Judicial Protection of the Constitution In Latin America

By DAVID S. CLARK*

A constitution, if it is to exist as a meaningful document for society, needs a protector. The question of who is to be the protector, however, has remained a controversial one throughout the history of modern nations. Locke and Montesquieu tended to take for granted that the people's representatives in an elected legislature would guard the constitution. Later the notion spread, through Hamilton's famous article in The Federalist Papers,[1] that an independent high judicial authority would be more reliable as a protector of the fundamental law and the rights of the citizen. This idea was slow to gain ground in Europe, and only became widespread after World War II.

However, in the nations of Latin America, frequently assumed to have adopted of European legal systems, the idea of judicial review was widely accepted in the nineteenth century. Development of the judiciary as the guardian of the constitution in Latin America has been uneven. Unevenness, however, connotes successes as well as failures. The former outnumber the latter today in Latin America. Out of a total Latin American population of 286 million, a majority of people live in countries with relatively effective judicial review.[2] Recent studies suggest that several nations in Latin America have powerful judiciaries that are substantially independent of the political branches of government.[3] To comprehend the social, political and economic environ-

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I owe particular appreciation to John Henry Merryman, Carlos José Gutiérrez, Edmundo Fuenzalida Faivovich, Lawrence Friedman, and Lorenzo Zolezzi for many helpful comments on this article.

1. *See* THE FEDERALIST No. 78 (A. Hamilton).

2. *See* text accompanying notes 119-20 *infra.*

3. *See, e.g.*, T. BECKER, COMPARATIVE JUDICIAL POLITICS 212-17, 226, 247 (1970) [hereinafter cited as BECKER]; J. LAMBERT, LATIN AMERICA: SOCIAL STRUCTURE AND POLITICAL INSTITUTIONS 272-76, 287-95 (1967) [hereinafter cited as LAMBERT]; and Schwarz, *Judges Under the Shadow: Judicial Independence in the United States and*

ment within which these legal institutions must function, it is instructive to consider briefly the background that led to the Latin American adoption of the judiciary as the protector of the constitution. After tracing the historical and ideological underpinnings for judicial review, this article will attempt to measure the effectiveness of judicial review in Latin American countries on a comparative basis. Finally, the relationship between effective judicial review and the level of national economic development and the type of political regime will be examined.

The Historical Background

At the time of the discovery of America, the political institutions of the Iberian peninsula were in the process of becoming more centralized. The marriage of Isabella, queen of Castile, and Ferdinand, king of Aragon, united these two kingdoms. Each, however, retained its political and administrative identity, its own laws, and its peculiar judicial institutions.[4] Since Isabella had provided the financial backing and legal authorization for Columbus' 1492 voyage, the American colonies were subjugated to the crown of Castile. Consequently, the laws and institutions of Castile came to the New World, shaping decisively the structure and character of early Spanish American institutions. As a result of Columbus' voyage, however, uncertainties regarding rights to the newly discovered land confronted both Spain and Portugal. Portuguese control of Brazil was the eventual consequence.[5]

Mexico, 3 CAL. WEST. INT'L. L.J. 260 (1973) [hereinafter cited as Schwarz]; *cf.* P. GONZALEZ, DEMOCRACY IN MEXICO 21-24 (1970) [hereinafter cited as GONZALEZ].

4. The kingdom of Aragon had, for example, a *justiciar* or chief justice who could annul acts of the king and also protect the liberty of the individual and his property rights against the unlawful action of the king's officials. In Castile, on the other hand, there was no *justiciar* or other judicial officer vested with equivalent prestige and power. Eder, *Judicial Review in Latin America*, 21 OHIO ST. L.J. 570, 570-71 (1960) [hereinafter cited as Eder I].

5. Portugal was unified before Spain. During much of the fifteenth century, the Portuguese explored the west coast of Africa and searched for a new route to the Far East. Columbus' voyage created certain problems concerning the newly discovered land. If Columbus had reached Asia, for example, Portuguese prior claims would have to be considered. If he had discovered new territory, then claims by Spain would have to be legalized. The Spanish pope, Alexander VI, was asked by the sovereigns of both nations to help settle the problem. As a result, the New World was divided between Spain and Portugal in 1493 by three papal bulls. These provided for a north-south line in the Atlantic running 100 leagues west of the Azores, with the territory east of the line belonging to Portugal and the territory west of the line belonging to Spain. When this arrangement caused Portugal to complain that she had not been given sufficient sea territory to navigate around Africa, the two countries signed the Treaty of Tordesillas, moving the line westward. Though not known at the time, this agreement gave Portugal a toe-

The pattern of Iberian administration in the American colonies reflected the steady growth of centralized rule in Spain and Portugal.[6] The colonies, treated as direct and exclusive possessions of the king, were separate kingdoms united with those of the Iberian peninsula, but under a common sovereign.[7] The Spanish king's power over his subjects was, although ample, not unlimited. America was a vast and distant land. Communication was slow. Totalitarian control, even if desired, was physically impossible. Furthermore Portugal, with her limited resources already committed to exploitation of Africa and the Far East, had administrative difficulties in controlling Brazil.

Administration and law enforcement in a complex society require the existence of courts or their functional equivalent to interpret and apply laws and regulations.[8] To meet this need, the Spanish and Portuguese administrators adapted the royal court system to a new environment. One of the most striking characteristics of colonial government was its heavy reliance on judicial devices, procedures, and on legally trained officials—what Professor Parry refers to as the "rapidly increas-

hold on the eastern bulge of South America. From this map manipulation developed the colony of Brazil.

6. *See* S. SCHWARTZ, SOVEREIGNTY AND SOCIETY IN COLONIAL BRAZIL, at xii-xiv (1973) [hereinafter cited as SCHWARTZ] The thirteenth and fourteenth centuries brought among the monarchies of Europe a progressive strengthening of the kings' position vis à vis the secular and clerical feudal limitations of the Middle Ages. In England and France, as well as in Spain and Portugal, the sovereigns strove to win direct control of their territory, free from feudal ties to local lords, by appointing their own officials. The authority of the kings' officials gradually increased, especially in the administration of justice. Castile, particularly by the end of the sixteenth century, began to approach the status of an absolute monarchy. At the center was the sovereign, surrounded by a small group of advisers. For financial, legislative and judicial problems, special bodies of counsellors and magistrates were formed; they acted in the name of the king and were constantly consulted by him. The king's court of justice, moreover, acquired increasing influence.

Only in England had a constitutional balance between the monarchy and other forces in society been reached and institutionalized by 1500. For example, the king was bound by the Magna Carta to seek assent of the lords in crucial matters of taxation and war. In 1295, representatives of the middle classes and landed commoners entered Parliament, and in 1433, the approval of both houses of Parliament became necessary for the passage of bills. As early as the thirteenth century, moreover, the more important civil and commercial cases were already being heard in the king's courts. A class of professional judges developed in these courts whose work was to be decisive in the elaboration of a uniform law throughout the kingdom. *See* Dainow, *The Civil Law and the Common Law*, 15 AM. J. COMP. L. 419, 421-23 (1967).

7. C. HARING, THE SPANISH EMPIRE IN AMERICA 7 (1947) [hereinafter cited as HARING].

8. *See* Schwartz & Miller, *Legal Evolution and Societal Complexity*, 70 AM. J. SOCIOLOGY 159, 165-66 (1964).

ing body of officials, lawyers, notaries and miscellaneous quill-drivers."[9] The interpretation of the various legal codes lay in the hands of a numerous and powerful judiciary, at whose head stood the king. Spain and Portugal carried over from the age of feudalism to the age of sovereignty the notion of jurisdiction as the essential function of authority. At least during the sixteenth century the king, though he legislated continually, was still regarded as the chief of judges.[10] The principal task of government, accordingly, was adjudicating between competing interests rather than deliberately planning and constructing a new society.[11]

After several temporary groups of advisers, Charles V of Spain decided in 1524 to create the Council of the Indies, modeled after the Council of Castile, to act in matters related to the colonies. The council's authority extended beyond judicial review, as the highest court of appeal, to practically all fields of government action: legislative, financial, military and ecclesiastical.[12] The principal royal agents in the colonies were the viceroys, the captains general, and the *audiencias.* Viceroys and captains general had the same duties. The former, however, were more important due to the larger expanse of territory assigned to their jurisdiction. Both viceroys and captains general were the supreme civil and military officers within their regions.[13] The major restraint upon the arbitrary exercise of power by these officials, however, lay in the royal *audiencias,*[14] nine of which were created in the sixteenth century.[15] The *audiencia* was essentially a court of appeals with jurisdiction over roughly the same territory governed by the viceroy or captain general. It served, in addition, as a consultative council to the executive officials and had a limited degree of legislative power.[16]

The *audiencia* system reflected two important characteristics of Spanish imperial government in America: the division of authority and responsibility, and the king's distrust of initiative on the part of his colonial officials. Although these characteristics often prevented effec-

9. J. PARRY, THE SPANISH SEABORNE EMPIRE 173, 192 (1966) [hereinafter cited as PARRY].

10. *Id.* at 193-94; *see also* Schwartz, *supra* note 6, at 4, 14.

11. PARRY, *supra* note 9, at 193-94.

12. W. PIERSON & F. GIL, GOVERNMENTS OF LATIN AMERICA 37 (1957) [hereinafter cited as PIERSON & GIL].

13. HARING, *supra* note 7, at 119.

14. *Id.* at 129.

15. PIERSON & GIL, *supra* note 12, at 45 n.5.

16. HARING, *supra* note 7, at 77, 119; J. VANCE & H. CLAGETT, A GUIDE TO THE LAW & LEGAL LITERATURE OF MEXICO 3 (1945) [hereinafter cited as VANCE & CLAGETT].

tive administration in the colonies, they aided the king and his council in maintaining political control in Spain. Spanish imperial government was one of checks and balances, although not secured by the separation of powers into executive, legislative, and judicial branches seen in modern constitutional regimes, but rather secured by a division of authority among different individuals or tribunals exercising the same powers.[17]

It is in the *audiencia,* as a result, that one can find the germination of what will be judicial review of legislative and executive acts in Latin American nations in the nineteenth and twentieth centuries.[18]

> It was the center, the core, of the administrative system, and the principal curb upon oppression and illegality by the viceroys and other governors. Viceroys came and went; the *audiencia* was a more permanent and continuous body, which acquired a long line of corporate tradition . . . . [*Audiencias*] embodied a "tendency toward jurisdictional autonomy in spite of royal pragmatics and the ill-concealed jealousies of viceroys and governors" . . . .[19]

As a court of law the *audiencia* maintained an unquestioned supremacy; the technical right of appeal from its decisions to the king and Council of the Indies, furthermore, was made so difficult as to be nearly impossible by the eighteenth century.[20]

The jurisdiction of the *audiencia* was extensive. All colonial *audiencias* exercised a general supervision over the conduct of inferior magistrates within their territory. They possessed, in addition to their appellate powers over civil, criminal, administrative and some ecclesiastical matters, original jurisdiction in cases concerning royal patronage and revenue, and might take the initiative in investigating any usurpation of royal authority, even to the point of sitting in judgment on the acts of a viceroy.[21] The protection of interests of indians, more-

17. HARING, *supra* note 7, at 121-22. The strict French doctrine of separation of powers did not find general acceptance in the newly independent Latin American republics of the nineteenth century; rather, the American checks and balances modification was found to be more congenial. *See* text accompanying note 42 *infra.*

18. VANCE & CLAGETT, *supra* note 16, at 104-05; H. CLAGETT, A GUIDE TO THE LAW & LEGAL LITERATURE OF PERU 55 (1947).

19. HARING, *supra* note 7, at 136-37. *See also* E. RUIZ, LA MAGISTRATURA INDIANA 37-38 (1916); Malagón-Barceló, *The Role of the Letrado in the Colonization of America,* 18 AMERICAS 1, 6-7 (1961) [hereinafter cited as Malagón-Barceló]; Kahle, *The Spanish Colonial Judiciary,* 32 SW. SOCIAL SCI. Q. 26, 31-33 (1951) [hereinafter cited as Kahle].

20. Kahle, *supra* note 19, at 26.

21. PARRY, *supra* note 9, at 199; Kahle, *supra* note 19, at 32; *see* Campbell, *A Colonial Establishment: Creole Domination of the Audiencia of Lima During the Late*

over, was one of the *audiencia's* more important functions.[22]

In the interests of impartiality, the seventeenth century code, *Recopilación de las Leyes de las Indias*, prescribed a semi-monastic life for the *audiencia* judges, the number of which varied from four to eighteen, depending on the importance of the territory.[23] Many of the code articles laid down strict rules of daily life for these judges, showing them to be a highly specialized and respected professional group upon which the crown placed particularly heavy reliance. For their many duties and responsibilities, *audiencia* judges received salaries much higher than those of any other colonial officials except viceroys, and considerably higher than those paid to corresponding judges in Spain.[24]

The Portuguese judicial system in Brazil differed somewhat from that in colonial Spain, although there were important similarities. During the sixty year period of Spanish-Portuguese union after Philip II of Spain inherited the crown of Portugal in 1580, for instance, the *Conselho da India*, resembling the Spanish Council of the Indies, was created to administer the king's policies in Brazil. The *Conselho da India*, however, and its successor, the Overseas Council (*Conselho Ultramarino*), did not have the judicial function of the Spanish Council of the Indies. Final appellate jurisdiction resided in the *Casa de Suplicação* in Lisbon for a few captaincies general and in the *relações* in Bahia or, after 1751, also in Rio de Janeiro for most of the Brazilian captaincies general. As with the *audiencia* in Spanish America, the *relação* acted as the principal check on the arbitrary exercise of power by a Brazilian captain general.[25] *Relações* were both judicial and administrative bodies, but they were not subordinate to the captain general. The harbinger of today's Supreme Court in Brazil finds its roots in the *relação*.[26]

Eighteenth Century, 52 HISPANIC AM. HIST. REV. 1, 4 (1972) [hereinafter cited as Campbell].

22. HARING, *supra* note 7, at 131. "The Indian very rapidly assimilated . . . juridical sense, and then defended himself against the acts of the colonizer, not with bows and arrows, but with lawsuits." Malagón-Barceló, *supra* note 19, at 16-17. *See* J. OSORES, EL MEDIO Y LA LEGISLACION 133-34, 158, 164-65 (1918); Coy, *Justice for the Indian in Eighteenth Century Mexico*, 12 AM. J. LEGAL HIST. 41, 42-45, 49. Up to forty percent of an *audiencia's* time was occupied with suits between indians, or between indians and spaniards. The indians, furthermore, were relieved in some regions of legal costs and had attorneys designated to defend them in court. HARING, *supra* note 7, at 131. In some areas a special court, the *juzgado de indios*, eventually heard most of the cases dealing with indians. *Id.*

23. Kahle, *supra* note 19, at 31; PARRY, *supra* note 9, at 201-02.

24. PARRY, *supra* note 9, at 201-02. High salaries are maintained in some Latin American countries today; *see, e.g.*, Costa Rica in text accompanying note 102, *infra.*

25. SCHWARTZ, *supra* note 6, at 9, 197, 359.

26. *See* D. ALDEN, ROYAL GOVERNMENT IN COLONIAL BRAZIL 435-36 n.57 (1968);

Even though the *audiencia* and *relação* were important institutions in colonial America in curbing the arbitrary exercise of official power, two points should be emphasized. First, these two partially judicial organs were not upholding a higher law, natural or secular, against the legislative or administrative acts of the king. On the contrary, *audiencias* and *relações* were the most consistently loyal and effective institutions of the colonial bureaucracy.[27] Legality was defined by the king and his councils. Aggrieved individuals could complain, and many thousands did, against official action that was contrary to the king's law. The second important fact to remember is that the New World was enormous in size, especially compared to the Iberian peninsula. The scattered pattern of settlement,[28] the lack of resources, the tremen-

E. BORCHARD, GUIDE TO THE LAW & LEGAL LITERATURE OF ARGENTINA, BRAZIL & CHILE 235-36 (1917); [hereinafter cited as BORCHARD]; Marchant, *The Political and Legal Framework of Brazilian Life*, MODERN BRAZIL 96, 123 (J. Saunders ed. 1971); C. PRADO, THE COLONIAL BACKGROUND OF MODERN BRAZIL 350, 353, 355-57, 359-60, 373-74 (1967).

27. PARRY, *supra* note 9, at 202. For much of the latter eighteenth century, however, American-born Europeans had substantial influence over these high courts. This led to the royal policy of securing control by naming only those born on the Iberian peninsula, especially after 1780. Burkholder, *From Creole to Peninsular: The Transformation of the Audiencia of Lima*, 52 HISPANIC AM. HIST. REV. 395, 395-97, 413 (1972); *see* D. BRADING, MINERS AND MERCHANTS IN BOURBON, MEXICO, 1763-1810, 40-42 (1971); Campbell, *supra* note 21, 1, 3, 10; Schwartz, *Family, Friends and Empire: Magistracy and Society in Colonial Brazil*, 50 HISPANIC AM. HIST. REV. 715 (1970).

28. Table 1 presents a rough impression of the distribution of the 22 million people living in Latin America at the beginning of their period of political independence from Europe. This can be compared with the distribution of 286 million people living in Latin America today in Table 9, *infra*.

TABLE 1: Population of Latin America in 1830, by Country.

Country	Population
Argentina	754,000
Bolivia	1,714,000
Brazil	4,692,000
Chile	905,000
Colombia	1,765,000
Costa Rica[1]	59,000*
Cuba[2]	704,000*
Dominican Republic[3]	139,000
Ecuador	564,000
El Salvador[1]	222,000*
Guatemala[1]	440,000*
Haiti[3]	463,000
Honduras[1]	194,000*
Mexico	6,365,000
Nicaragua[1]	226,000*
Panama[4]	—
Paraguay	421,000
Peru	1,585,000
Uruguay	95,000
Venezuela	453,000
TOTAL	21,760,000

dous distances involved, the often complex nature of judicial procedure in the sixteenth to eighteenth centuries, corruption, especially at lower levels in the hierarchy—all naturally made the task of extending royal authority in an effective manner to all parts of the colonies a difficult one. The actual administration of justice probably only approximated the model in and near the larger towns where *audiencas* and *relações* were located.[29] Outside these areas, large landowners frequently ruled arbitrarily; from their rule there was no appeal.[30]

To sum up, the principal task of government during the colonial period was to adjudicate between competing interests. The *audiencia* and *relação* were the institutions that fulfilled this function. The high salaries received by the magistrates, in addition, reflect the prestige and importance of their position in the Iberian imperial governments. The colonial government was one of checks and balances, of divided au-

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* The following population estimates are for years other than 1830: Costa Rica (1838); Cuba (1827); El Salvador (1841); Guatemala (1839); Honduras (1838); and Nicaragua (1838).

1. These five nations were part of the Central American Federation until 1839.

2. Cuba was part of the Spanish Empire until 1898.

3. The Dominican Republic, previously known as Santo Domingo, was part of Haiti from 1821 to 1844. Its population here has been subtracted from that of Haiti.

4. Panama was a department of Colombia until 1903.

SOURCES: *See* A. BANKS, CROSS-POLITY TIME-SERIES DATA 4-51 (1971); except STATISTICAL ABSTRACT OF LATIN AMERICA 1972, 67 (1974) for Cuba.

Surprisingly, there were probably fewer people living in Latin America in 1830 than when the Europeans first landed. It is estimated, for instance, that there were 25,000,000 indians living in Mexico in 1500. PARRY, *supra* note 9, at 215. In every area of the New World, the European invasion was followed by a steep decline in the numbers of the native population, caused chiefly by foreign pestilence: smallpox, malaria and yellow fever. *Id.* at 213, 215-16. The estimated number of indians in Mexico by 1580 was 1,900,000. *Id.* at 220. Even though there were huge numbers of negro slaves imported into Brazil, especially during the eighteenth century, their death rate was also extremely high. R. FOGEL & S. ENGERMAN, TIME ON THE CROSS 14, 16, 25 (1974).

Although indians had substantial access to the high courts, most judicial review probably dealt with those of European ancestry living in Latin America, whose number had risen from 225,000 in 1600 to 3,400,000 by 1800. SCHWARTZ, *supra* note 6, at 31, 247; A WILGUS & R. D'EÇA, LATIN AMERICAN HISTORY 93 (5th ed. 1963).

29. Brazilians were served by high courts in Bahia and Rio de Janeiro. In addition, there were thirteen *audiencias* in Spanish America during the latter part of the eighteenth century. There were two *audiencias* for Mexico (one each in Guadalajara and Mexico City), one for the Caribbean islands located in Santo Domingo, one for all of Central America in Guatemala, one each for Panama, Venezuela, Colombia and Ecuador, two for Peru (one each in Lima and Cuzco), one for both Bolivia and Paraguary, one for Chile and one for both Argentina and Uruguay. PIERSON & GIL, *supra* note 12, at 44-45.

30. 1 A. CAMPILLO, TRATADO ELEMENTAL DE PROCEDIMIENTOS CIVILES 25 (1924).

thority and responsibility. The *audiencia* and *relaçaõ*, forerunners of today's high courts, exercised the principal restraint on the arbitrary use of power by viceroys or captains general. These agencies protected what rights the colonials and indians had under the king's law. When the age of revolution arrived in Latin America at the beginning of the nineteenth century, new institutions were fashioned. They were not completely hewn from the abstract political ideology of the time, however. Many were based on the practical experience of the previous centuries.

Independence and the First Latin American Constitutions

During the first quarter of the nineteenth century, the Spanish and Portuguese empires in America, which had existed for more than three centuries, were broken up. The struggles for independence represented the first efforts of the patriots to liquidate the colonial system in government and society. For example, there were frequent attempts to remove legislative and executive duties from the high courts and to restrict the judiciary to the administration of justice.[31]

In the nations which emerged from the Spanish empire, the removal of the mother country as a common enemy severed a bond of cohesion; divisive political forces erupted throughout the Americas. In fact, the next few decades in many regions of Latin America could be best characterized as in a condition of anarchy.[32] Independence had brought pressing economic problems.[33] The principal cause of protests and revolutions, however, was the delay in reaching a consensus as to the form of government to be adopted. In spite of unsatisfactory experiments with monarchy in Haiti and Mexico, debate persisted in many countries between advocates of monarchy and those in favor of a republic. Where republics were established there were lengthy conflicts between federalists and those in favor of centralized government, between the city commercial class and rural landowners, between those

31. *See* Campbell, *supra* note 21, at 19.

32. For example, Bolivia during the remainder of the nineteenth century had more than 70 revolts; there were 30 presidents, six of whom were assassinated. In Paraguay, only six presidents were able to serve for the entire legal term. J. YCAZA, SOCIOLOGIA DE LA POLITICA HISPANO-AMERICANA 157 (1950).

33. Many of the new states were inadequately prepared for a self-supporting economy. Market rights in Spain were lost, and the abolition of indian tribute removed a production incentive. Moreover, the financing of wars brought fiscal burdens with which few of the emergent nations were able to successfully cope. PIERSON & GIL, *supra* note 12, at 106.

favoring separation of church and state and those supporting clericalism, and between ideological conservatives and liberals.[34]

The first constitutions of the Latin American nations are important because they indicate political traditions as well as the controversial issues which emerged. The political thought of Hobbes, Locke, Rousseau and Montesquieu had become well-known to the educated elite in the Americas, as censorship became less strict and travel abroad by colonials increased. These writings contained theoretical discussions of the practical issues that later confronted the authors of the Constitutions of the United States and France. The influence of social contract theories, especially as they related to issues of natural rights, and ideas on the proper functions for a limited government, particularly the separation of powers, pervaded the constitutional formulations of the revolutionary era. Many leaders of the cause for independence in Latin America, familiar with constitutional developments in the United States and France, drew on translations of the French Declaration of the Rights of Man and of the Citizen and certain major political documents of the United States, including the Declaration of Independence, the constitutions of Maryland, Massachusetts and Virginia, the Articles of Confederation and the Constitution of 1789.[35]

The history of Latin American constitutional theory and practice portrays the elaboration of a set of values—including liberty, equality, justice, and the sanctity of private property—widely shared with other western nations. One hundred and fifty years of experience, however, amply demonstrates that these values are not self-executing. Their implications are by no means unambiguous. On the contrary, these values are frequently contradictory. Freedom of contract and the private ownership of property, for example, have clashed with modern notions of social justice. Similarly, concepts of equality may conflict with notions of liberty, and so on. Furthermore, the values incorporated into Latin American constitutions have never been universally accepted.

All Latin American governments are obliged by their constitutions to respect the basic rights of man enumerated in the provisions that define liberty, equality, justice and property. In construing these matters, Latin American regimes are often misunderstood. Since political unrest impedes the proper functioning of political and legal institutions, all too often generalizations are based on such situations of unrest. The generalities in turn lead to assertions that the constitutional guaran-

34. *Id.* at 104; LAMBERT, *supra* note 3, at 264-66.

35. PIERSON & GIL, *supra* note 12, at 107.

tees are deceptive and that Latin Americans' desire for liberty and justice expresses itself in words and not action. This conclusion applies to some nations generally, but for the large nations with major populations it is true only for relatively short periods of time.[36]

There have been two major epochs in the establishment of constitutional guarantees in Latin America. The first stage includes the decades subsequent to the wars for independence, influenced by the liberal thought of the eighteenth century.[37] The second stage dates from the Mexican Revolution. Beginning in 1910, the first successful socialist revolt spelled out its goals of social justice and expressed them in the Constitution of 1917. This document, emphasizing nationalism, the concept that private property must serve a social function and containing a social program for land reform and the protection of labor, has had an important impact on constitution-making since that time.[38]

The central issue that faced the framers of Latin American constitutions, and has confronted western political theorists in general, was the problem of ensuring that governmental power, which is necessary for the realization of constitutional values, be constrained so that it would not impinge upon these same values.[39] The resolution of the problem lies in a system of effective restraints upon government action. Such controls involve some division of power, since those who are expected to do the restraining must act with some authority. The principal division of governmental power has generally taken one, and frequently two forms. First, there is a functional division into legisla-

36. LAMBERT, *supra* note 3, at 272-73. Many countries spent some of their history since independence under dictators, especially during the nineteenth century. There have continued to be several cases of dictatorship in the twentieth century: Venezuela from 1908 to 1935, the Dominican Republic from 1930 to 1961, and Haiti, Paraguay and Nicaragua for much of this century. Argentina suffered oppression until about 1850, and Mexico until much later, but the situation in these large countries today is different. Brazil has seldom known egregious constitutional violations until recently, and they do not often occur in Argentina, Chile, Colombia, Costa Rica or Uruguay. *Id.* at 273-74. *See* text accompanying notes 75-76 and 119-20 *infra.*

37. *See* text accompanying note 35 *supra.* In these early constitutions one finds various basic rights: freedom of speech, press, petition, assembly and association; freedom of movement; fundamental guarantees of fair procedure for persons accused of crime; the right to petition for a writ of habeas corpus; equal protection of the law; and the right to private property. LAMBERT, *supra* note 3, at 280-86; PIERSON & GIL, *supra* note 12, at 192-94.

38. LAMBERT, *supra* note 3, at 273, 276-80; PIERSON & GIL, *supra* note 12, at 184-85.

39. *See* M. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 1 (1967) [hereinafter cited as VILE]; *see also* Grant, *Judicial Control of Legislation,* 3 AM. J. COMP. L. 186 (1954) [hereinafter cited as Grant].

tive, executive and judicial spheres. Second, there may be a territorial division of sovereignty between a central government and smaller political units.[40]

Some form of the functional separation of powers is clearly required in order for courts to have the authority to declare statutes and other governmental action contrary to the constitution. This is, nevertheless, insufficient. The separation of powers doctrine taken to its logical conclusion, as the French had done after 1789,[41] or as advocated by the Jeffersonian Republicans, is incompatible with the idea that one branch of government can interfere with the duties of the other branches by invalidating their acts. The establishment of judicial review, like the veto power, depends on the acceptance of checks and balances.[42] No nation today subscribes to a pure doctrine of separation of powers, whereby each branch of the government must be confined to the exercise of certain duties and not allowed to encroach upon the functions of the other branches. Modern constitutional theories all espouse some form of mixed government.[43]

The Beginnings of Latin American Judicial Review

Every one of the Latin American nations has had since independence some period of explicit or implied authorization of judicial review of the constitutionality of legislative and executive action.[44] Particularly in regard to judicial review of legislation, the United States' influence has been important.[45] The framers of the American Constitution were

40. *See* C. FRIEDRICH, CONSTITUTIONAL GOVERNMENT & DEMOCRACY 172 (4th ed. 1968) [hereinafter cited as FRIEDRICH I].

41. *See* J. MERRYMAN, THE CIVIL LAW TRADITION 16-19 (1969) [hereinafter cited as MERRYMAN I].

42. *See* VILE, *supra* note 39, at 157-58; N. DOWLING & G. GUNTHER, CASES & MATERIALS ON CONSTITUTIONAL LAW 22, 26, 30 (7th ed. 1965).

43. *See* VILE, *supra* note 39, at 2-6, 13; Frohnmayer, *The Separation of Powers: An Essay on the Vitality of a Constitutional Idea*, 52 ORE. L. REV. 211, 216-19 (1973).

44. *See* Table 2 *infra*. Henry Abraham defines judicial review as "the power of any court to hold unconstitutional and hence unenforceable any law, any official action based upon a law, and any other action by a public official that it deems . . . to be in conflict with the Basic Law." H. ABRAHAM, THE JUDICIAL PROCESS: AN INTRODUCTORY ANALYSIS OF THE COURTS OF THE UNITED STATES, ENGLAND AND FRANCE 283 (2d ed. 1968). For similar definitions, *see* BECKER, *supra* note 3, at 204; G. SCHUBERT, CONSTITUTIONAL POLITICS 188 (1960); and E. MCWHINNEY, JUDICIAL REVIEW 13 (4th ed. 1969). In this article, "judicial review" is used according to Professor Abraham's definition, *except* that, unless otherwise stated, reference is made to the judicial consideration of legislation and executive action, and *not* to the hierarchical function of determining the legality of inferior judicial action.

45. In M. MONTAÑO, LAS IDEAS POLITICAS DE JOSE MANUEL ESTRADA 18 (1944),

divided on the issue of the supremacy of legislative versus judicial power. While Federalists were especially sensitive to the opportunities of arbitrary usurpations of power by a legislature, the Jeffersonian Republicans were more concerned about judicial improprieties. John Adams found Hamilton's discussion of judicial review in The Federalist[46] most congenial and found comfort in Justice Marshall's opinion in *Marbury v. Madison*,[47] convincingly asserting the Supreme Court's power in this area.[48] In Europe, on the other hand, idealists were greatly concerned with securing bills of rights, but they gave little attention to securing sufficient legal guarantees for their enforcement. After the revolution in France, suspicion of the reactionary courts militated against efforts to give them the power of judicial review.[49] State positivism, as expressed in the dogma of the absolute sovereignty of the state, coupled with Rousseau's formulation of the strict separation of powers, formed a matrix into which judicial review could not fit. Moreover, such review was believed not necessary, since the legislature, as the only directly elected branch of the government, alone could respond to the popular will.[50] The European tradition of resolving fundamental issues, consequently, is by explicit legislative enactment. This has resulted in codification of such principles as freedom of expression and assembly. The European practice has not, accordingly, favored judicial development of broad constitutional rights.[51] Only since World War I has a type of judicial review evolved, usually estab-

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the many Spanish translations of influential treatises during the period 1855-80 dealing with the United States Constitution are enumerated, including translations of THE FEDERALIST (1788); G. CURTIS, HISTORY OF THE ORIGIN, FORMATION, AND ADOPTION OF THE CONSTITUTION OF THE UNITED STATES (1854-58); J. KENT, COMMENTARIES ON AMERICAN LAW (1826-30); F. LIEBER, ON CIVIL LIBERTY & SELF-GOVERNMENT (3d ed. 1875); J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1834); and J. TIFFANY, A TREATISE ON GOVERNMENT AND CONSTITUTIONAL LAW (1867). PIERSON & GIL, *supra* note 12, at 267 n.3. *See* S. AMADEO, ARGENTINE CONSTITUTIONAL LAW 28-34, 49-56, 73-87 (1943); BORCHARD, *supra* note 26, at 286-90, 318-19; *cf.* C. FRIEDRICH, THE IMPACT OF AMERICAN CONSTITUTIONALISM ABROAD 12 (1967) [hereinafter cited as FRIEDRICH II]. The Spanish translation of A. DE TOCQUEVILLE, LA DEMOCRATIE EN AMERIQUE (1835) in 1837 and in later editions also had an important impact in Latin America. Eder I, *supra* note 4, at 571 n.5.

46. THE FEDERALIST No. 78 (A. Hamilton).

47. 5 U.S. (1 Cranch) 137 (1803).

48. FRIEDRICH I, *supra* note 40, at 252; FRIEDRICH II, *supra* note 45, at 78-79.

49. *Id.* *See also* Cappelletti & Adams, *Judicial Review of Legislation: European Antecedents and Adoptations*, 79 HARV. L. REV. 1207, 1208, 1211-12 (1966) [hereinafter cited as Cappelletti & Adams].

50. *See* MERRYMAN I, *supra* note 41, at 23-24.

51. FRIEDRICH I, *supra* note 40, at 252-53.

lished in a special constitutional court.[52]

Although both the United States' practice of judicial review and the European tradition of strict separation of powers influenced the authors of Latin American constitutions, the former seems to have had greater impact. The judicial institution, however, was not imported intact. Rather, the North American and European traditions stimulated the Latin American framers into thinking out the various alternatives confronting them in the years following independence.[53]

The power to interpret the constitution was expressly or implicitly vested in the judiciary in most Latin American nations during the nineteenth century. Although such a provision was not immediately acted upon in some countries, it served as a basis for the evolution of judicial review, especially of the constitutionality of legislation, in the twentieth century.[54]

Table 2: Earliest Explicit or Implied Authorization of Judicial Review in Latin American Constitutions or Statutes by Country[1].

Country	Review of Legislation	Habeas Corpus or Amparo Protection[2]
Argentina	1853	1863
Bolivia	1851	1931
Brazil	1891	1830
Central American Federation	1824	——
Chile	1925	1925
Colombia	1886	1964
Costa Rica	1821	1847
Cuba	1901	1901
Dominican Republic	1844	1947
Ecuador	1845	1929
El Savador	1886	1872
Guatemala	1839	1839
Haiti	1843	1964
Honduras	1894	1894

52. *See* Cappelletti & Adams, *supra* note 49, at 1207-08, 1214. *See generally* MAX-PLANCK-BERLIN INSTITUT FÜR AUSLÄNDISHES ÖFFENTLICHES RECHT UND VÖLKERRECHT, VERFASSUNGSGERICHTSBARKEIT IN DER GEGENWART (1962).

53. *Cf.* FRIEDRICH II, *supra* note 45, at 11. Latin American framers seem to have followed, in large part, the advice of de Tocqueville: "Let us not turn to America in order slavishly to copy the institutions she has fashioned for herself but in order that we may better understand what suits us; let us look there for instruction rather than models . . . ." A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA xiv (J. Mayer ed. 1969), in de Tocqueville's preface to the twelfth edition.

54. *See, e.g.*, R. BACKUS & P. EDER, A GUIDE TO THE LAW AND LEGAL LITERATURE OF COLOMBIA 11 (1943); C. HAINES, THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY 573-646 (2d ed. rev. 1959); Furnish, *The Hierarchy of Peruvian Laws*, 18 AM. J. COMP. L. 91, 98-110 (1971).

Mexico	1847	1847
Nicaragua	1838	1950
Panama	1904	1904
Paraguay	1940	1940
Peru	1856	1897
Uruguay	1934	1874
Venezuela	1811	1947

1. In several countries, even though judicial review was at least implicitly authorized, it was not immediately implemented. In Peru, for example, judicial review of legislation has never been invoked, although executive decrees and regulations have been held unconstitutional. Furnish, *The Hierarchy of Peruvian Laws*, 18 AM. J. COMP. L. 91, 98-110 (1971).

2. Habeas corpus has been called by a variety of names, including writ of exhibition of the person. In many countries it has been broadened to provide protection not only against bodily restraint and arbitrary imprisonment, but also against violation of various individual freedoms. J. LAMBERT, *supra* note 3, at 289.

SOURCES: *See* J. LAMBERT, LATIN AMERICA 274 (1967); H. CLAGETT, A GUIDE TO THE LAW & LEGAL LITERATURE OF BOLIVIA 47 (1947); Camargo, *The Right to Judicial Protection*, 3 LAWYER AMERICAS 191, 194-200 (1971); Eder, *Habeas Corpus Disembodied: The Latin American Experience*, TWENTIETH CENTURY COMPARATIVE & CONFLICTS LAW 463, 465-76 (1961); Eder, *Judicial Review in Latin America*, 21 OHIO ST. L.J. 570, 571-609 (1960).

Table 2 details the earliest explicit or implied authorization of judicial review in Latin American constitutions or statutes. Most of the countries recognized the possibility of judicial review of legislation in the nineteenth century.[55] About half, furthermore, adopted in this same period the writ of habeas corpus or something similar to protect freedom of movement.[56] In some nations habeas corpus, as a writ used to protect one from unconstitutional executive action, was expanded to include the protection of other or all individual liberties, often under the name of *amparo* in Spanish America and *mandado de segurança* in Brazil.[57] There were, however, some significant exceptions to this general trend. Chile, Paraguay and Uruguay, for instance, were strongly influenced by the French interpretation of the separation of powers which precluded judicial review. Guardianship of the constitution was left to the legislature until 1925 in Chile, until 1934 in Uruguay, and until 1940 in Paraguay. To this day, moreover, the Ecuadorian Supreme Court shares the power of constitutional review with the legislature.[58]

55. Eder I, *supra* note 4, at 571-609.

56. Eder, *Habeas Corpus Disembodied: The Latin American Experience*, TWENTIETH CENTURY COMPARATIVE AND CONFLICTS LAW, 465-76 (1961) [hereinafter cited as Eder II]. But habeas corpus was slow to be implemented in some countries. *See, e.g.*, W. STOKES, HONDURAS 140-41 (1950).

57. Eder II, *supra* note 56, at 467-70.

58. Eder I, *supra* note 4, at 572-73, 585, 607. For a perceptive discussion of judicial review in Latin America *see* Rosenn, *Judicial Review in Latin America*, 35 OHIO ST. L.J. 785 (1974).

The Reality of Latin American Judicial Review in the Twentieth Century

We have seen that all Latin American governments are required by their constitutions to respect the basic rights of man enumerated in the articles that define liberty, equality, justice and property. Courts, moreover, have generally been given the authority to declare legislative and executive action contrary to the constitution and thus invalid.

The extent to which judicial review is an effective restraint on unconstitutional government activity, nevertheless, is essentially an empirical question. It is, furthermore, inextricably intertwined with the concept of judicial independence. Paraphrasing Theodore Becker's interpretation, judicial independence is the *degree* to which judges believe they can decide, and do decide, disputes, consistent with their own conception of the judicial role in interpreting the law, in *opposition* to what those who have *political* power think about or desire in such matters.[59] This definition, first, implies that there are degrees of judicial independence. There may be partial political control of judicial behavior; it is more than a simple dichotomous variable.[60] Costa Rica may have a more independent supreme court than Mexico, for example, and they both may be more independent than the high court in Nicaragua. Second, independence denotes freedom from certain sources of influence—represented here as opposition from governmental power embodied in the legislative and executive branches.[61]

Following this definition of judicial independence, it seems clear that a judiciary which is not independent to some degree cannot effec-

59. BECKER, *supra* note 3, at 144. *See* J. BLONDEL, AN INTRODUCTION TO COMPARATIVE GOVERNMENT 441-42 (1969) [hereinafter cited as BLONDEL]; Eckhoff, *Impartiality, Separation of Powers, and Judicial Independence*, SCANDINAVIAN STUDIES IN LAW : 1965, 11 (F. Schmidt ed. 1965); Schwartz, *supra* note 3, at 263.

60. BLONDEL, *supra* note 59, at 437. *See* Cohen, *The Chinese Communist Party and "Judicial Independence"*: 1949-1959, 82 HARV. L. REV. 967, 972-75 (1969).

61. It is possible to conceive of a totalitarian society where judges decide conflicts according to a pervasive ideology that is substantially shared with the political elites. In this case, even though there might exist freedom from governmental influence, if there was no opposition to nonjudicial political power, there would be no independence under the definition adopted here. *See* BECKER, *supra* note 3, at 14, 141.

An issue that is outside the scope of this article concerns the impartiality of judges. The judge in the totalitarian illustration may be impartial even if he is not independent; he is impartial to the extent he decides disputes objectively according to the specific guidelines society has established. *See* BECKER, *supra* note 3, at 25-26, 141. Judicial independence is hardly a closed issue in the United States. *See generally Hearings on the Independence of Federal Judges, before the Subcommittee on Separation of Powers of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. (1971).

tively undertake constitutional review. Independence, consequently, is a necessary, but not a sufficient condition, for effective judicial review.[62] Independence of the judiciary, moreover, may occur without any provision for judicial review—as it has in England. In general, nevertheless, a judiciary's independence is related to the extent judicial review is exercised, and the power of judicial review is related to the actual degree of independence.[63]

Effective judicial review, in Latin America as elsewhere, is a relative phenomenon. It may make little sense, as a result, to conclude that at a certain period in history, judicial review in the United States, or Chile, was a powerful or weak political force. Such a statement becomes meaningful only when it takes on the attribute of comparison.[64] Was federal judicial review in the first half of the nineteenth century in the United States ineffective after *Marbury v. Madison* just because no federal law was declared void for another fifty years?[65] Is it effective today if sixty-five percent of the federal public administrators *believe* judicial review is effective? In part the answer depends on how one measures judicial review. But equally important is the definition of "weak," "effective" or "powerful" judicial review. Terms such as these can be given meaning only by comparison—either across time, between political units at a given point in time, or by combining both dimensions. Thus, it may facilitate explanation to state that federal judicial review was more effective in the United States, returning to our example above, from the Civil War to World War II than from *Marbury v. Madison* until the Civil War because seventy-four statutes (or parts thereof) were declared unconstitutional by the Supreme Court after 1860.[66] Similarly, a statement that Colombian judicial review is a powerful safeguard of individual constitutional liberties may be significant if seventy-five percent of the public officials believe judicial review is an effective deterrent to their action whereas an equivalent percentage in the United States is sixty-five percent.

By comparison, therefore, accurate assertions concerning the effectiveness of judicial review in various Latin American nations can

62. Certain institutional structures and procedures, of course, must also be provided.

63. BECKER, *supra* note 3, at 214-15.

64. *See generally* Merryman, *Comparative Law and Scientific Explanation*, LAW IN THE UNITED STATES OF AMERICA IN SOCIAL AND TECHNOLOGICAL REVOLUTION 81 (1974) [hereinafter cited as Merryman II].

65. *See* L. FRIEDMAN, A HISTORY OF AMERICAN LAW 301 (1973).

66. *See* R. CARR, THE SUPREME COURT & JUDICIAL REVIEW 204 (1942) [hereinafter cited as CARR].

be made. Inquiry, of course, need not end here. One might next ask what are the political and economic factors associated with judicial independence and effective judicial review: what causes a strong judiciary? For instance, the type of political system (whether democratic or authoritarian) might be an important variable explaining why some nations have strong court systems. Does a nondemocratic regime imply a dependent judiciary, largely submissive to the executive branch? Similarly, it might be hypothesized that effective judicial review correlates significantly with the national level of economic development. By investigating these kinds of questions, it is possible to speak more intelligently about judicial review in Latin America.

The definition of judicial review adopted previously[67] needs to be put into operation. Before judicial review in Uruguay can be compared with judicial review in Brazil, it is necessary to be able to measure what we mean by judicial revew. A recipe for chocolate cake, to illustrate, is an operational definition for such a cake because it details what operations and components are necessary to produce it. To measure degrees of effectiveness of judicial review, a detailed set of instructions is necessary to classify those degrees unambiguously.[68]

Table 3: Behavioral Determinants of Effective Judicial Review

	Indicator	Code[1]
I.	Number of laws, decrees, and regulations (or part thereof) declared unconstitutional annually	One point for each declaration of unconstitutionality
II.	Number of writs (habeas corpus, *amparo, mandado de segurança*) filed annually, per million population	One point for each 20 writs
III.	Percentage of writs decided against the government	One point for each 5 percentage points
IV.	Number of cases filed against government agencies annually alleging unconstitutional official action, per million population	One point for each 20 cases
V.	Percentage of cases decided against the government	One point for each 5 percentage points
	Effectiveness of judicial review	Total points

1. The code used here is illustrative; a balance among laws, writs and cases should be developed in conjunction with the data gathered for the indicators.

67. *See* note 44 *supra.*

68. H. BLALOCK, SOCIAL STATISTICS 12 (2d ed. 1972); J. SIMON, BASIC RESEARCH METHODS IN SOCIAL SCIENCE 16 (1969).

Table 3 details certain indicators which taken together serve as an operational definition of judicial review.[69] They measure the activity of courts in carrying out the judicial review function: assessing the constitutionality of laws and other legal norms as well as deciding cases and writs brought against government agencies.

To compare one nation with another, the indicators measuring the number of writs and cases filed are adjusted for population. It is not necessary to hold population constant, alternatively, when measuring the number of legal norms declared unconstitutional since one agrarian law, for instance, can regulate both a country the size of Honduras and one the size of Brazil.

If we lived in a world where perfect information existed, the indicators in Table 3 would allow us to compare the effectiveness of judicial review in the twenty Latin American nations with a high degree of reliability. Such information does not exist. There is, in fact, a dearth of judicial statistics for Latin American courts.[70]

Table 4: Substitute Behavioral Determinants of Effective Judicial Review

	Indicator	Code[1]
I.	Percentage of legislators who believe judicial review is effective	One point for each 5 percentage points
II.	Percentage of public administrators (including police) who believe judicial review is effective	One point for each 5 percentage points
III.	Percentage of judges who believe judicial review is effective	One point for each 10 percentage points

69. For a discussion suggestive of the indicators adopted in Table 3, *see* BECKER, *supra* note 3, at 147, 151-52, 214-15; BLONDEL, *supra* note 59, at 442; CARR, *supra* note 66, at 204-06, 224, 227-28; Toharia, *The Spanish Judiciary* 190-93 (unpublished Ph.D. thesis, 1974, on file in Yale University Library) [hereinafter cited as Toharia]; *The Supreme Court, 1961 Term: Foreword*, 76 HARV. L. REV. 75, 81-82 (1962), THE FEDERAL JUDICIAL SYSTEM 103 (Jahnige & Goldman eds. 1968); Schwarz, *supra* note 3, at 313-32; and Tanenhaus, *Supreme Court Attitudes toward Federal Administrative Agencies 1947-1956*, 14 VAND. L. REV. 473, 482-502 (1961), THE FEDERAL JUDICIAL SYSTEM 230-44 (Jahnige & Goldman eds. 1968).

70. This situation is slowly changing. SLADE (for Studies in Law and Development), a research enterprise centered at Stanford Law School, is undertaking the study of a large series of indicators that measure the complex of legal actors, institutions, processes, norms—all in the context of the legal culture—that comprise selected legal systems in Latin America and Mediterranean Europe. Data collected are comparative: between regions within each nation, across countries and over the period 1945-1970. Publication of the results is projected for 1976. *See* Merryman II, *supra* note 64, at 101-03, for a brief description of the Stanford project.

IV.	Percentage of general population who believe judicial review is effective	One point for each 10 percentage points
	Effectiveness of judicial review	Total points

1. This code is illustrative. It may be more representative of reality if a high percentage of police or legislators believe judicial review is effective than the same percentage for judges. The number of points assigned depend upon an investigator's theory. A more elaborate code could be devised if one were able to ascertain greater differentiation among responses to questions about judicial effectiveness.

Table 4, consequently, presents another approach in operationalizing the concept of effective judicial review.[71] The idea behind this table is that effective judicial review (Table 3) in some objective sense will be reflected by a large percentage of people *believing* it effective. The distance between belief and reality, however, may vary from one society to another, and also among groups within a nation. The reliability of these indicators, as a result, may be less than those presented in Table 3. Perhaps most important, however, is the extent to which people have *confidence* in the effectiveness of judicial review. It is not sufficient that judicial review be effective in an objective sense. According to this theory, Table 4 would be more meaningful than Table 3.[72]

Table 5: Structural Determinants of Effective Judicial Review

Indicator	Code[1]
Independence of supreme court judges	
I. Recruitment[2]	
A. Appointment by judiciary	2 points
B. Appointment by executive with checks (by legislature or judiciary) or by legislature	1 point
C. Appointment by executive alone	0 points

71. For a discussion suggestive of the indicators used, *see* BECKER, *supra* note 3, at 146, 151; CARR, *supra* note 66, at 206-08; PIERSON & GIL, *supra* note 12, at 281-82; Toharia, *supra* note 69, at 410-12; Murphy, *The Problem of Compliance by Police Departments*, 44 TEXAS L. REV. 939, at 939-46 (1966), THE FEDERAL JUDICIAL SYSTEM 353-57 (Jahnige & Goldman eds. 1968); Address by President F. Roosevelt, March 9, 1937, *The President Attacks the Court*, THE FEDERAL JUDICIAL SYSTEM 341-42 (Jahnige & Goldman eds. 1968); Sorauf, *Zorach v. Clauson: The Impact of a Supreme Court Decision*, 53 AM. POL. SCI. REV. 777 (1959), THE FEDERAL JUDICIAL SYSTEM 343-53 (Jahnige & Goldman eds. 1968); *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L.J. 1519, 1573-74 (1967); and Note, *Congressional Reversal of Supreme Court Decisions: 1945-1957*, 71 HARV. L. REV. 1324 (1958), THE FEDERAL JUDICIAL SYSTEM 334-40 (Jahnige & Goldman eds. 1968).

72. *See* Eckhoff, *supra* note 59, at 12. I am also grateful to Professor Merryman for this point.

II.	Tenure	
	A. Lifetime	3 points
	B. De facto lifetime (automatic renewal with good behavior)	2 points
	C. More than six years	1 point
	D. Six years or less	0 points
III.	Salary	
	A. Equal or greater than executive minister	2 points
	B. Equal or greater than full time law professor	1 point
	C. Less than full time law professor	0 points
Restrictions in making constitutional complaint against government		
IV.	Scope of competence	
	A. Review of all jurisdictions[3]	3 points
	B. Excludes one important jurisdiction (administrative law, labor law, agrarian law)	2 points
	C. Excludes two important jurisdictions	1 point
	D. Excludes three or more important jurisdictions	0 points
V.	Political questions	
	A. Moderate political question exclusion	1 point
	B. Substantial exclusion	0 points
VI.	Case and controversy requirement	
	A. Direct review of constitutional question	1 point
	B. Incidental review with other issues	0 points
VII.	Availability of review	
	A. Diffused throughout lower courts	1 point
	B. Concentrated in supreme court	0 points
Effects of constitutional ruling		
VIII.	Efficiency of review	
	A. Action or norm invalid for all (*erga omnes*)	2 points
	B. Invalid only between parties (*inter partes*), but stare decisis can provide general invalidity	1 point
	C. Invalid only *inter partes*	0 points
Effectiveness of judicial review		Total points

1. This code is illustrative.

2. The notion that appointment of judges by organs outside the executive and legislative branches might further judicial independence is suggested in the INT'L COMMISSION OF JURISTS, No. 11, at 4, February, 1961.

3. Supreme court review does not have to include the electoral court nor military court to qualify for 3 points, since most matters from these tribunals have traditionally been outside the scope of judicial review.

A third and even less reliable set of indicators is listed in Table 5. These are the structural variables normally found in the literature on judicial review.[73] In fact, most assertions about effective judicial review are based on the conditions of tenure and the selection procedures for supreme court judges.[74]

The principal shortcoming in using structural determinants to measure the effectiveness of judicial review is the propensity to confuse legal prerequisites with reality. It is possible that both structural and behavioral indicators would lead to approximately the same ranking of Latin American nations for the effectiveness of judicial review. We cannot make that determination, however, until information is made available to complete Tables 3 or 4.

Table 6: Effectiveness of Judicial Review in Latin America, by Country

	Recruitment	Tenure	Scope of Competence	Effects of Ruling	Effectiveness Score[1]
Argentina	1	3	3	0	7
Bolivia	1	1	2	0	4
Brazil	1	3	3	2	9
Chile[2]	1	2	3	2	8
Colombia	1	3	3	2	9
Costa Rica	1	2	3	2	8
Cuba	0	3	0	2	5
Dominican Republic	1	0	2	0	3
Ecuador	0	0	2	0	2
El Salvador	1	0	2	2	5
Guatemala	1	0	2	2	5
Haiti	0	1	3	0	4
Honduras	1	0	2	0	3
Mexico	1	3	3	1	8
Nicaragua	1	3	3	0	7
Panama	0	1	2	2	5

73. For discussion suggestive of the indicators used in Table 5, *see* BECKER, *supra* note 3, at 142, 148, 150, 206-09; BLONDEL, *supra* note 59, at 438-39, 444-56, 538; M. CAPPELLETTI, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD 46-66, 69-88 (1971); H. CLAGETT, THE ADMINISTRATION OF JUSTICE IN LATIN AMERICA 32-40, 55-98 (1952); FRIEDRICH I, *supra* note 40, at 115-18; LAMBERT, *supra* note 3, at 292-95; PIERSON & GIL, *supra* note 12, at 273-75, 278-81, 285-88; Toharia I, *supra* note 69, at 8-13, 188-93, 270, 382-86, 400-06, 445-48; Clagett, *Law and Court Systems*, GOVERNMENT AND POLITICS IN LATIN AMERICA 353-66 (H. Davis ed. 1958); Eder I, *supra* note 4, at 610-12; Grant, *supra* note 39, at 187-89; Schwarz, *supra* note 3, at 264-65, 330.

74. Vines, *Courts as Political and Governmental Agencies*, POLITICS IN THE AMERICAN STATES 257 (1965).

Paraguay	0	0	2	0	2
Peru[3]	0	3	1	0	4
Uruguay	1	1	3	0	5
Venezuela	1	1	3	2	7

1. Based on the sum of four indicators from Table 5, calculated as of January 1, 1975. If the legislature normally participates in the selection of judges, but it was temporarily suspended in January, 1975, "recruitment" would be coded "C" in Table 5 and listed with zero points in column one.

2. The recruitment and tenure figures are averages for the supreme court, constitutional court, and the *contraloría*. Scope of competence and effects of ruling are cumulative for all three institutions. *See* text accompanying notes 93-98, *infra*.

3. There is no judicial review of the constitutionality of laws; there is, however, habeas corpus review of executive action and the "popular action" to review the constitutionality of executive decrees and regulations.

SOURCES: *See* 4 A. PEASLEE, CONSTITUTIONS OF NATIONS (3d rev. ed. 1970); WORLD PEACE THROUGH LAW CENTER, LAW & JUDICIAL SYSTEMS OF NATIONS (1965); CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Blaustein & Flanz ed. 1971-74); INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW (V. Knapp ed. 1972-73); THE STATESMAN'S YEAR-BOOK 1974-75 (J. Paxton ed. 1974).

Table 6 ranks all twenty Latin American countries according to the present estimated effectiveness of their judicial review. It is based on four of the indicators in Table 5, and thus should be considered provisional. It was impossible to find current data on supreme court salaries as well as the political question exclusion for every Latin American nation. In addition, even though extensive information exists on the "case and controversy" requirement and the availability of review (concentrated in the supreme court or extended to lower courts), it was too confusing to be presented here. For instance, many countries have multiple procedures for deciding constitutional issues, depending on whether one lives in the capital, whether one is complaining about a law, about a decree by one ministry or by another, or about an official's discretionary action. For this reason, these two theoretically interesting variables may not be practical for measuring the effectiveness of judicial review.

One additional warning should be made about using structural indicators to measure the effectiveness of judicial review. Since World War II, there have been hundreds of declarations or extensions of a state of siege in the Latin American countries. The state of siege is a constitutional measure—sometimes known as state of emergency or state of national defense—designed to provide for the security of the nation in times of emergency due to external attack or serious disturbances of the public order which the government is unable to control by normal action. What does a state of siege mean for judicial review? It temporarily grants extraordinary powers to the executive branch and

permits the suspension or restriction of certain constitutional liberties.[75] Even though the state of siege is a common occurrence in Latin America, it occurs in some nations with much less frequency than in others, and when it does occur, it is generally a temporary phenomenon. In this article, consequently, one should consider the "normal" situation when discussing the structural determinants of effective judicial review.[76] During a state of siege, one could hypothesize that judges would tend to be much more circumspect in protecting individuals against unconstitutional norms and official action.[77] The behavioral indicators mentioned above could verify or disprove that hypothesis.

Table 6 may become clearer if we consider some examples. Argentina received a relatively high effectiveness score. The president there appoints, with the consent of the Senate, the magistrates of the Supreme Court and the lower federal courts.[78] The justices hold office for life during their good behavior.[79] There is a federal judicial system, and each province also maintains its own hierarchy of courts. The federal judiciary has jurisdiction over all cases dealing with the national constitution and laws, as well as cases that involve citizens of different provinces, even if only provincial laws are relied upon.[80] Constitutional questions can be heard by the lower federal courts as well as by the Supreme Court. While certain military matters are not appealable before the Supreme Court, administrative, tax and labor cases are appealable, thus giving the Argentine high court a broad scope of competence.[81] Since a constitutional ruling does not nullify an offensive statute or decree, however, the courts' power only affects the parties in the particular case.[82]

On the lower end of the judicial effectiveness scale, Ecuador serves as an illustration. Justices of the Supreme Court are elected for terms of six years by the Congress.[83] Lower court magistrates in this

75. INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, PRELIMINARY STUDY OF THE STATE OF SIEGE AND THE PROTECTION OF HUMAN RIGHTS IN THE AMERICAS 1, 5 (1963), K. KARST, LATIN AMERICAN LEGAL INSTITUTIONS 690-91 (1966).

76. A state of siege (or similar measure) has recently been declared in the following countries: Argentina (November 1974); Bolivia (November 1974); Chile (September 1973); Nicaragua (January 1975); and Peru (February 1975). 2-3 LATIN AMERICAN INDEX (1974-75).

77. *See* BECKER, *supra* note 3, at 165-66.

78. CONSTITUCIÓN art. 86(5) (1853, amended 1860, 1866, 1898 and 1957).

79. *Id.* at art. 96.

80. *Id.* at art. 100.

81. WORLD PEACE THROUGH LAW CENTER, *Argentina*, LAW & JUDICIAL SYSTEMS OF NATIONS 5-10 (1965) [hereinafter cited as JUDICIAL SYSTEMS].

82. PIERSON & GIL, *supra* note 12, at 290.

83. CONSTITUCIÓN art. 203 (1945, amended 1972).

unitary judicial system serve for shorter periods and are appointed by the Supreme Court.[84] Recruitment, however, is coded zero in Table 6 because the legislature has been suspended since the military coup d'état of Brigadier General Guillermo Rodriguez in 1972. He reinstated the 1945 Constitution with certain amendments.[85] This document envisions a tribunal for constitutional guarantees composed of ten members, with only one from the judiciary. This body would be the general overseer of the Constitution, presenting unconstitutional laws to Congress for its final decision in a peculiarly Ecuadorian procedure.[86] This court has not yet been instituted.[87] Rather, the Supreme Court continues to exercise the function of constitutional guardian.

The Supreme Court acts in two ways to protect the Constitution. First, it can declare any law, decree or regulation contrary to the Constitution for the purposes of the particular litigation before it. This declaration has, consequently, only *inter partes* effect.[88] Second, the Supreme Court has the power to suspend the application of a law, decree or regulation as unconstitutional, upon its own initiative or upon petition, until such time as Congress may make the final determination of the legal norm's constitutionality.[89] The judiciary's jurisdiction, finally, is not as encompassing as that in other nations;[90] collective labor disputes can only be appealed to a conciliation and arbitration court under the ministry of labor.[91]

Chile has probably the most complicated structure of judicial review in Latin America. At the center is the Supreme Court, with judges appointed for life by the executive from a list of five individuals nominated by the Supreme Court itself.[92] The Supreme Court has broad superintendence over the lower courts handling civil, penal and administrative cases as well as over the special courts dealing with la-

84. *Id.* at art. 205(1).

85. Bustamante & Lovato, *Ecuador*, in 1E INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 1-2 (V. Knapp ed. 1973) [hereinafter cited as Bustamante & Lovato]; THE STATESMAN'S YEAR-BOOK 1974-1975, 876 (J. Paxton ed. 1974).

86. CONSTITUCIÓN arts. 219-20.

87. Bustamante & Lovato, *supra* note 85, at 2.

88. CONSTITUCIÓN art. 206.

89. *Id.* at art. 205 (4). It is not clear what the consequences of this provision are when the Congress is suspended. It is probable that the Supreme Court is not exercising this power and that the executive shares the guardianship of the constitution along with the Supreme Court's authority to make rulings *inter partes*. *See* Bustamante & Lovato, *supra* note 85, at 2.

90. *See* Table 6, *supra*.

91. Bustamante & Lovato, *supra* note 85, at 2.

92. CONSTITUCIÓN art. 83 (1925, amended 1943, 1957, 1959, 1967, 1970 and 1971).

bor, agrarian and social law cases.[93] Almost all declarations of unconstitutionality of legislation by the Supreme Court, which are effective only *inter partes*, occur as the result of appeals from cases either pending or already concluded by definitive sentences.[94]

A second institution exercising judicial review in Chile was created in 1927, the *contraloría general* (comptroller general). Heading an autonomous agency with both administrative and judicial functions, the comptroller is appointed by the president with the consent of the Senate and enjoys the same guarantees of tenure as members of the Supreme Court. The *contraloría* takes cognizance of all executive decrees before they are applied and pronounces upon their constitutionality and legality. If necessary, it returns them for reconsideration by the executive within twenty days from the time they are received.[95] It is still possible, nevertheless, for the decree to be issued if it is countersigned by the president and all cabinet ministers. Although the *contraloría* exerts significant control over the executive, the judiciary may be an even greater constraint at another level since it has the authority, through the *amparo* petition, to protect individual rights from the unconstitutional action of public administration officials.[96]

Finally, a constitutional court, with jurisdiction over both legislative and executive acts, was added in 1970 to complement the Chilean *contraloría*'s jurisdiction over executive decrees. Five magistrates (each with a four year tenure) comprise this new constitutional court. Three members are appointed by the president with the consent of the Senate, and two are selected from among the members of the Supreme Court. Upon request of the president or Congress, the Court has the power to determine the constitutionality of a law before its promulgation or a decree-law that has been rejected by the *contraloría*. Rulings of this constitutional court have *egra omnes* effects; the Supreme Court cannot later make a contrary decision.[97]

Although Chilean judicial review has an effectiveness rating of eight based on the structural determinants in Table 6, behavioral indi-

93. F. GIL, THE POLITICAL SYSTEM OF CHILE 125-27 (1966) [hereinafter cited as F. GIL].

94. *Id.* at 125; Illanes, *The Supreme Court of Justice of Chile*, 7 J. INT'L COMMISSION OF JURISTS 269, 274-75 (1966); *Chile*, INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 5-6 (V. Knapp ed., typed version in Spanish, Stanford Law School SLADE program).

95. F. GIL, *supra* note 93, at 97-98; R. RECABARREN, LA TOMA DE RAZON DE LOS DECRETOS Y RESOLUCIONES 50-59 (1969).

96. *Chile*, JUDICIAL SYSTEMS, *supra* note 81, at 9.

97. CONSTITUCIÓN art. 78(a), (b) and (c).

cators would probably give Chile a lower rating beginning in September, 1973 when General Augusto Pinochet and his military junta overthrew the previously elected regime of Salvador Allende. Congress was immediately dissolved and a state of siege was declared.[98] This state of siege was downgraded by the junta in 1974 to a state of domestic emergency. Nevertheless, there are several situations in which civil liberties remain suspended. Even though the *contraloría* was active in rejecting several of President Allende's executive decrees, only one decree-law of the present regime has been declared unconstitutional. Similarly, although the *amparo* petition to protect individual rights has not been suspended, the courts have been systematically denying this petition since September, 1973.[99]

Colombia has a very high rating for effectiveness of judicial review in Table 6. Furthermore, there is some empirical evidence to support this rating. Colombia instituted in 1910 the "popular action" against statutes, which permits any person, regardless of any direct interest in the outcome, to bring an action directly to the Supreme Court challenging a statute. The Court's decision of unenforceability has the effect of annulling the statute. During the period 1910-53, over fifty national statutes in whole or in part were invalidated under the popular action.[100]

There is also some behavioral evidence to support Costa Rica's relatively high effectiveness score in Table 6.[101] The salaries of Supreme Court judges, for instance, compare favorably with those of executive ministers or full time law professors. Thus, in 1945, Supreme Court magistrates earned a monthly salary from 1200 to 1500 *colones*, while ministers were paid 1500 *colones*. (There were no full time law professors in Costa Rica until 1958.) By 1970, Supreme Court judges earned 4500 to 6000 *colones*, ministers 5000 *colones* and full time law professors 3200 to 4000 *colones*.[102] In the administrative

98. *See* text accompanying notes 75-76 *supra*.

99. Interview with a Chilean (who wishes to remain anonymous), February 3, 1975.

100. Grant, *supra* note 39, at 194-95. For a thorough discussion of the Colombian experience in judicial review, *see* Grant, *Judicial Control of the Constitutionality of Statutes and Administrative Legislation in Colombia*, 23 So. CAL. L. REV. 484 (1950); Grant, *Judicial Review by Executive Reference Prior to Promulgation, The Columbian Experience*, 21 So. CAL. L. REV. 154 (1948).

101. For a comment on the supreme court tenure question, *see* Gutiérrez, *Síntesis del Proceso Constitucional*, in COSTA RICA CONSTITUCIÓN POLITICA XXV (1975).

102. Interview with Dr. Carlos José Gutiérrez, former dean of the University of Costa Rica Law School, at Stanford, California, February 6, 1975. Dr. Gutiérrez is the

tax court, the decisions of which are reviewable by ordinary courts, thirty-nine percent to sixty-five percent of the cases were modified or decided against the government annually between 1963 and 1970.[103] Finally, since the ratification of the 1949 Constitution, at least five statutes or decrees have been declared unconstitutional, with *erga omnes* effects, by the plenary Supreme Court.[104]

Mexican judicial review, of all the nations in Latin America, has been the most studied. It is possible, therefore, to assert with some confidence that the score assigned in Table 6 reflects the relatively high degree of effectiveness in constitutional review exercised by the Mexican federal judiciary.[105] The practice of judicial review in Mexico today is associated exclusively with the *amparo* action.[106] The writ of *amparo* lies against the actions of all types of officials, including judges, bureaucrats, police, legislators, and even the president and his cabinet. The writ takes three separate forms. First, the direct *amparo* may be used to reverse the final judgment of a state or federal court, a labor mediation board, or the federal tax court. A plaintiff takes his appeal "directly" to one of the chambers of the Supreme Court, or, since 1968, to the nearest collegiate circuit court, depending on the importance of the case.[107]

A second form of the writ, an indirect *amparo*, is brought against all other types of illegal or fundamentally unfair acts of government authorities. The indirect *amparo* generally is utilized to enjoin or compel specific actions of nonjudicial authorities—the police, prosecutors and public administrators. Instead of proceeding directly to the appellate courts, the plaintiff must first bring his complaint before the nearest federal district court.[108] From here, the case may be taken "in-

author of a forthcoming book on the Costa Rican legal system, written under the auspices of the SLADE program at Stanford Law School; *see* note 70 *supra*. In 1970, 1000 Costa Rican *colones* were equivalent to approximately U.S. $150.

103. *Id.*

104. *Id. See generally* M. Murillo, Jurisprudencia Constitucional (unpublished extracts from Supreme Court decisions available in Stanford Law School SLADE program, 1973).

105. Along with Argentina, Mexico is the only other country in Latin America with both a national and a state (or provincial) system of trial courts. Brazil has federal appellate courts, but no federal trial courts. Moniz de Aragão, *The Brazilian Judicial Organization*, 6 INTER-AMERICAN L. REV. 237, 250-52 (1964).

106. R. BAKER, JUDICIAL REVIEW IN MEXICO 90 (1971) [hereinafter cited as BAKER]. For a brief history of the writ of *amparo, see* H. CLAGETT & D. VALDERRAMA, A REVISED GUIDE TO THE LAW & LEGAL LITERATURE OF MEXICO 38-61 (1973).

107. Schwarz, *Exceptions to the Exhaustion of Administrative Remedies Under the Mexican Writ of Amparo: Some Possible Applications to Judicial Review in the United States*, 7 CAL. WEST. L. REV. 331, 332 (1971).

108. *Id.* at 332-33.

directly" for consideration by the circuit or Supreme Court.

The third form of the writ is designed to attack the inherent constitutionality of an offending statute, decree or regulation. Called an *amparo contra leyes,* it permits an individual to enjoin enforcement, but only to protect himself, of an injurious self-executing law. Initiated in the federal district court, the *amparo contra leyes* may be ultimately decided by all the chambers of the Supreme Court sitting in plenary session.[109] As in half the countries of Latin America, the Mexican constitutional ruling only has *inter partes* effects. There is, however, in Mexico a form of stare decisis, called *jurisprudencia,* which mitigates the inefficiency involved in having each aggrieved party take his own *amparo contra leyes* to the Supreme Court. *Jurisprudencia,* declaring a legal norm unconstitutional, is established by a two-thirds majority of the whole Supreme Court in five consecutive decisions on the same point. It is binding upon all lower courts, as well as military, labor and administrative tribunals. In spite of this, *jurisprudencia* is frequently ignored by administrative agencies. *Amparo contra leyes* judgments, as a result, can never have the effect of abrogating a law *erga omnes.*[110]

Two excellent empirical investigations of judicial review in Mexico have concluded that the federal judiciary exhibits significant independence, especially from the executive.[111] One study sought to measure the number of *amparo* cases decided in favor of the complainant in which the president was named as at least one of the responsible authorities. During the period 1917 to 1960, 3700 such cases were tallied—thirty-four percent were won by the plaintiff.[112] In a similar examination of decisions before the United States Supreme Court in which the federal government was a party, thirty-six percent of the cases between 1900 and 1967 were decided in favor of the nongovernmental party.[113] Even more impressive is the total output of the Mexican Supreme Court. Between 1963 and 1971, the high court decided 67,700 cases; almost ninety percent of these dealt with the writ of *amparo,* an annual average of 6,683 *amparos.*[114] It is obvious that

109. *Id.* at 334-35. The plaintiff in an *amparo contra leyes* petition must name, as responsible authority, the legislature passing the offending norm, the president or governor signing it, and the executive agency administering it. If the statute or regulation expressly requires a subsequent act for its enforcement, such as a hearing, it is not a self-executing law. The hearing, in this latter case, should be attacked in an indirect *amparo. Id.* at 335.

110. BAKER, *supra* note 106, at 256, 270.

111. GONZALEZ, *supra* note 3, at 23; Schwarz, *supra* note 3, at 314-15, 332.

112. GONZALEZ, *supra* note 3, at 22.

113. R. SCIGLIANO, THE SUPREME COURT & THE PRESIDENCY 177 (1971).

114. Schwarz, *supra* note 3, at 316.

the Mexican citizenry is well aware of judicial remedies when aggrieved by official action. This is reflected even more in the case load of the lower federal judiciary. In 1971, the thirteen collegiate circuit courts disposed of 21,349 cases, most of which were *amparos*.[115] Finally, the fifty-five district courts received in the same year some 58,000 filings; sixty-two percent of these were *amparo* petitions for relief from criminal proceedings. Fully 12.5 percent of the criminal *amparo* writs were granted; the analogous figure for federal habeas corpus in the United States is five percent.[116]

Effective judicial review, of course, need not be a homogeneous phenomenon. In most nations, the judiciary will be more independent in protecting the constitution against some political agencies than against others. Table 7, considering only supreme court cases involving the government as a party, reflects this variability in Mexico compared to the United States for four subject matter areas: penal, administrative, labor and civil law.

Table 7: Percentage of Cases Decided in Favor of Nongovernmental Party in Mexican and United States Supreme Courts, by Subject Matter[1]

Subject Matter	Mexico		United States	
Penal	49%	(49)	74%	(98)[2]
Administrative	40%	(39)[3]	39%	(48)
Labor	43%	(34)	0%	(0)[4]
Civil	40%	(69)	75%	(18)[5]
TOTAL[6]	43%	(191)	55%	(164)

1. This table represents a survey made of *amparo* cases decided by full written opinion as reported in the *Semanario Judicial* (Mexico) for a 33 month period during 1964-66, and 1968, compared with the United States Court's final dispositions with full written opinion during the three terms of 1966-68. The figures in parentheses are the number of cases the nongovernmental party won. *See* Schwarz, *supra* note 3, at 318-19.

2. Includes federal and state criminal cases and federal habeas corpus petitions.

3. Includes indirect *amparos* and *amparos contra leyes*.

4. National Labor Relations Board cases; 14 were decided in favor of the government.

5. Private litigation with the government as a party.

6. Excludes nine cases in Mexico remanded to other chambers of the Supreme Court or to lower courts and 70 cases in the United States where the government was not a party.

SOURCE: *See* Schwarz, *Judges Under the Shadow: Judicial Independence in the United States and Mexico*, 3 CAL. WEST. INT'L. J. 260, 321 (1973).

In Mexico, the percentage of cases decided in favor of the nongovernmental party at the Supreme Court level is similar for all four subject matters, varying between forty and forty-nine percent. On the

115. *Id.* at 326.

116. *Id.* at 327-29.

other hand, there is much more variability in the United States Supreme Court. Penal cases, representing two-thirds of the decisions in Table 7, are decided in favor of the nongovernmental party seventy-four percent of the time, reflecting a concern with this field on the part of the United States Court. The total percentage of cases decided in favor of nongovernmental parties, moreover, is higher in the United States compared to Mexico, fifty-five percent to forty-three percent. Nevertheless, the Mexican Supreme Court, viewing all the indicators discussed above, appears to be effective in serving as the guardian of the national constitution.

Economic Development, Democracy and the Effectiveness of Judicial Review

Comparison permits us to make meaningful statements about the effectiveness of judicial review in Latin America. This section will attempt a preliminary ordering of our understanding of a complex subject matter, one that is difficult to measure and about which little is empirically known.[117] Once it is determined that constitutional review is more effective in some nations than in others, even with the imperfect indicators elaborated in Table 6, we may want to know why, or at least under what conditions, effective review seems to occur. After assessing the distribution of effective judicial review among Latin American nations, we shall compare the nations in terms of their level of economic development and their present type of political regime. In this way, one can determine whether or not effective judicial review in Latin America occurs randomly or under certain predictable circumstances.

A frequency breakdown for the scores on the effectiveness of judicial review from Table 6 reveals that there is a fairly even spread among levels two to nine, with the mode at level five.[118]

Table 8: Degree of Effectiveness of Judicial Review in Latin America[1]

2	3	4	5	7	8	9
			Cuba			
			El Salvador			
		Bolivia	Guatemala	Argentina	Chile	
	Dominican				Costa	
Ecuador	Republic	Haiti	Panama	Nicaragua	Rica	Brazil
Paraguay	Honduras	Peru	Uruguay	Venezuela	Mexico	Colombia

1. Effectiveness is represented by degrees 2 to 9, with 9 the most effective judicial review.
SOURCE: *See* Table 6 *supra.*

117. *See* text accompanying notes 64-76 *supra.*
118. *See* Table 8 *infra.*

Given the frequency distribution of scores in Table 8, one might wish to ascertain how widespread effective judicial review is with respect to population in Latin America. Recent population figures are given in Table 9. Dividing the scores into three classes of approximately equal size—effective (7 to 9), somewhat effective (5), and ineffective (2 to 4)—it appears that out of a total Latin American population of 286 million, seventy-eight percent of the people live in countries with effective (scores 7 to 9) judicial review.[119] Only fourteen percent live in the seven nations with a judiciary ineffective (scores 2 to 4) in protecting the constitution. Wild generalizations about Latin America as a region with ineffectual judiciaries, based upon occurrences in Bolivia, Haiti or the Dominican Republic, for instance, too often lead to misunderstanding and stereotyping.[120]

Another manner of assessing judicial review is to consider its effectiveness in relation to the economic development of a nation. Table 9 gives us two measures of economic development: gross domestic product per capita, and a more indirect indicator, male life expectancy at birth. The most widely accepted and commonly employed index to measure the production and resources of a country in terms of the size of its population is gross domestic product (GDP) per capita. GDP per capita is also frequently used as an indicator of relative comfort or well-being.[121] A second indicator, male life expectancy at birth, has similarly been used as a measure of economic development, although it is obviously not an index of production. It also can

119. For a similar grouping of nations with substantial judicial independence in the early 1960's, *see* LAMBERT, *supra* note 3, at 295.

120. *See id.* at 272-73. *See generally* A. EDELMANN, LATIN AMERICAN POLITICS AND GOVERNMENT 462 (1965); M. NEEDLER, LATIN AMERICAN POLITICS IN PERSPECTIVE 152-55 (1963); Mechem, *Latin American Constitutions: Nominal and Real*, 21 J. POLITICS (1959), THE DYNAMICS OF CHANGE IN LATIN AMERICAN POLITICS 42 (Martz ed. 1965). A more serious indictment has been made about the protection of human rights in Brazil since 1964. It is claimed, for example, that at least 40 people have been beaten to death by the police or prison officials and probably more than 21,000 have been detained at some time for political reasons from 1964 to 1973. Tyson, *Economic Growth and Human Rights in Brazil: The First Nine Years of Military Tutelage*, 67 AM. J. INT'L L. 208-10 (1973). No one, of course, would want to defend this record. It would be very instructive, nevertheless, to compare these figures, as well as the behavioral indicators presented in Tables 3 and 4, with Brazilian indicators from a prior period or with indicators from other nations.

121. C. TAYLOR & M. HUDSON, WORLD HANDBOOK OF POLITICAL AND SOCIAL INDICATORS 287-88 (2d ed. 1972); Finsterbusch, *Recent Rank Ordering of Nations in Terms of Level and Rate of Development*, 8 STUDIES COMP. INT'L DEVELOPMENT 53 (1973). GDP per capita is an imperfect measure of economic well-being because the distribution of income varies from one nation to another.

be considered a rough measure of socioeconomic well-being.[122]

Table 9: Population and Indicators of Economic Development in Latin America, by Country

	Population Mid-Year 1972 (in 1000's)		GDP Per Capita 1970 (in US $)	Male Life Expectancy at Birth (1973)
Argentina	23,920		1,053	64
Bolivia	5,190		206	44
Brazil	98,850		402	58
Chile	10,050		755	58
Colombia	22,490		409	57
Costa Rica	1,840		544	64
Cuba	8,750		826[1]	65
Dominican Republic	4,300		364	51
Ecuador	6,510		269	56
El Salvador	3,760		291	53
Guatemala	5,410		367	50
Haiti	5,070		92[2]	43
Honduras	2,690		271	47
Mexico	52,640		682	61
Nicaragua	1,990		431	49
Panama	1,520		731	62
Paraguay	2,580		249	57
Peru	14,460		400	57
Uruguay	2,960		816	66
Venezuela	10,970		999	62
TOTAL:	285,950	MEAN:	508	56

1. Calculation is for 1968.
2. Calculation is for 1969.

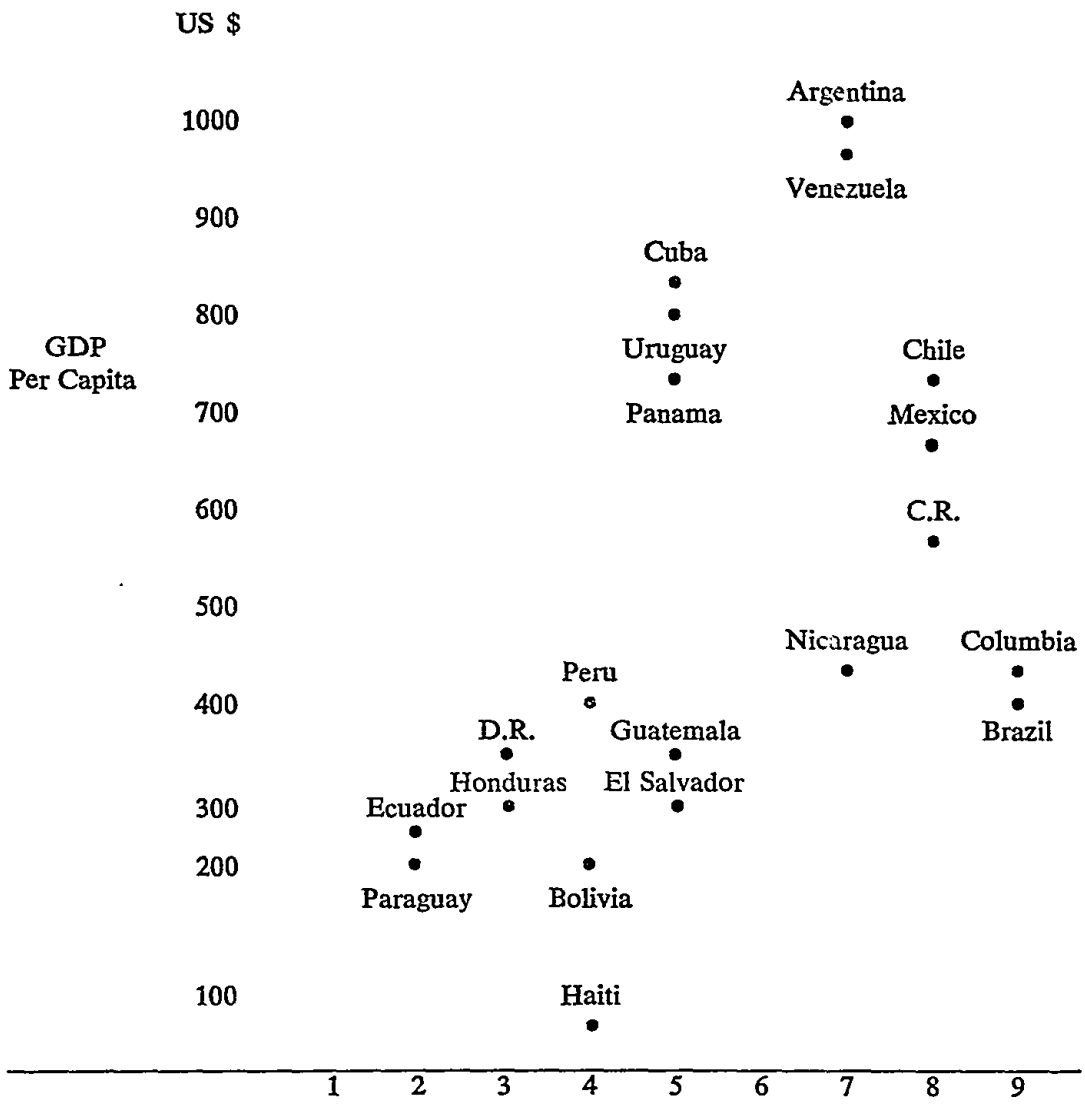
SOURCES: Population—STATISTICAL ABSTRACT OF LATIN AMERICA 1972, at 49 (1974); except Chile is from ORGANIZACION DE LOS ESTADOS AMERICANOS, AMERICA EN CIFRAS 1974, at 15 (1974). GDP Per Capita—STATISTICAL ABSTRACT OF LATIN AMERICA 1972, at 433 (1974); except Cuba is from JUNTA CENTRAL DE PLANIFICACION (Cuba), BOLETIN ESTADISTICO 1971, at 45 (1971) [for 1968 GDP estimated at 7,330,000,000 pesos], and STATISTICAL HANDBOOK ON CUBA 10, 78 (A. Bekarevich ed., trans. from Russian 1973) [for 1968 population estimated at 8,074,000 and exchange rate at 1 peso = $0.91]. Male Life Expectancy—STATISTICAL ABSTRACT OF LATIN AMERICA 1972, at 5 (1974).

Is effectiveness of judicial review associated with economic production per person in a Latin American country or with the average

122. M. NEEDLER, POLITICAL DEVELOPMENT IN LATIN AMERICA 86 (1968).

citizen's socioeconomic well-being? Figure 1 gives us a preliminary answer. It is a scattergun plotting the effectiveness score on the horizontal axis and GDP per capita on the vertical axis for all twenty Latin American nations.

Figure 1: Effectiveness of Judicial Review and Economic Development



SOURCES: *See* Table 6 and Table 9, *supra.*

There appears to be a positive association between the level of economic development and the degree of judicial effectiveness. Those nations where the court system is ineffective in protecting the constitution (scores 2 to 4) have a per capita GDP of $400 or below. Conversely, those Latin American countries with relatively effective judicial review (scores 7 to 9) all have per capita GDPs greater than $400. The strength of this apparent association between the level of economic

development and judicial effectiveness can be determined by calculating the correlation coefficient for these two variables.[123] The Pearson coefficient of correlation is 0.47, which is statistically significant at the 0.017 level. Accordingly, there is a moderate, positive correlation; as a Latin American nation's production per capita increases (and presumably the average level of socioeconomic well-being follows), we can expect the effectiveness of judicial review to also be greater.[124] The 0.017 significance level means that the probability of finding this degree of correlation among these twenty countries if the variables were not associated is less than one in fifty.

In this same manner, the Pearson correlation coefficient measuring the strength of association between male life expectancy at birth and the effectiveness of judicial review is 0.40, significant at the 0.041 level. This tends also to support the hypothesis that as Latin American nations become more developed economically, the judiciary can be expected to take on added importance as a more effective guardian of the constitution.[125]

Another avenue that may give us insight into the nature of judicial review is to consider its effectiveness in relation to the present type of political regime in each of the Latin American countries.[126] Table 10 groups the twenty nations into four types of political regimes, based largely upon the manner in which the present chief executive was chosen or came to office.[127] Democratic regimes are defined as those

123. *See generally* H. ALKER, MATHEMATICS AND POLITICS 54-88 (1965); G. SNEDECOR & W. COCHRAN, STATISTICAL METHODS 172-90 (6th ed. 1967).

124. The use of cross-sectional data to gain insight into dynamic processes poses several problems. When complete time series data are unavailable, however, an exploratory and preliminary use of cross-national information to draw conclusions about a historical process is permissible. I. ADELMAN & C. MORRIS, ECONOMIC GROWTH AND SOCIAL EQUITY IN DEVELOPING COUNTRIES 145 (1973). *See* Kuh, *The Validity of Cross-Sectionally Estimated Behavior Equations in Time Series Applications,* 27 ECONOMETRICA 197-214 (1959).

125. *But cf.* Trubek, *When is an Omelet? What is an Egg? Some Thoughts on Economic Development and Human Rights in Latin America,* 67 AM. J. INT'L L. 198-204 (1973).

126. Several elaborate taxonomies of political regimes exist. *See, e.g.,* G. ALMOND & G. POWELL, COMPARATIVE POLITICS 255-98 (1966); G. ALMOND, POLITICAL DEVELOPMENT 173-79 (1970); M. CURTIS, COMPARATIVE GOVERNMENT AND POLITICS 42-63 (1968) [hereinafter cited as CURTIS]. For an excellent historical treatment of different types of political regimes in Spain and the breadth of judicial competence to hear disputes, *see* J. TOHARIA, MODERNIZACION, AUTORITARISMO Y ADMINISTRACIÓN DE JUSTICIA EN ESPAÑA 39-46 (1974) [hereinafter cited as TOHARIA].

127. *See* Lanning, *A Typology of Latin American Political Systems,* 6 COMP. POL. 367, 372-75 (1974), for a division of Latin American nations similar to that used in Table 10, even though based on the "pattern of central governmental authority office

where there are regular constitutional opportunities for peaceful competition for political power and the president is chosen in a relatively fair election.[128]

Authoritarian regimes, on the other hand, are characterized by limited political pluralism;[129] for purposes of Table 10, they are divided into two categories depending upon whether the present chief executive came to power (or was retained) by an election noted for its coercion and other irregularities or by a coup d'état. Finally, a totalitarian regime is differentiated from an authoritarian system by the former's larger degree of control over behavior, and by the subordination of almost all organizations to the state.[130]

Table 10: Effectiveness of Judicial Review and Type of Political Regime[1]

Democratic	Authoritarian Pseudo-Election	Authoritarian Coup d'État	Radical Totalitarian
[7] Argentina[2] (1974)	[9] Brazil (1974)	[4] Bolivia (1971)	[5] Cuba (1959)
[9] Colombia (1974)	[3] Dom. Rep. (1974)	[8] Chile (1973)	
[8] Costa Rica (1974)	[5] El Salvador (1972)	[2] Ecuador (1972)	
[8] Mexico (1970)	[5] Guatemala (1974)	[4] Haiti[3] (1971)	
[5] Uruguay (1973)	[7] Nicaragua (1974)	[3] Honduras (1975)	
[7] Venezuela (1973)	[2] Paraguay (1973)	[5] Panama (1968)	
		[4] Peru (1968)	
Mean Judicial Effectiveness Score: 7.33	5.17	4.29	5.00

1. The classification of political regimes is based on the manner in which the present chief executive was chosen (or retained) or came to power. The effectiveness score for judicial review is included within brackets for each country. The year each chief executive came to office (or was reelected) is given in parentheses.

2. Maria Estela Perón, as former vice-president, succeeded her husband upon his death.

3. Jean Claude Duvalier was chosen by his father, who was president for life under the 1964 Constitution, to succeed him when he died.

SOURCES: *See* THE STATESMAN'S YEAR-BOOK 1974-1975 (J. Paxton ed. 1974); 2 LATIN AMERICAN INDEX (1974); and interview with Dr. Carlos José Gutiérrez, at Stanford, California, February 7, 1975 (especially in reference to the placement of doubtful cases between either "democratic" or "authoritarian pseudo-election").

From the calculation of the mean score for the effectiveness of judicial review for each type of political regime in Table 10, it is clear

tenure" for the period 1960-72. Lanning's "power balance" category, analogous to "democracy" in Table 10, is defined as "a pattern of regular rotation in office by central governmental authorities." Utilization of Lanning's typology (based on the 12 year period) would not affect the analysis presented here since it would only entail moving Chile into the "democratic" category and Argentina into one of the "authoritarian" categories. *See* Table 10 *infra*.

128. *See* S. LIPSET, POLITICAL MAN 46 (1960); J. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 269 (3d ed. 1950); Linz, *An Authoritarian Regime: Spain*, CLEAVAGES, IDEOLOGIES AND PARTY SYSTEMS 295 (1964) [hereinafter cited as Linz].

129. *See* Linz, *supra* note 128, at 297.

130. *See* CURTIS, *supra* note 126, at 59.

that democratic nations in Latin America tend to have more effective judicial protection of the constitution than authoritarian systems. Eleven of the fourteen countries classified authoritarian or totalitarian received low scores, with Brazil, Chile and Nicaragua the only exception. This result is what one might expect. Democracy, as a system based upon extensive political pluralism, requires a relatively strong judiciary to protect the individual against unconstitutional government activity. Consequently, the two tend to occur together. From Figure 1 one might infer, moreover, that this relationship is usually found at higher levels of economic development.[131] Authoritarian regimes, on the other hand, probably due to their lower level of economic development, cannot control political diversity. When the enormous pressures due to social mobilization are placed on a government already fragmented by various political forces, the polity degenerates into a condition of disorder and stagnation.[132] Authoritarian regimes, by limiting the participation of political groups, can in some instances be more efficient in achieving desired national goals. Modernizing authoritarian governments frequently select economic growth as the primary goal, as in Brazil, or some notion of social justice, as in the case of Peru. On the other hand, conservative authoritarian regimes in Latin America, such as Paraguay or Haiti, may be characterized more as personal dictatorships, less interested in productively channeling the forces of modernization.

Restricting the effectiveness of the judiciary in protecting constitutional guarantees is one way authoritarian and totalitarian systems limit political pluralism. This need not, however, always be directed toward controlling the judiciary through recruitment and short tenure. Frequently, the political branches of government will simply reduce the jurisdiction of the supreme court so that it can review only certain types of disputes.[133] Thus, all of the democracies in Latin America provide their supreme courts with wide competence over disputes in society. On the contrary, from Table 6 one observes that eight of the thirteen authoritarian nations restrict the jurisdiction of their supreme courts in one or two important subject matter areas. Cuba, moreover, receives

131. *See generally* S. HUNTINGTON, POLITICAL ORDER IN CHANGING SOCIETIES 39-47 (1968) [hereinafter cited as HUNTINGTON]; M. NEEDLER, *supra* note 123, at 91. *See also* Torres, *Concentration of Political Power and Levels of Economic Development in Latin American Countries*, 7 J. DEVELOPING AREAS 397-410 (1973).

132. HUNTINGTON, *supra* note 131, at 47-56; Deutsch, *Social Mobilization and Political Development*, 55 AM. POL. SCI. REV. 493, 499-501 (1961).

133. *See* TOHARIA, *supra* note 126, at 39-46; Toharia, *supra* note 69, at 445-48.

the lowest score for breadth of jurisdiction since three important fields have been removed from supreme court review.[134] It is a perfect example of an independent judiciary with no power.

Conclusion

Judicial protection of the constitution has had a long and varied history in Latin America. During the early nineteenth century, the leading jurists of the newly independent nations gradually evolved a judicial procedure for reviewing the constitutionality of legislative and executive action. Based on preliminary information, it appears that a majority of the population in Latin America today lives under legal systems that permit relatively effective judicial review. Recurrent states of siege and coups d' état, of course, complicate this picture. These political phenomena, however, more frequently occur in the less economically developed countries, which are also those usually under authoritarian regimes. Effective judicial review, accordingly, appears to be associated with the level of economic development. The hope is that one day in Latin America all nations will be able to sustain sufficient political diversity so that the liberties of all peoples can be protected from unconstitutional action.

134. *See* Berman, *The Cuban Popular Tribunals*, 69 COLUM. L. REV. 1317, 1321-22, 1332-34, 1345 (1969).