 2, *opened for signature* Nov. 22, 1969, OEA/ser. K/XVY1.1, Doc. 65, Rev. 1, Corr. 1 O.A.S.T.S., No. 36 (1970).

periods where it managed any type of existence. Some initiatives already taking place in certain countries have little or nothing to do with the law. For instance, public and private efforts are under way to bridge the traditional gap between officers and civilians by developing within the democratic sectors of civil society, a cadre of experts on national defense issues, similar to those found in the United States and Britain.⁷⁵ As far as actual or possible legal projects are concerned, this paper focuses on two. The first is to strengthen the judiciary in general, with particular emphasis on the institution of judicial review of both executive and legislative action. The second is to redesign political institutions to alleviate the problems stemming from weak or dysfunctional parties, from concentration of power in the presidency, and from confrontation between the president and the legislature.

III. JUDICIAL REVIEW

In common law countries with written constitutions, judicial review denotes a readiness to invalidate acts of executive officials, including the head of government and the legislature, on the grounds of their formal or substantive incompatibility with constitutional provisions.⁷⁶ Even the most casual observers of politics in the United States are aware of the prominent role the federal courts play through the exercise of their review power. American citizens from the otherwise most impotent and humble levels of society have been able to demolish with one blow long established and widely accepted practices of the public authorities. At a time when panhandlers and the homeless compete vigorously for urban space with solid burghers, many of the latter would doubtless be surprised to learn that for most of the nation's history, persons who appeared unemployed (for reasons other than being the eldest son of a long-lived monarch) were subject to arrest for "vagrancy," and in lieu of jail time, or in addition thereto, were forcibly deposited at the city limits with orders backed by threats not to reappear.⁷⁷ This means for main-

75. Interview with Virginia Gamba, leading member of the growing fraternity of Latin civilian strategists.

76. See Justice Robert F. Utter & David C. Lundsgaard, *Judicial Review in the New Nations of Central and Eastern Europe: Some Thoughts From a Comparative Perspective*, 54 OHIO ST. L.J. 559, 568 (1993).

77. See Harry Simon, *Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive Homeless Persons From Cities*, 66 TUL. L. REV. 631, 638 (1992); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 171 (1971) (noting that vagrancy statutes were used to eliminate the presence of "undesirables").

taining a preferred public order, enshrined in ordinances throughout the land and in the standard operating procedures of local police forces,⁷⁸ was shattered by one not-so-humble gentleman who chose arrest over moving on, and had the good fortune to attract the support of a leading civil liberties organization.⁷⁹

Before the Second World War, persons trained in the civil law, the principal source of national legal systems in Latin America,⁸⁰ found it unnatural for a court at any level to invalidate settled law and practice based on its supposed incompatibility with substantive constitutional provisions, much less language as vague and open-textured as that of the Fourteenth Amendment to the U.S. Constitution.⁸¹ Why? What was it about the civil law tradition that made the exercise of constitutional review, particularly substantive review, appear incompatible with the judicial function, even in countries widely perceived as venues for the rule of law?⁸² As Justice Robert F. Utter and David C. Lundsgaard note in their recent exploration of this question, one might summarize the answer as codes, positivism, and majoritarianism.⁸³ Together, these answers produce a conception of the judicial function very different from the one that prevails in common-law countries.

Classical civil lawyers began with the premise that all of the law was in the formally enacted codes.⁸⁴ These were deemed so clear and detailed, that once the facts of a given case were established, law appliers

78. See, e.g., *Edelman v. California*, 344 U.S. 357, 364-66 (1953) (Black, J., dissenting) (criticizing subsection 5 of § 647 of the Penal Code of California which fined or imprisoned "idle, lewd or dissolute" persons); *Hawaii v. Anduha*, 48 F.2d 171 (9th Cir. 1931) (invalidating a statute which prohibited idling, loitering, or loafing upon the streets of the city); *Lazarus v. Faircloth*, 301 F. Supp. 266 (S.D. Fla. 1969) (holding that Florida's vagrancy statute was unconstitutionally overbroad).

79. See generally *Papachristou*, 405 U.S. at 170 (1971) (invalidating a vague ordinance used to roust transient, beggars and loungers (i.e. streetcorner society)).

80. See Rosenn, *supra* note 27, at 33; Robert S. Barker, *Constitutional Adjudication in Costa Rica: A Latin American Model*, 17 U. MIAMI INTER-AM. L. REV. 249, 251 (1986).

81. The Fourteenth Amendment reads as follows: "[n]or shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

82. See James Beardsley, *Constitutional Review in France*, in 1975 SUPREME COURT REVIEW 189, 189 (Philip B. Kurland ed., 1976) (surveying France's historical aversion to judicial review).

83. Utter & Lundsgaard, *supra* note 76, at 563-65.

84. See *id.* at 565 (discussing the civil law theory that judicial interpretation could add nothing to the precise code).

needed only to find the right code provision to reach the correct result. Hence, reasonable judges acting in good faith would all reach the same result in essentially identical cases.⁸⁵ This view necessarily presupposed that words in the context of texts—as distinguished from the context of life with its kaleidoscopic patterns of fact, value, and purpose—have a plain meaning accessible to persons of legal training and unremarkable intelligence.

A number of things followed from this cluster of assumptions. One was that the role of judge was much like that of any person in the public administration engaged in the resolution of claims.⁸⁶ Let us assume, for instance, that a customs agent must decide whether the 150-year old clock you purchased abroad is an “antique,” hence non-dutiable. You produce a document from the seller purporting to authenticate the clock's age. The agent looks in the customs handbook and finds a regulation which provides that an antique is any object older than a century, and that a statement from the seller is sufficient to establish an object's age, unless the agent has reason to doubt the claim. Since the clock looks vaguely obsolete and its case seems battered, this agent sees no basis for doubt—end of case.

If judges are only a certain species of bureaucrat, then they should have a bureaucratic career pattern: finish university with the appropriate degree, take an exam and possibly a modicum of specialized instruction, then begin work. Work would begin with relatively simple and inconsequential matters and progress to higher levels largely on the basis of seniority, protected by, but also subordinate to, the hierarchy and the traditions of the bureaucratized service, protected above all by a determined anonymity in relation to the public and undeviating neutrality in relation to the politicians. If politics is the process which determines who gets what, when, and how, then how can the law do the determining? In the bureaucratic scenario of the judicial function, the judge only *announces* the result.

This could not get farther away from the view of classical common law judges. These judges consciously decide where losses shall fall and gains shall accrue by crafting a rule of decision, in the manner of a

85. See *id.* at 564. Under this assumption, of course, there was no place for a doctrine of *stare decisis*. *Id.*

86. See Burt Neuborne, *Judicial Review and Separation of Powers in France and the United States*, 57 N.Y.U. L. REV. 363, 378 (1982) (referring to classic civil law judges as “skilled mechanics operating a syllogism machine”); see also Rosenn, *supra* note 27, at 33 (characterizing civil law judges as “expert technicians”).

bricoleur, out of available materials: customary practice, widely shared moral precepts, and public policy.⁸⁷ They then publicly justify the result so that their peers and the public may evaluate it and private citizens may better know the legal consequences of their acts and omissions. Such a judge must have experience of the world, must be in touch with its customs and expectations, its principles, and its official discourse about public policy.

Lawyers in the United States starting with the assumptions and attendant self-confidence of the common-law tradition, moved to a very wide conception of the judging function, which in its essentials remains vital today.⁸⁸ They did so by virtue of the sensation of creating a new and very different society, of selecting and consolidating the liberal elements in the mixed bag of British political thought,⁸⁹ and of adopting a written and a federal constitution as much designed to restrain as to authorize the exercise of power.⁹⁰ American lawyers nevertheless retain a certain measure of concern with the problem of reconciling a creative, politically independent judiciary with majoritarian government.⁹¹ The Yale Jurisprude, Alexander Bickel, wrote that judicial review of the constitutionality of legislative acts, and acts of the Executive within its realm of coordinate or distinctive authority, is anomalous because it inhibits the expression of popular preference.⁹² In fact, Learned Hand, one of our most celebrated judges, doubted aloud whether judicial review had even been contemplated by the founding fathers, regardless of

87. See Neuborne, *supra* note 86, at 379-82 (discussing how members of France's Conseil constitutionnel forged judicial review itself from tools such as the text of the 1958 Constitution, the Declaration of the Rights of Man, the preamble of the 1958 Constitution, the preamble of the 1946 Constitution, and fundamental principles of the laws of the Republic, and general principles of French law).

88. See CHRISTOPHER WOLFE, *THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW* 18 (1994).

89. See *id.* at 20-21 (observing that Hamilton employed several of Blackstone's rules of interpretation in *Federalist* no. 83 to interpret the constitutional provision for trial by jury in criminal cases).

90. See *THE FEDERALIST PAPERS* 423 (Garry Wills ed., 1982) (interpreting article I, § 8 as authorizing only enumerated powers, not general authority).

91. See WOLFE, *supra* note 88, at 60 (noting that the broadest criticism of John Marshall, who invented judicial review, is that he applied his own will, rather than the will of the law and the people); see also WILLIAM M. WIACEK, *LIBERTY UNDER LAW: THE SUPREME COURT IN AMERICAN LIFE* 1 (1990) (exploring the controversial question of how an undemocratic institution can invalidate the products of democracy).

92. ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 26-27 (Jeannette Hopkins et al. eds., 1975).

what John Marshall said in *Marbury v. Madison*⁹³ and often thereafter.⁹⁴

American history illustrates the legitimacy of this concern about the full-blown exercise of substantive constitutional review. The Supreme Court's *Dred Scott* decision,⁹⁵ which declared unconstitutional the efforts of Congressional moderates to find a compromise between slave and free states, helped set the country on course to its Civil War.⁹⁶ In the early part of this century, a conservative Supreme Court majority and counterparts in some state courts frequently frustrated legislative efforts to reduce class polarization and to mitigate the severities of rapid industrial growth under extreme free market conditions.⁹⁷ It seems as close to certain as any counterfactual hypothesis can be, however, that in the absence of a tradition of vigorous constitutional review, law and practice in the United States would deviate much more significantly than they do from the dictates of international human rights treaties.

Although the act of striking down the deliberate acts of the majority's representatives entails a kind of arrogance by unelected officials, it is just such arrogance, or high self-confidence, that is the necessary psychological stance for exercising constitutional review in a highly democratic and/or populist society.⁹⁸ Judges who envision themselves as little

93. 5 U.S. (1 Cranch) 137 (1803).

94. See *infra* note 98 and accompanying text (recounting Justice Marshall's view that James Madison, the Father of the Constitution, did not understand the document).

95. *Scott v. Sanford*, 60 U.S. (1 How.) 393 (1856).

96. See WOLFE, *supra* note 88, at 69-70 (stating that the *Dred Scott* decision "exacerbated" the issue of slavery).

97. See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905) (invalidating a New York law prohibiting bakers from working more than 60 hours a week or 10 hours a day); BICKEL, *supra* note 92, at 26 (arguing that the justices that ruled on the *Lochner* case based their decision on their personal economic convictions which they derived from the *laissez-faire* teachings of Herbert Spencer); *Adair v. United States*, 208 U.S. 161 (1908) (invalidating a federal law prohibiting "yellow dog" employment contracts, which specified that the employee could be fired for joining a union); *Coppage v. Kansas*, 236 U.S. 1 (1915) (invalidating state legislation similar to the federal "yellow dog" prohibition); *Ribnik v. McBride*, 277 U.S. 350 (1928) (invalidating regulation of employment practice and rate); *Schechter Poultry Corp. v. United States*, 295 U.S. 368 (1935) (invalidating act that regulated the conditions and price of labor for poultry dealers); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (invalidating an act regulating labor terms in coal industry). Constitutional scholars speculate that the Court desisted in applying Spencer's social statistics only when President Roosevelt threatened to "pack" the Court. See JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW § 4.7, at 154 (4th ed. 1991) (stating that the Court packing plan was defeated because the justices "reformed themselves").

98. See *Marbury*, 5 U.S. (1 Cranch) at 175-80 (stating that the Constitution is a

more than a species of bureaucrat are generally less likely to have the necessary confidence,⁹⁹ even in places like Japan and Western Europe where public service has long been a distinguished calling attracting some of the best and brightest students.¹⁰⁰ This, it seems to me, is one reason why civil law systems are strongly inclined to concentrate whatever constitutional review they allow in special courts (or quasi-courts).¹⁰¹ In general, public service has much less prestige and relatively poor remuneration in Latin America.¹⁰² In terms of introducing or enlarging substantive constitutional review, that disadvantage is hugely compounded by the physical and financial risks, as well as the financial temptations that haunt government officials in many Latin countries.

Despite the civil law's tendency to disparage the imaginative and creative elements of judicial function, and its historical association with the idea of legislative supremacy, even in its Gallic heartland, its spirit has not precluded the evolution of the judiciary as guarantor of constitutional government.¹⁰³ Of course, judicial policing of *executive* action through specialized courts—culminating in the *Conseil d'Etat*¹⁰⁴—is virtually coterminous with the consolidation of French democracy in the

higher form of law than the enactments of Congress and that the Court, therefore, may not enforce those enactments that are not in accordance with the Constitution); see also MORRIS RAPHAEL COHEN, *THE FAITH OF A LIBERAL* 178-80 (1946) (commenting that John Marshall accused James Madison, the Father of the Constitution, of "either not understanding the Constitution, or else wilfully disregarding it").

99. See Rosenn, *supra* note 27, at 33 (providing that civil law judges are "weak figures" who do not enjoy the power, prestige, and deference of United States judges, and who do not even have the power to jail people who defy their orders for contempt of court).

100. See Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 67 (1988) (describing the civil services of Europe and Japan as "prestigious and powerful").

101. See Beardsley, *supra* note 82, at 216 (explaining that France bestows exclusive jurisdiction for constitutional review of legislative acts upon its Conseil Constitutionnel). Germany bestows this authority on its Constitutional Court. Kommers, *supra* note 12, at 840.

102. See Rosenn, *supra* note 27, at 29 (stating that the outrageous inflation in Latin American countries makes judicial salaries illusory, and citing an Argentinean case where waiters in Buenos Aires earned more than the president of the Supreme Court).

103. See Utter & Lundsgaard, *supra* note 76, at 570 (providing that even France, "a hotbed of antipathy to judicial review," established the Conseil constitutionnel to control the constitutionality of legislation).

104. Neuborne, *supra* note 86, at 385.

Third Republic.¹⁰⁵ While that review focused primarily on the question of whether executive action was consistent with the legislature's declared will, the *Conseil d'Etat* gradually expanded its scope of review by drawing on two additional sources of restraint on executive power.¹⁰⁶

The first was a set of values identified and defined by the *Conseil* and often referred to as "general principles of French Law."¹⁰⁷ The other was the preamble to the Fourth Republic's Constitution of 1946 which incorporated the seminal Declaration on the Rights of Man and an unwritten body of norms described as "fundamental principles recognized by the laws of the Republic."¹⁰⁸ The *Conseil* treated the "general principles," the Declaration, and the "fundamental principles" as, in Professor Neuborne's words:

an inertial base from which the French executive could not depart without [explicit] legislative authorization Thus, . . . the *Conseil d'Etat* used a separation of powers rationale to justify judicial review of executive action in derogation of an amorphous, judicially defined set of values, without contesting the power of the legislature to take the challenged action.¹⁰⁹

The legislature's impunity from external constitutional review lasted until 1958.¹¹⁰ Then, while establishing the constitutional foundations of a new (the fifth) Republic, the French finally limited legislative supremacy by creating a new institution, the *Conseil constitutionnel*, and endowing it with the authority to measure legislative enactments against the constitutional benchmark.¹¹¹ Initially, the *Conseil* could only exercise this authority at the insistence of the President of the Republic, the Prime Minister, and the Presidents of the Senate and the National Assembly, except in the case of laws affecting the structure of government and the rules of the two legislative organs.¹¹² In 1974, however, parliament extended the power to invoke review by the *Conseil* to any group comprising at least sixty members of the Senate or Assembly.¹¹³ Since

105. *See id.* at 384-85.

106. *See id.*

107. *Id.*

108. *Id.* at 386.

109. *Id.* at 385.

110. *See id.* at 388.

111. *See id.*

112. *Id.* at 382 n.67.

113. *Id.*

1974, most invocations of the review power occurred at the instance of the parliamentary minority.¹¹⁴

There is debate over whether the Conseil's decisions to invalidate legislation are instances of substantive review or enforcement of the separation-of-powers principle.¹¹⁵ Regardless of the underlying rationale for the *Conseil's* decisions, the fact remains that it has effectively vetoed initiatives of the political institution most directly responsive to the currents of majority will.¹¹⁶ To that extent, the *Conseil* has functioned like the Supreme Court of the United States.

In Germany, another great center of the civil law tradition, the parallel to the United States Supreme Court is far less approximate. The Federal Constitutional Court,¹¹⁷ established by the 1949 Constitution, arguably surpasses its United States counterpart in jurisdictional reach and unabashed normative creativity.¹¹⁸ Unlike the United States Supreme Court, it need not always await a specific case or controversy before clarifying the constitutional status of a contested assertion of legislative power. Immediately following the enactment of a statute, the

114. *Id.*

115. Neuborne, *supra* note 86, at 363-67. Neuborne's conclusion, the thrust of his whole article, is that "separation of powers-based theory of judicial review is capable of proving protection for important substantive values without running afoul of democratic political theory." *Id.* at 367.

116. *See* Neuborne, *supra* note 86, at 389-90 nn.94, 96, 390-410 (discussing cases).

117. *See generally* Kommers, *supra* note 12, at 837-45 (tracing the history of the Federal Constitutional Court of Germany).

118. *See generally id.* at 837-45 (characterizing German constitutionalism primarily as interpreted by Germany's highest Court of review). *See also* DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* (1989) (evaluating German constitutionalism and its highest constitutional court); Mauro Cappelletti, *Judicial Review in Comparative Perspective*, 58 CAL. L. REV. 1017 (1970) (arguing that although judicial review is seemingly different in various countries, it is responsive to social problems common throughout the world). In comparing judicial review in Germany with that in the United States, Professor Kommers states:

[i]n the United States, by contrast, the main task of constitutional theory is to find the source and establish the limits of judicial review This situation poses a dramatic irony: on the one hand, judicial review is one of the hallmarks of American constitutionalism; on the other hand, there exists no 'convincing theoretical explanation of where the Supreme Court's power comes from and how it should be used.' Supplying that explanation has become the central focus of American Constitutional theory.

Kommers, *supra* note 12, at 842-43 (quoting Bert Neuborne, *Justiciability, Remedies, and the Burger Court*, in *THE BURGER YEARS* 3 (Herman Schwartz ed., 1987)).

government, or its opponents in the parliament, or the government of any of the federation's constituent units (the Lander), may petition the Court¹¹⁹ and obtain a definitive ruling as to whether the statute is factually unconstitutional.¹²⁰

The German Court is also unencumbered by the perceived constitutional or prudential constraints that influence the United States Court to treat certain acutely controversial issues as "political questions," which are thus exempt from judicial review.¹²¹ On the contrary, the German Court obligates itself to answer all questions of constitutional interpretation brought before it by persons or institutions authorized to invoke its jurisdiction.¹²² Authorization extends to "any person who claims that one of his basic rights . . . has been violated by the public authorities."¹²³ The German Court's sense of obligation flows naturally from its underlying conviction that "any law, administrative regulation, legal relationship, or political practice that cannot be justified in terms of the Basic Law is by definition unconstitutional."¹²⁴

If as a consequence of its own jurisprudence, the Court cannot avoid resolving constitutional issues that come before it, neither can it temporize in their resolution by selectively exercising its reviewing power, or by awaiting the gradual trudge of those issues through the lower courts.¹²⁵ For if at any point in a proceeding in an inferior court, including an administrative court, the Judge identifies a constitutional issue in the pending case, the Judge postpones the proceeding and sends the issue to the Constitutional Court for a final determination.¹²⁶

With respect to the constitutional merits of a matter, the Court adopts a view of the Basic Law which appears to endow the Court with broad discretion to choose among competing social values and interests.¹²⁷

119. THE BASIC LAW (German Const.) art. 93(1). In order for Parliament to petition the German Federal Supreme Court to rule on the constitutionality of a statute, the petition must be supported by one-third or more of the members. *Id.*

120. *Id.* art. 93 (1).

121. See Kommers, *supra* note 12, at 842 (arguing that the jurisdiction and authority of the German Federal Constitutional Court are relatively undisputed). These controversial issues, such as limits of executive power in the conduct of foreign affairs, have an indirect effect, if any, on civil liberties. *Id.* at 849.

122. See generally *id.* at 840-45.

123. THE BASIC LAW (German Const.) art. 19(4).

124. Kommers, *supra* note 12, at 648.

125. *Id.*

126. THE BASIC LAW (German Const.) art. 100(1).

127. See generally Kommers, *supra* note 12, at 871 (describing the methodology used by the Court in weighing opposing rights and values).

While the American Constitution protects negative liberty by protecting individuals from injurious actions by the government, the Basic Law embodies human values which it requires the state to incorporate into its positive law.¹²⁸ Hence, in Germany, the legislature's failure to act—for example, a failure to declare that the fetus has a right to life and therefore a failure to criminalize abortion¹²⁹—can trigger the Court to find a constitutional violation. The Court's potential scope of substantive review is expansive since the Court treats every provision of the Basic Law, no matter how open-textured, as implying the existence of enforceable rights.¹³⁰ Article 20(1) of the Basic Law, for example, states that "[t]he Federal Republic of Germany is a democratic and *social* federal state."¹³¹ Since the Court has previously interpreted the word "social" to mean "social welfare," it has thus breathed content into the term by calling it a basic constitutional "principle."¹³² The Court applied this principle along with other constitutional materials when it struck down an effort to limit admissions in order to limit overcrowding at two law and medical schools.¹³³

French and German experience demonstrates that nothing in the civil law constitutes an insuperable obstacle to the evolution of robust judicial review of executive and legislative behavior. Moreover, since Europe exercises strong cultural influence over Latin America, particularly over its educated elite, Europe's changing conceptions of the judiciary's proper role should increase Latin American receptivity to energetic constitutional review.¹³⁴ Indeed, if legal institutions enjoyed a partially autonomous existence, one might expect Latin America to anticipate developments at the civil law's Gallic root. For when Latin American leaders began designing constitutions in the wake of their successful wars of

128. See generally *id.* at 855-63 (analyzing the structure of rights and values in Germany).

129. See *id.* at 870-72 (explaining that the "right to life," guaranteed in the German Constitution and protected by the state, also extends to the fetus).

130. See Kommers, *supra* note 12, at 855-63 (discussing the German Federal Supreme Court's interpretation of the Basic Law).

131. THE BASIC LAW (German Const.) art. 20(1).

132. See Kommers, *supra* note 12, at 865-66 (noting that according to German constitutional theorists, the Courts interpretation of the term "social" require the state to contribute to human growth and development).

133. *Id.* at 865.

134. See generally THE U.S. CONSTITUTION AND THE CONSTITUTIONS OF LATIN AMERICA (Kenneth Thompson ed., 1991) (discussing the influence of other constitutions on the development of Latin American constitutions).

independence, they were also influenced by the thriving constitutional system in the United States, a system already marked by an assertive and self-confident Supreme Court.¹³⁵

Assuming that Latin America can overcome these psychological and material impediments to the vigorous exercise of judicial review, how solid are the grounds for confidence that the judiciary will not abuse the power of review? By abusing the power of review, I mean using it to impede rather than to facilitate realization of the human rights immanent in a fully democratic society. Is there not a danger that greater power will attract more violence and corruption? Can a state in which the bureaucracy has proven vulnerable to corruption and colonization by powerful interests protect the judiciary from the same experience? Furthermore, given the fact that the distribution of wealth and capital is more skewed in Latin America than any of the other regions that were formerly known collectively as the Third World, is it not likely that representatives of the propertied classes will staff the highly energized constitutional courts? Will not they, like their conservative predecessors in the United States, use judicial review to obstruct redistributive measures authorized by electoral majorities, or block changes in the electoral system and other institutional arrangements that might ease the translation of majority preference into public policy?

I can claim no systematic study of Latin America's constitutional jurisprudence. The scattered evidence that is readily available to people like myself who follow Latin politics, however, provides a basis for the foregoing concerns. After the 1973 *coup d'etat* in Chile, the honorable Justices of its Supreme Court contrived to discover the elements of constitutional legitimacy in the ensuing dictatorship.¹³⁶ Moreover, they consistently sidestepped or rejected efforts by human rights advocates to use the judicial process to pry open the regime's torture chambers and to prevent the processless exile of whomever it chose to dislike.¹³⁷

As for El Salvador's Supreme Court, the "Truth Commission,"¹³⁸ established under U.N. auspices as part of the civil war settlement agree-

135. See generally *id.* (evaluating the actual degree of influence initially exerted on Latin American democracies by the United States constitutional experience).

136. See Robert Vaughn, *Proposals for Judicial Reform in Chile*, 16 *FORDHAM INT'L L.J.* 577, 583-88 (1992/1993).

137. See generally *id.*

138. See Thomas Buergenthal, *The United Nations Truth Commission for El Salvador*, 27 *VAND. J. TRANSNAT'L L.* 497 (1994) (describing the process by which the Truth Commission gathers information and presents recommendations to El Salvador's Supreme Court).

ment, found the Court's actions and omissions so flagrantly inconsistent with the rule of law that it identified the Court as one of the major obstacles to ending the war and establishing the rule of law. To be fair, governments of little or no democratic pretensions controlled appointments to El Salvador's Court. The Chilean Justices, however, found their seats through the workings of one of the most authentic and sustained democratic systems in the southern part of the hemisphere.¹³⁹

The Argentine judiciary's response to finding itself part of a regime employing terrorist means was much less active cooperation, as in the Chilean case, than lethargy, a mode of being made easy by the fact that the governing officers, students of the world's reaction to Pinochet's open brutality, surrounded their extraordinary measures with night and fog.¹⁴⁰ It appears that Argentine judges only summoned the moral energy to challenge lawless behavior on three occasions, all of which occurred after pitiless state terror shattered the spine of the clandestine anti-governments movements. In challenging this lawlessness, the Argentine judiciary demonstrated the considerable contribution courts can make to democratic consolidation.¹⁴¹

The first instance in which the Argentine courts challenged the government's lawless behavior was the case of journalist Jacobo Timerman. Originally kidnapped and carried off to a clandestine torture center—"disappeared," to use the idiom of that moment—Timerman¹⁴² was propelled to the surface by international outcry. Although no longer among the disappeared, he remained a prisoner, the object of various criminal charges which the government seemed disinclined to test in court. After a delay of two years in an action brought by Timerman's family on his behalf, the Supreme Court ordered his release, finding that

139. See generally PAUL C. SIGMUND, *THE OVERTHROW OF ALLENDE AND THE POLITICS OF CHILE, 1964-1976* (1977).

140. See generally IAIN GUEST, *BEHIND THE DISAPPEARANCES* (1990) (describing the clandestine measures employed by the Argentine military). See also INTER-AM. C.H.R., *REPORT ON THE SITUATION OF HUMAN RIGHTS IN ARGENTINA* (Organization of American States 1990) (hereinafter *REPORT ON THE SITUATION OF HUMAN RIGHTS IN ARGENTINA*) (recounting human rights violations in Argentina).

141. See generally GUEST, *supra* note 140.

142. See JACOBO TIMERMAN, *PRISONER WITHOUT A NAME, CELL WITHOUT A NUMBER* (Toby Talbot trans., 1981) (recounting the story of Jacobo Timerman's ordeal with the Argentine military). Jacobo Timerman was one among many moderate figures who, despairing of the chaotic and violent conditions that prevailed under the inept and corrupt regime of Isabel Peron, originally supported military intervention. *Id.*

the charges against him were completely unsupported by evidence.¹⁴³ The regime complied to the extent of stripping Timerman of his Argentine citizenship and expelling him from the country.¹⁴⁴

The Court's decision has limited precedential significance, however, because of the notoriety of the case and the government's brazen effort to detain Timerman indefinitely without even a reasonable suspicion that he posed a threat to public order. But in two instances which were unaffected by salient demonstrations of international concern, the Court, applying the same standard of "reasonableness" used in the Timerman case, also found abuses of discretion.¹⁴⁵

Through these tiny checks to arbitrary rule¹⁴⁶ the Argentine Supreme Court demonstrated the contribution that self-confident, independent constitutional courts can make to the protection of human rights and elected governments. The Chilean and Salvadoran courts, on the other hand, legitimize fears that such courts are at least as likely to defend extreme privilege, as they are to defend representative government.¹⁴⁷ One way of reducing the latter risk is to emphasize the special task of constitutional courts and the corresponding need to develop a selection process calculated to produce justices whose philosophies of government and views of the court's role are compatible with democratic reform.

It might also be useful, albeit dangerous, to provide a process for modifying the Court's composition in the event that it abuses its power. For instance, the constitution might provide for an increase in the number of justices by a weighted vote less than that required for a constitutional amendment. Another way to reconcile independent constitutional review with majority rule under the particular conditions that prevail in contemporary Latin America is to provide for something less than irreducible lifetime tenure on the Court. For example, justices could serve

143. Timerman, Jacobo, CSJN, 300 Fallos 816 [1978-C] L.L. 586.

144. See REPORT ON THE SITUATION OF HUMAN RIGHTS IN ARGENTINA, *supra* note 150, at 173.

145. See Garro, *supra* note 20, at 56 n.178.

146. Argentina's courts have consistently refused to recognize a power to review not only particular statutes and decrees enacted during states of emergency, but also the decision to declare the emergency and suspend individual rights.

147. Ironically, six years before the Chilean judiciary would lend itself to the protection and legitimation of Chile's military putschists, Chile unwittingly established the principal means to that end, namely a special Constitutional Tribunal with the power to rule on the general constitutionality of laws and to decide disputes between the executive and the legislature. See SIGMUND, *supra* note 139, at 17.

an initial long term (perhaps a decade), which could be terminated by a weighted legislative majority.

IV. THE LIMITS OF JUDICIAL REVIEW IN FOSTERING THE RULE OF LAW

Full-face confrontation between a handful of determined justices on the one hand, and Parliament or President, on the other, is the high drama of judicial review. While replete with arresting literary qualities, judicial review is far less important to the protection of human rights and the coincident deepening of democratic governance than routine review of acts and omissions by the foot soldiers of the state, including its security forces. Democracy works for and is sustained by citizens. Citizenship in its true sense is not a blessing enjoyed by the entire native-born population of most Latin states. Latin America's marginalized inhabitants—favela-dwellers, street people, landless rural laborers, and indigenous groups—enjoy it in name only.¹⁴³ Citizens have a sense of possessing rights, enforceable claims against their fellow citizens and public officials. True, they may have to pay informal gratuities to make some of those claims good, but as long as the tariff is reasonably predictable, gratuities are hardly distinguishable in their effects from the user fees charged for certain services by the most fastidious of governments. The key element of true citizenship is having some sense of influence over one's environment, a sensation of enjoying a zone of autonomous existence. This sense endows its possessors with dignity, and with the confidence that they can plan their lives. The ominous bulk of *force majeure* does not shadow their every move. They are citizens. Tens-of-millions of Latin Americans are not.

Supreme Court review of acts of parliament and presidential decrees will not substantially alter their condition. They require workaday redress of grievances and vindication of claims for licenses to work, for enforcement of labor codes, and for access to what few public services are nominally their due. An important question facing leaders of new or renewed democracies is whether and how the existing judicial system can become an instrument of quotidian justice.

148. See LATIN AMERICAN CENTER PUBLICATIONS, UNIVERSITY OF CALIFORNIA AT LOS ANGELES, 30 STATISTICAL ABSTRACT OF LATIN AMERICA 275-77 (James A. Wilkie et al. eds., 1993) (providing a basis for comparing political and civil rights among Latin American countries).

One key to popular justice is money. In most countries the judicial system is a budgetary stepchild. Salaries are poor and working conditions abominable. I have interviewed a judge of first instance in a Central American country. His "chambers" are a room with a fan that hardly stirs the beads of sweat on the leprous walls. It is morning. The man looks weary. His secretary sits in one corner pecking at a typewriter I could import as a non-dutiable antique. On sagging shelves papers bulge from broken files. A formless mass of concerned parties wait stoically, without visible expectation, on the threshold.

Having witnessed this "*tableaux vivant*" directly or through proxies, sympathetic members of the international aid-giving community are now investing funds and offering technical assistance to upgrade the working conditions of the judiciary. Computers, air conditioning, space, and paint will presumably contribute to efficiency and dignity, will enhance the attractions of the profession, and possibly make its members more vigorous and resolute.¹⁴⁹ But one wonders whether so formal a system of justice as the one which operates with variations in all of Latin America can ever effectively cope with the needs of the popular classes. At least to a superficial observer like myself, it seems ponderous and far too dependant on the written word, particularly in countries where illiteracy remains widespread.¹⁵⁰

A quantum leap in justice for the popular classes may require a radical streamlining and deformatization of judicial procedure, as well as two other important developments. One necessary development is a vast increase in representation for the poor. For the foreseeable future, traditional legal assistance programs will not suffice, since the number of poor people in need of assistance is too great. Full-time lawyers for the poor—supplemented by volunteers with paralegal training, and supported by government funds, churches, and public and private sources in the OECD countries—can provide cadres. Perhaps the full-time lawyers can come from the ranks of recent law school graduates, if this type of public interest work were to become a mandatory condition of entry to the bar.

149. Permanent improvement in the material conditions of the justice system obviously cannot be achieved exclusively through foreign assistance. Assistance can provide direction and incentives. It cannot substitute for the will to increase the justice system's share of the state budget, which in country's like Guatemala, where the rich pay only nominal taxes, means also the will to increase the general revenues of government.

150. LATIN AMERICAN CENTER PUBLICATIONS, *supra* note 148, at 212-15.

In addition to representation for the poor, the second necessary development is the creation, where it does not exist, and expansion, where it does exist, of an institution modeled after the *Fiscal Publico* in Venezuela. The *Fiscal Publico* is an ombudsman-like position, equivalent in Venezuela to Cabinet rank, filled by parliamentary election rather than presidential appointment. The *Fiscal Publico* investigates allegations of corruption, defends human rights, and is broadly responsible for assuring that public officials comply with the law. Lawyers who work for the *Fiscal* may, for instance, inspect jails and observe police behavior in controlling demonstrations. As I envision the office, it would monitor the judiciary as well as the executive branch, and might even have a measure of coercive power rather than just the responsibility for bringing cases before the courts.

V. PRESIDENTIALISM, GRIDLOCK, AND CONSTITUTIONAL CRISIS

Presidential government has become the Latin American norm since independence, maintaining its paradigmatic status through a long historical night episodically illuminated by economic or political disaster. After studying the recent, as well as the older transitions to and from democracy, an influential band of scholars¹⁵¹ has concluded that institutions of parliamentary democracy are inherently better equipped for survival and success under the conditions prevailing in Latin America and Eastern Europe. Indeed, they claim it would enjoy comparative advantage in most countries. These scholars do not think it a mere coincidence that practically all of the world's established democracies, with the single exception of the United States, utilize some form of parliamentary government.

The proponents of parliamentary democracy make a strong *a priori* argument backed by detailed case studies.¹⁵² Presidential government, as they perceive it, suffers from a number of serious defects. One is the difficulty of removing a president before the end of the constitutionally-prescribed term, even when that president suffers an irreversible collapse of public confidence.¹⁵³ While an established democracy may survive

151. See, e.g., JUAN LINZ & ARTHUR VALENZUELA, *THE FAILURE OF PRESIDENTIAL DEMOCRACY* (1994); Juan Linz, *The Perils of Presidentialism*, 1 J. DEM. 62 (1990); Arthur Valenzuela, *Latin America: Presidentialism in Crisis*, 4 J. DEM. 3 (1993).

152. See *infra* notes 154-55.

153. See Carlos Santiago Nino, *Transition to Democracy, Corporatism and Consti-*

the consequent deflation in the perceived legitimacy of governmental institutions, one that is not yet deeply-rooted may not. Survival is particularly problematic in countries where the military has a tradition of stepping in to fill political vacancies.

The effort to end the crisis of legitimacy through impeachment is uncertain, prolonged, and traumatic even when the collapse of confidence stems from the target's crimes and misdemeanors; when the only material delinquencies are ineptitude and bad luck, impeachment is virtually impossible. In a parliamentary system, its proponents argue, no more is necessary than a vote of no-confidence made possible by the predictable shift of erstwhile supporters fearful for their political lives.

The connection between successful administration of the country's affairs and the political health of legislators ties in to a second virtue of parliamentary government: the lack of policy gridlock which arises from conflict between the executive and legislative branches.¹⁵⁴ The leaders of government remain members of parliamentary parties. If the former fail, all members of the parliamentary party suffer.¹⁵⁵ Consequently, in addition to their personal hopes of holding office in the future, ordinary members of the parliamentary party have a powerful incentive to support the government.¹⁵⁶ Prime Ministers and their cabinet associates also have an incentive not to pursue policies which are abhorrent to average members. This incentive arises because regardless of whether the Prime Minister and cabinet are selected by a proportional representation system or in a constituency, as the "first past the post," they have no independent national base of support. The Prime Minister can neither reasonably claim nor easily imagine having been chosen by and thereby acquired something like a mystic bond to the people along with a virtually absolute discretion for the length of the Presidential term to decide where to steer the ship of state.¹⁵⁷

The existential condition of Latin America aggravates, and is in turn aggravated by, the endemic tendencies of the presidential system. Violent swings in economic momentum occur with sufficient frequency that few presidential terms pass without them.¹⁵⁸ Violent turn downs almost

tutional Reform in Latin America, 44 U. MIAMI L. REV. 129, 153 (1989) (stating that the process of impeachment is almost impossible to carry out).

154. See *id.* at 148-49 (citing executive-legislative confrontations as a major reason for the failure of more than 30 presidential regimes outside the United States).

155. See *id.* at 149 (contrasting presidential and parliamentary forms of government in that the former provides "little incentive to remain faithful to the party").

156. *Id.*

157. Guillermo O'Donnell, *Delegative Democracy*, 5 J. DEM. 55 (1994).

158. See Stotzky, *supra* note 1, at 124-26 (analyzing the impact of economic trou-

invariably eviscerate the reigning president's legitimacy. The region remains the home of military establishments, still living apart from civil society, still very much a state within the state, still imagining themselves both as stewards of the national essence, and as more virtuous and competent than civilian governments. The military views presidential administrations that lose their authority and executive-legislative gridlock as occasions calling for exercise of the steward's function.

If the generality of Latin American political parties were well-organized representatives of distinct social interests with programs corresponding to those interests, presidential elections would be more programmatic in content, and presidential mandates would be more specific and inclined toward convergence with the programs of the dominant parties in the legislature. Enduring parties with enduring programs would give greater continuity to policy, and would tend to dominate the selection of presidential candidates. As things now stand in Latin American countries like Brazil, established parties are strong enough to dominate legislative elections, but not to block hitherto obscure outsiders from surging out of nowhere into the presidential office. When outsiders take over the presidency, the parties in the legislature see no advantages accruing to them from the president's success. As a result, there is no incentive for cooperation and gridlock often follows.

The elements of the presidential and parliamentary systems of government are not entirely incompatible.¹⁵⁹ A number of democratic countries have tried a certain amount of mixing and matching in the search for optimal political arrangements.¹⁶⁰ The main Western European form of government is parliamentarianism, with a president as the largely ceremonial head of state where no monarch is available to play the role. This ceremonial president is, however, not directly elected. Under Charles DeGaulle, France adopted a more genuinely mixed system.¹⁶¹ It has a directly elected president authorized to represent the country in foreign relations, regardless of who commands parliament. The president has far more problematical authority, however, over domestic matters,

bles on Argentinean Presidents Alfonsín and Menem).

159. See Nino, *supra* note 153, at 156-57 (discussing mixed systems of government which combine the advantages of presidentialism with those of parliamentary government).

160. See *id.* at 147-52 (recounting various attempts at mixed government by Brazil, Venezuela, Costa Rica, Uruguay, Chile, and Argentina).

161. See generally F.L. Morton, *Judicial Review in France: A Comparative Analysis*, 36 AM. J. COMP. LAW 89 (1988) (discussing the French system of government in the context of judicial review).

when opposing parties dominate the legislative branch. President Mitterand, a Socialist, cohabited if not happily, then at least rather quietly, with conservative prime ministers largely by leaving domestic issues to them. It is difficult to predict whether such an arrangement can work with a less cautious person as president, in a time when politics are more polarized.

Latin America's presidentialist states might seek to mitigate the defects of presidentialism by altering the constitution to allow the president to appoint members of parliament to the cabinet, without them having to surrender their seats and hence their power bases. This change might facilitate coalition government, which is considered a virtue by advocates of parliamentarianism. It is unclear whether presidents from outside the traditional party structure would have sufficient incentives to exploit the opportunity, and whether parliamentary leaders of the traditional parties would have sufficient reason to accept cabinet positions. One-term limits may render presidents loath to share the patronage. Presidents with one term and an agenda shaped by ideological passions may not want to compromise their perceived popular mandate unless and until they experience an implosion of popular support, at which time parliamentary leaders have little reason to participate.

The case for parliamentary government remains stronger in the scholarly literature than in politics. When Brazilian voters had the option to choose a parliamentary government as part of the reconstruction of democratic institutions after a long period of military rule, they soundly rejected it.¹⁶² In other countries, the possibility of parliamentary government has not even entered serious political discourse. For the time being, at least, it appears that Latin America will have what it can out of presidential government.

CONCLUSION

To paraphrase an F. Scott Fitzgerald heroine, the only thing you can say with confidence about the future of democratic politics in Latin America is that there is little you can say with confidence. In historical terms, democracy is a recent and only lightly tested phenomenon. It has

162. See James Brooke, *Latin America in Flux; Economic Ills Sap Brazilians' Faith in Democracy*, N.Y. TIMES, July 25, 1993, at A10; Katherine Ellison, *Brazilians Opt for 'Devil They Know'*, CALGARY HER., Apr. 22, 1993, at A18; *Brazil: Latest Poll Data Shows People Still Want a President*, Inter Press Service Global Information Network, Apr. 26, 1993, available in WESTLAW, Allnws database, Interps file (1993).

appeared most enduring in countries that enjoy relative homogeneity of race and culture, an electorate dominated by a combination of the bourgeoisie and workers in secure jobs that provide something at least close to a middle-class life style, and overall, a high and still improving standard of living. A number of Latin countries—Argentina, Costa Rica, Chile, and Uruguay—possess the first of those characteristics.¹⁶³ Many others do not. Very few possess the second and third. Long-standing democracies are also characterized by the rule of law, in the sense in which I have used that term. Of course the rule of law is in part a symptom of democracy consolidated, but it is also a cause. In most countries in Latin America, it is not a salient feature even of middle-class life.

Although there are ample grounds for pessimism about the success of democracies in Latin America, past experience may not extrapolate well. Anti-democratic ideologies seem at least temporarily exhausted in the world at large, and particularly in Latin America. Corresponding to that exhaustion is a growing belief in the intrinsic virtue of the liberal values or rights which are immanent in democratic systems.¹⁶⁴ In this regard, the experience of state terror in Latin America had an important pedagogical effect. Another promising difference in today's Latin America is the strength of civil society, as reflected by the proliferation of non-governmental organizations, particularly in the fields of human rights, economic development, and the environment.¹⁶⁵ Thus, while Latin America is far from the end of ideological conflict and authoritarian temptations, at least there is reason to doubt that its peoples are condemned to revisit their past.

163. THE CAMBRIDGE ENCYCLOPEDIA OF LATIN AMERICA AND THE CARIBBEAN 155-60 (Simon Collier et al. eds., 1985).

164. See SAM HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* (1991) (acknowledging the resurgence of support for democratic systems of government); see also Larry Diamond, *Ripe for Diffusion: International and Domestic Factors in the Global Trend Toward Democracy*, Presented to the Annual Meeting of the International Studies Association, (March 20-23, 1991) (unpublished manuscript on file with *The American University Journal of International Law and Policy*).

165. See Kathryn Sikkink, *Human Rights, Principled Issue-Networks, and Sovereignty in Latin America*, 47 INT'L ORG. 411 (1993); see also Kathryn Sikkink, *Non-governmental Organizations, Democracy, and Human Rights in Latin America*, in *BEYOND SOVEREIGNTY: COLLECTIVELY DEFENDING DEMOCRACY IN THE WESTERN HEMISPHERE* (Tom Farer ed., 1995).