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Latin American Hybrid Constitutionalism: The United States Presidentialism in the Civil Law Melting Pot

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**LATIN AMERICAN HYBRID
CONSTITUTIONALISM: THE UNITED STATES
PRESIDENTIALISM IN THE CIVIL LAW
MELTING POT**

Rett R. Ludwikowski*

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If modeling means searching for a structural design for prospective constitution making, then it can be claimed that the early Latin American constitutions were “modeled” on the United States Constitution. The intention to adopt the U.S. presidential model of governance in Latin America was well evidenced,¹ as well as the tendency of the Latin American presidential system to deviate into authoritarianism. Commentators attempted to explain this phenomenon through a comparative examination of parliamentarism and presidentialism.² The

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¹ A. P. BLAUSTEIN, *CONSTITUTIONS OF THE WORLD* 25-29 (1993).

² See generally Carlos Santiago Nino, *Transition to Democracy, Corporatism, and Presidentialism with Special Reference to Latin America*, in *CONSTITUTIONALISM AND DEMOCRACY: TRANSITION IN THE CONTEMPORARY WORLD* (Douglas Greenberg et al. eds., 1993); *Council for the Consolidation of Democracy’s Report on Constitutional Reform in Argentina*, in *PARLIAMENTARY VERSUS PRESIDENTIAL GOVERNMENT* (Arend Lijphart ed., 1992) [hereinafter *PRESIDENTIAL GOVERNMENT*].

conclusions were to illustrate that a “less democratic” character of presidentialism contributed significantly to political problems of the region.³ In looking for a remedy, commentators often suggested that Latin American countries incorporate more features of parliamentary systems or experiment with “mixed” models of governance.⁴

This article presents arguments that the above-mentioned diagnosis should be carefully analyzed and suggests that a remedy be double-checked before applied. First, the article demonstrates that, since the early stages of post-colonial history, the Latin American states modified U.S. presidentialism. The states have already experimented with many features of a parliamentary system, adopted a model of judicial review which was an amalgam of several well-known models, and wrestled with their own ethnic, cultural and legal problems not linked to the U.S. system of governance. Second, the article examines Western European and post-communist experiments with “mixed” models of governance, exposing some problems with their application. Third, it reviews some over-used arguments about the “less versus more” democratic character of presidentialism and parliamentarism. The article concludes with the observation that blending together constitutional features, produced by long-term practice in some countries, requires a deep comparative knowledge. The eclectic character of the “mixed constitutions” justifies concern over their consistency. Consistency is one of the basic features of a good constitution. The term implies that constitutional provisions gel in such a manner that their rationale is fully explainable, and that they mesh with other components of the constitutional system. The Latin American countries have already attempted to “mix” elements of presidentialism with parliamentarism and components of civil law and common law systems. The results were not always impressive, thus it is a good time to consider whether “less” rather than “more” mixing would be good for this region.

I. BETWEEN TWO WORLDS: U.S. INFLUENCE ON THE PROCESS OF FORMATION OF LATIN AMERICAN CONSTITUTIONALISM

The framers of the United States Constitution, meeting in Philadelphia in May 1787, fully recognized that they would have to take a “new-way” approach to government making. In *The Federalist* No. 9, Alexander Hamilton wrote about the new tasks:

The regular distribution of power into distinct departments; the introduction of legislative ballances [sic] and checks; the institution

³ See, e.g., Nino, *supra* note 2, at 46-64. Although the thesis about “democratic” dysfunctional features of presidentialism is questionable, the article is an excellent examination of the Latin American problems with corporatism.

⁴ *Council for the Consolidation of Democracy’s Report on Constitutional Reform in Argentina*, in *PRESIDENTIAL GOVERNMENT*, *supra* note 2, at 158-61.

of courts composed of judges holding their offices during good behavior; the representation of the people in the legislature by deputies of their own election: these are wholly new discoveries, or have made their principal progress towards perfection in modern times. They are means, and powerful means, by which the excellencies of republican government may be retained and its imperfections lessened or avoided.⁵

The new approach did not stem from the total lack of doctrinal antecedents, but from the awareness that the European models of government fit the needs of the rising American Union only to a limited extent.⁶ The framers' concept of governmental checks and balances differed from the English model, where powers were neither balanced nor well separated. In revolutionary France the idea that functions of the government should be diffused was implemented in a way different than envisioned by the Americans.⁷ Although in France the principle of the division of powers was associated, to a large degree, with the idea concerning the separation of the organs and their functions, the emphasis was put on different roles within the divisions and not on a collaborative effort between powers.⁸

Developing the presidential power was even more difficult. In the seventeenth and eighteenth centuries, the center of political philosophers' attention was the relationship between monarchs and representative bodies,⁹ while the role and function of the executive was largely ignored.¹⁰ In European monarchies, kings were recognized as sovereign powers and Ministers worked for them.¹¹ Over time cabinet governments with dual

⁵ THE FEDERALIST NO. 9, at 72-73 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

⁶ For further discussion on the formation of the U.S. presidential system, see generally Rett R. Ludwikowski, *Politicization and Judicialization of the U.S. Chief Executive's Political and Criminal Responsibility: A Threat to Constitutional Integrity or a Natural Result of the Constitution's Flexibility?*, 50 AM. J. COMP. L. 405 (2002).

⁷ See generally ARTHUR TAYLOR VON MEHREN & JAMES RUSSELL GORDLAY, *THE CIVIL LAW SYSTEM* (1977).

⁸ *Id.* at 217 (stating that

The leaders of the French Revolution saw the principle [of separation of powers] in more abstract and conceptual terms. . . . Each power was entirely independent of the others: collaboration between powers was forbidden and, theoretically, unnecessary because each had been delegated the fragment of the national sovereignty necessary to discharge its functions.

Id.

⁹ For further discussion see Ludwikowski, *supra* note 6, at 408-09.

¹⁰ JAMES MACGREGOR BURNS, *PRESIDENTIAL GOVERNMENT: THE CRUCIBLE OF LEADERSHIP* 5 (2d ed. 1965) (stating that "[t]he Framers floundered in dealing with these questions because neither theory nor practice was of much help.").

¹¹ In France and England, where the American Framers looked most for some features which they could borrow, the position of a prime minister was fully formed in

executives, Monarchs and Prime Ministers, evolved. Post-colonial leaders seeking to develop their own systems of government did not find this model helpful but, instead, sought to break from the European monarchic traditions and establish a system to meet their new needs. Colonies such as South Carolina, New Hampshire and Pennsylvania elected “presidents” to moderate the king’s council’s meetings and, since the first meetings of the Continental Congress in the fall of 1774, its presiding officers held the same title. This practice resulted in the tendency of calling the elected chiefs of republican political entities “presidents.” The question of the presidential power remained controversial and was only partially resolved by the drafters of the United States Constitution; in fact, practice shaped the real scope of the Chief Executive Officer’s prerogatives.¹²

The American practice also predominantly contributed to the development of another great novelty of modern times, the institution of judicial review. The so-called American decentralized model was rooted in the concept of constitutional supremacy. The idea that a constitution should be drafted, not by regular legislative bodies but by special conventions, to which the people delegate a constituent power, originated in the United States as well.¹³ The American Constitution imposed rigid amendment requirements and this, coupled with the principle of its supremacy, inferred on courts the right to “disqualify any repugnant laws,” thereby developing the concept of checks and balances.¹⁴ This system implied that one power is balancing, controlling, and supplementing the functions of the other. However, no single power can completely subrogate the other. This decentralized and concrete system gave the courts power to nullify the law in concrete disputes involving concrete parties. The princi-

the seventeenth century. The prime ministerships of Richelieu or Mazarini in France were well established. A similar prime ministerial position emerged in England in the time of George I, who was often absent from the debates of his cabinet and relied heavily on his administrators selected to preside the meetings. E.C.S. WADE & A.W. BRADLEY, *CONSTITUTIONAL LAW* 44-45 (10th ed. 1985).

¹² For more examination, see Ludwikowski, *supra* note 6, at 408-09.

¹³ The conventions, in the sense of assemblies of the representatives of a nation, had their European roots. The best examples of such meetings would be the parliamentary convention, which reestablished Charles II on the British throne in 1660. The constitutional conventions, which would draft basic framework documents of a country, however, were the American invention. The 1787 Constitutional Convention was preceded by the Annapolis Convention, which was arranged in September 1786 to discuss economic problems of several states. It was dissolved upon the recommendation that its work will be continued in May 1787 by the Constitutional Convention in Philadelphia. See CARL B. SWISHER, *AMERICAN CONSTITUTIONAL DEVELOPMENT* 29-30 (1943).

¹⁴ Rett R. Ludwikowski, *Constitution Making in the Countries of Former Soviet Dominance: Current Development*, 23 GA. J. INT’L & COMP. L., 155, 157-58 (1993)

ple of *stare decisis* extended the validity of the courts' decision to other cases.¹⁵

The colonial elites in the predominantly Spanish and Portuguese territories of Central and South America carefully watched the constitutional developments in the United States and the political transformations of continental Europe.¹⁶ On the one hand, the prospective leaders of this colonized New World realized that the decline of their countries' colonial status was possible because of Napoleon's inroads into the Iberian Peninsula. On the other hand, the process of the separation of the North American colonies from England seemed to provide a structural design which could serve as a pattern for all new post-colonial states. Europe, with its philosophy of Enlightenment and newly drafted legal codes of the Napoleonic era, was dragging Latin America into the family of civil law countries.¹⁷ The United States lured them by its well-functioning constitutional model, absorptive markets, and investment capital. As Robert Barker correctly observed:

Thus, while Latin Americans subscribed to some French formulations of human rights, they were less enthusiastic about France as a governmental model. The Spanish historian Salvador de Madariaga, comparing the democratic revolutions of the eighteenth century, has said that the United States Revolution was the more productive of the two, because to Latin Americans, it inspired fewer fears.¹⁸

Latin America, with similar North American colonial history, tried to follow the U.S. experience in departing from the European monarchic traditions and replacing them by republican and federal concepts of government.¹⁹ The presence of the United States' political ideas in the region can be found in the constitutional preambles, in implanted consti-

¹⁵ Rett R. Ludwikowski, "Mixed" Constitutions-Product of an East-Central European Constitutional Melting Pot, B.U. INT'L L.J. 1, 49 (1998).

¹⁶ Harry Kantor, *Efforts Made by Various Latin American Countries to Limit the Power of the President*, in PRESIDENTIAL GOVERNMENT, *supra* note 2, at 101. (stating that "[i]t was logical for the victorious military leaders [of Latin American countries] to turn towards the US model in setting up their new governments."). For more comments on the spread of the Iberian Law to Latin America, see David S. Clark, *Judicial Protection of the Constitution in Latin America*, 2 HASTINGS CONST. L.Q. 405, 406-13 (1975).

¹⁷ Robert C. Means, *Codification in Latin America: The Colombian Commercial Code of 1853*, 52 TEX. L. REV. 18, 22 (1973).

¹⁸ Robert S. Barker, *Constitutionalism in the Americas: A Bicentennial Perspective*, 49 U. PITT. L. REV. 891, 900 (1988) (citing SALVADOR DE MADARIAGA, CUADRO HISTÓRICO DE LAS INDIAS 823 (1945)).

¹⁹ Barker, *supra* note 18, at 899-900. See also ALLAN R. BREWER-CARIAS, JUDICIAL REVIEW IN COMPARATIVE LAW 156 (1989) (discussing the role of judicial review in the foundation of Latin American countries).

tutional rigidity, in the concept of separation of powers, and in experiments with judicial review.

While Latin American states borrowed, sometimes heavily, from the U.S. model, it was tested but not duplicated in all details.²⁰ The discrepancies, which resulted in many deviations from the original concept of presidentialism and contributed to Latin American experiments with authoritarianism, require at least a two-fold analysis of the formal, namely intentional, deviations of the Latin American concepts from the U.S. paradigm and the objective problems with implanting presidentialism in this region. Both issues warrant a short presentation of the fundamental features of the U.S. system, as contrasted with some major governmental alternatives reviewed in the past and recently by the framers of Latin American constitutional systems.

II. SYSTEMS OF PRESIDENTIAL AND PARLIAMENTARY GOVERNMENT: MAJOR EUROPEAN MIXED SYSTEMS

It is sometimes claimed that the doctrine of the division of power as practically applied in various countries contributed to the development of the two major political systems: presidential and parliamentary government.²¹ Although the distinction between the two systems is not as great as it was at their inception, that original dichotomy is still valuable as an analytical tool. An efficient way to distinguish variations of the two major political systems is to focus on several fundamental features of each one.²² The presidential system, typically associated with the American system, is characterized by a concentration of executive power in the office of the President. The President, as the sole executive, is elected as head of state and head of the government.²³ The legislature is independently elected for fixed terms and separated from the executive.²⁴ The President can call a special session of the legislature or force its adjournment, but he cannot dissolve the legislature or mandate new elections.²⁵ The President appoints his cabinet with the advice and consent of one house of the legislature, but cabinet members are not part of the legisla-

²⁰ Tom Farer, *Consolidating Democracy in Latin America; Law, Legal Institutions and Constitutional Structure*, 10 AM. U. J. INT'L L. & POL'Y 1295, 1300-10 (1995) (elaborating on at least eight distinct characteristics, which set Latin American states apart from North America and Western Europe).

²¹ See Douglas V. Verney, *Parliamentary vs. Presidential Systems: Analysis of Political Systems*, in *COMPARATIVE POLITICS: A READER* 175-78 (Harry Eckstein & David E. Apter eds., 6th ed. 1968).

²² For a more elaborate list of the basic features of the presidential and parliamentary systems, see *id.* at 175-91. For further discussion on the distinctions between systems, see Ludwikowski, *supra* note 15, at 31-35.

²³ See Verney, *supra* note 21, at 187.

²⁴ *Id.* at 189.

²⁵ *Id.*

ture.²⁶ Although the legislature can call upon cabinet members to account for their actions, the legislature cannot veto those actions by a vote of no confidence.

A typical distinguishing feature of the parliamentary system is the dual executive. Presidents or monarchs serve as head of state, essentially “senior statesmen” or “supreme arbitrators,” while the prime minister is the politically accountable chief executive. When the head of state is a president, he is generally elected by the parliament or a type of Electoral College rather than directly by popular vote.²⁷ The head of state, whether or not a president, then appoints the head of government with the consent of the parliament, and the head of government appoints the ministry. Distinct from the rigorous separation of powers seen in the presidential system (especially its American form), the parliamentary system is characterized by a fusion of the legislature and executive. Ministers are generally members of parliament, and are responsible to the legislature insofar as it may vote the executive out of office without turning the question over to the people. In some parliamentary systems, the head of state and the head of government can together dissolve the legislature and force elections before the end of the parliamentary term. Potentially exercising control over both the legislative and the executive powers, parliament is the most powerful element of government, meaning “[t]he supremacy of Parliament as a whole over its parts is a distinctive characteristic of parliamentary systems.”²⁸ Nevertheless, within the parliament, the executive has no dominion over the legislature nor the legislature over the executive.

While conventional wisdom suggested that a pure parliamentary system characterized post-World War II democracies,²⁹ parliamentary supremacy was only clearly discernable where a state had a multi-party system leading to coalition governments dependant on the fluctuating opinions of the supporting majorities of deputies.³⁰ Ruling governments

²⁶ *Id.* at 187.

²⁷ There are exceptions to this pattern and recently more states with parliamentary systems (especially in the new post-socialist democracies) elect Presidents directly.

²⁸ *Id.* at 181.

²⁹ AREND LIJPHART, *DEMOCRACIES: PATTERNS OF MAJORITARIAN AND CONSENSUS GOVERNMENT IN TWENTY-ONE COUNTRIES* 38 (1984) (arguing that in the group of twenty-one postwar democracies, seventeen had pure parliamentary systems, two had mixed presidential-parliamentary systems, one a semi-presidential system and one (the United States) had a pure presidential system).

³⁰ For comments on the process of the transition to cabinet government in Great Britain, see E.C.S. WADE & A.W. BRADLEY, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 33-34, 112-13 (11th ed. 1993). For the role of small parties that have the potential to create coalition governments, particularly in Italy, see Geoffrey Pridham, *Italian Small Parties in Comparative Perspective*, in *SMALL PARTIES IN WESTERN EUROPE: COMPARATIVE AND NATIONAL PERSPECTIVE* (Geoffrey Pridham & Ferdinand Muller-Rommel eds., 1991). See generally Geoffrey Pridham, *An*

in countries with two party systems could generally assert sufficient control over their party's parliamentary representation, guaranteeing some stability and influence in the legislative process. Exemplified by the British system, this arrangement endowed the prime minister with formidable power. To distinguish it from a pure parliamentary system, the arrangement where the government wielded decisive influence has been termed the "parliamentary-cabinet system."³¹

The German parliamentary system, the so-called "chancellor's democracy," evolved in response to the fear that allocating power to a fragmented parliament could lead to governmental impotence. The situation is avoided by enhancing the Chancellor's power without abandoning the parliamentary system. The Chancellor alone controls the policy of the federal government, while the Ministers only have autonomy in spheres designated by the Chancellor's guidelines.³² Second, while the lower house of parliament (the Bundestag) may dismiss the Chancellor, the "constructive vote of no confidence" requires that the Bundestag simultaneously choose a successor by a two-thirds majority.³³ Finally, if supported by the President and the upper house of parliament (the Bundesrat), the government may survive for up to six months without the support of a majority of the Bundestag under the "legislative emergency procedure."³⁴

The French conceived of a hybrid system referred to as a presidential-parliamentary system, or semi-presidentialism.³⁵ While traditionally favoring a parliamentary system, the Fifth Republic introduced several features which, at least initially, pulled the French model closer to the

Inductive Theoretical Framework for Coalitional Behavior: Political Parties in Multi-Dimensional Perspective in Western Europe, in *COALITIONAL BEHAVIOUR IN THEORY AND PRACTICE: AN INDUCTIVE MODEL FOR WESTERN EUROPE* (Geoffrey Pridham ed., 1986).

³¹ TWOJA KONSTYTUCJA (YOUR CONSTITUTION) 82 (1997) (noting that W. Osiatynski goes so far in the evaluation of the influence of the British PM as to state that, in practice, he has more power than the American president).

³² Art. 65 BGB, translated in DAVID P. CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 367 (1994).

³³ *Id.* art. 67.

³⁴ *Id.* art. 81.

³⁵ See Stephen Holmes, *A Forum on Presidential Powers*, 2-3 E. EUR. CONST. REV. 36, 39 (1993). See Maurice Duverger, *A New Political System Model: Semi-presidential Government*, 8 EUR. J. POL. RES. 165, 173, 176-77 (1980) (claiming that, in Europe (until 1989) besides France, only Portugal could meet conditions distinguishing semi-presidential systems from other systems: direct elections of the president, significant actual and constitutional prerogatives of the president, political dependence of the prime minister on the confidence of parliament). The system has been also called "premier-parliamentarism." See MATTHEW SOBERG SHUGART & JOHN M. CAREY, *PRESIDENTS AND ASSEMBLIES: CONSTITUTIONAL DESIGN AND ELECTORAL DYNAMICS* 55 (1992).

presidential system. While retaining a dual executive, the people directly elect the President who is, in turn, less dependent on Parliament. The President appoints the head of government without seeking Parliamentary approval, though Parliament does have the power to vote the government out of office. The President may, in cooperation with the Prime Minister, dissolve the legislature and call new elections. Although the President cannot veto Parliamentary action, he can request reconsideration of bills which he opposes.³⁶ Ministers cannot sit in Parliament, thus maintaining a more rigid separation between executive and legislative than typically found in parliamentary systems. As a counterpoint, however, some legislative functions can be assigned to the executive who then legislates in those areas by decree. This hybrid system has "elements both of parliamentary and presidential systems."³⁷

This short review of the major models of government warrants several comments. First, it must be noted that constitution-making techniques are changing. Modern constitution drafting resembles techniques of social engineering rather than modeling. Even this characterization is unsatisfactory, however. While the engineer has many choices in what sort of structure to build, he cannot experiment outside the draftsman's shed for fear of exposing the occupants to harm. Constitutional drafters, however, have traditionally tested their creations in actual operation. The drafters' work resembles cooking rather than engineering. Constitutional institutions are not erected from well-tested interlocking elements. Rather, the components are carefully selected from different countries and regions, combined with the traditional ingredients of the host state—each changed by and changing the other. These "new dishes" do not resemble traditional French or German fare; they are new blends with an eclectic character combining cultures, tastes and styles.

Second, the growing number of "mixed" constitutions undermined the clarity of presidential and parliamentary systems' definitions. The dichotomy dividing the Western democratic world on pure presidential and pure parliamentary systems is in decline. Comparativists note that it may be easier to determine what features are shared by the countries with parliamentary and presidential systems than to find out what exactly are specific components distinguishing these models. For example, direct elections of the chief executive officer are not a characteristic component of the presidential system. The original U.S. system provided for the president to be elected for a limited term and chosen by electors; the "unit rule," giving all state's votes to a winner of the popular state's elections, became a practice at the end of the nineteenth century when the electors started automatically casting their votes for winning party candi-

³⁶ LA CONSTITUTION [CONST. FRANCE] art. 10, *translated in* 7 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 5 (Gisbert H. Flanz ed., 2000) [hereinafter CONSTITUTIONS OF THE COUNTRIES].

³⁷ ALEX N. DRAGNICH, MAJOR EUROPEAN GOVERNMENTS 274 (1992).

dates. In *Ray v. Blair* the U.S. Supreme Court confirmed that “[h]istory teaches that the electors were expected to support the party nominees.”³⁸ Direct elections, however, ceased to characterize exclusively presidential systems. In modern times, many countries with parliamentary systems elect their presidents directly. Similarly, the U.S. concept of checks and balances became increasingly popular in the states experimenting with mixed models of government. The drafters of the new twentieth century constitutions emphasize that they go beyond Montesquieu’s system of divided powers and portray institutions, which are not only separated but which share functions and are able to hamper each other.³⁹ The presidential right to veto legislative actions was also incorporated into the practice of parliamentary governments, as well as wide presidential nomination power. In many countries with parliamentary systems, the ministers also do not sit on the legislatures.

Only three traditional attributes of the presidential system remain almost intact: the centralized executive concentrating the functions of a head of state and head of government; the lack of political responsibility of the members of cabinet before the parliament; and the lack of presidential or executive prerogative of a dissolution of the legislature.

Third, regardless of the enormous general influence and popularity of American constitutionalism in the world, the U.S. presidential system did not make major inroads into the political culture of the countries of the world. Commentators could not agree how many states really are attracted to the U.S. model. A. Przeworski and M. Alvarez indicated, in the beginning of the nineteenth century, that fifty out of the one hundred and six existing democracies show attributes of a presidential system.⁴⁰ In 1994, Giovanni Sartori was inclined to classify only twenty states as presidential republics, adding that they are mostly located in Latin America.⁴¹ This number might be further reduced in light of recent attempts to depart from this system in the Latin American region.

Fourth, the above-mentioned transformations are interrelated. The changing techniques of constitution-making resulted in the shrinking of “pure” governmental models and the mushrooming of so-called “mixed”

³⁸ 343 U.S. 214, 228 (1962). See also *id.* at 228-31; HAROLD W. CHASE & CRAIG R. DUCAT, EDWARD S. CORWIN’S: THE CONSTITUTION AND WHAT IT MEANS TODAY 454 (14th ed. 1978).

³⁹ See RICHARD E. NEUSTADT, PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP 33 (1960); GIOVANNI SARTORI, COMPARATIVE CONSTITUTIONAL ENGINEERING: AN INQUIRY INTO STRUCTURES, INCENTIVES, AND OUTCOMES 86 (1994); Paul R. Verkul, *Separation of Powers, The Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301 (1989).

⁴⁰ A. Przeworski, M. Alvarez, *Parliamentarism and Presidentialism: Which Works? Which Lasts?*, Address at the Congress of Polish Sociological Society (June 17-30, 1994). See also S. GEBETHNER, KONSTYTUCYJNE SYSTEMY RZADOW 79 (Michał Domagała ed., 1997).

⁴¹ See SARTORI, *supra* note 39, at 85, 174.

models. The question remains: To what extent will the process of intermingling different components of several well-known constitutional models work in practice? The recent experiments with “mixed” models seem to contribute more to reservations than to enthusiasm about the results of “blending” technics.

III. LATIN AMERICAN CONSTITUTIONAL DEVIATIONS FROM U.S. PRESIDENTIALISM

Even a very sketchy review of Latin American constitutions reveals numerous borrowings from U.S. constitutional ideas. The preambles of several constitutions echoed the language adopted by the Philadelphia Convention. For example, the preamble to the Argentinean Constitution of 1853 clearly resembled the U.S. act. It reads:

We, the representatives of the people of the Argentine Nation, assembled in General Constituent Congress, by the will and election of the provinces which compose it, in fulfillment of pre-existing pacts, with the object of constituting the national union, establishing justice, consolidating internal peace, providing for common defense, promoting the general welfare, and securing the blessings of liberty to ourselves, to our posterity, and to all men in the world who wish to dwell on Argentine land: invoking the protection of God, source of all reason and justice, do ordain, decree this Constitution for the Argentine Nation.⁴²

The Preamble has stayed intact even after several constitutional reforms and still provides the introduction to the text of the current Constitution of 1994.⁴³

The 1886 Constitution of Columbia also referred to the people who came together to decree the Constitution for “the purpose of guaranteeing the national unity and assuring the safety of justice, liberty, and peace.”⁴⁴ The Cuban Constitution of 1940⁴⁵ and the current Brazilian Constitution of 1988 started with similar phrases: “We the representatives

⁴² CONSTITUCIÓN ARGENTINA DE 1853 [CONST. ARG.] pmb., translated in THE CONSTITUTIONS OF THE AMERICAS 14-32 (Russell H. Fitzgibbon et al. eds., 1948) [hereinafter THE CONSTITUTIONS]; CONST. ARG. (1994), translated in 1 CONSTITUTIONS OF THE COUNTRIES, *supra* note 36, at 1.

⁴³ See CONST. ARG. (1994) pmb.

⁴⁴ CONSTITUCIÓN POLÍTICA DE COLOMBIA DE 1886 [CONST. COLOM.], translated in THE CONSTITUTIONS, *supra* note 42, at 166. The 1991 Constitution of Colombia opens with the statement: “The people of Colombia, in the exercise of their sovereign power, represented by their delegates to the National Constituent Assembly” CONST. COLOM., translated in 4 CONSTITUTIONS OF THE COUNTRIES, *supra* note 36, at 163.

⁴⁵ REPÚBLICA DE CUBA CONSTITUCIÓN DE 1940 [CONST. CUBA], translated in THE CONSTITUTIONS, *supra* note 42, at 227.

of the . . . People, convened the National Constituent Assembly”⁴⁶ A more searching constitutional analysis exposes multiple examples of borrowing from the U.S. experience,⁴⁷ however, numerous deviations from the original model also become exposed.

Drafted with the clearest intention to copy the U.S. template,⁴⁸ the 1853 Constitution of Argentina declared that the President is “the supreme chief of the Nation, chief of the government, and the politician responsible for the general administration of the country.”⁴⁹ The original Constitution provided, however, that the Ministers have to endorse acts of the President, which have no effect without their co-signatures.⁵⁰ The 1994 Constitution departed even further from the U.S. model adding the position of the Chief of the Cabinet of Ministers,⁵¹ who, with other Secretary-Ministers, can be censured and removed by the Parliament.⁵² The Executive, differently than in the United States, has the legislative initiative⁵³ and Ministers may participate in Congressional debates, though without voting rights.⁵⁴

The Constitutions of Bolivia also made concessions toward the parliamentary system. The Constitution of 1945, following the pattern of other basic laws of the region, provided for the possibility of censuring the Ministers and introduced a countersignature requirement as a prerequisite of enforcement of Presidential acts.⁵⁵ The 1967 Constitution, amended in

⁴⁶ CONSTITUIÇÃO FEDERAL [CONST. BRAZIL], translated in CONSTITUTIONS OF THE COUNTRIES, *supra* note 36, at 3.

⁴⁷ See Barker, *supra* note 18, at 891.

⁴⁸ See Jonathan M. Miller, *Introductory Notes: Constitutional History and Political Background*, in 1 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD vii (Gisbert H. Flanz ed., 2002).

⁴⁹ CONST. ARG. (1853) art. 86, translated in THE CONSTITUTIONS, *supra* note 42, at 27; CONST. ARG. (1994) art. 99, §1, translated in CONSTITUTIONS OF THE COUNTRIES, *supra* note 36, at 19.

⁵⁰ CONST. ARG. (1853) art. 87 repealed by CONST. ARG. (1949) art. 84, translated in AMOS J. PEASLEE, 1 CONSTITUTIONS OF NATIONS 64 (2d ed. 1956); See also CONST. ARG. (1994) art. 100, translated in 1 CONSTITUTIONS OF THE COUNTRIES, *supra* note 36, at 21 (listing the same requirement in the current Argentinean Constitution).

⁵¹ CONST. ARG. (1994) art 100, translated in 1 CONSTITUTIONS OF THE COUNTRIES, *supra* note 36, at 21-22.

⁵² *Id.* art 101, translated in 1 CONSTITUTIONS OF THE COUNTRIES, *supra* note 36, at 22-23.

⁵³ *Id.* art 77, translated in 1 CONSTITUTIONS OF THE COUNTRIES, *supra* note 36, at 16.

⁵⁴ CONST. ARG. (1853) art. 91-92, translated in THE CONSTITUTIONS, *supra* note 42, at 23 (stating that the Ministers cannot sit in the Congress).

⁵⁵ CONSTITUCIÓN POLÍTICA DE BOLIVIA DE 1945 [CONST. BOL.] art. 63, translated in PEASLEE, *supra* note 50, at 188; CONST. BOL. (1945) art. 100, translated in PEASLEE, *supra* note 50, at 193.

1994,⁵⁶ vests in Congress the right to express no-confidence in the Ministers formally appointed and dismissed by the President.⁵⁷ The Constitution, lacking consequence, states that the Minister deprived of Congressional support has to submit his resignation; but the President may reject it.⁵⁸ The reform of 1994 extended the President's term from four to five years.⁵⁹ It retained, however, the rule vesting in the Congress the right to elect the President if none of the candidates received absolute majority in the direct elections.⁶⁰

United States inspirations were also clear with regard to the first Constitutions of Brazil; notwithstanding the tendency, the drafters did not duplicate the U.S. act.⁶¹ For example, the first Brazilian Republican Constitution of 1889 introduced the direct election of senators⁶² much earlier than the U.S. Constitution's Seventeenth Amendment.⁶³ Brazil later adopted Constitutions reserving for the President extensive legislative prerogatives granting him exclusive power to initiate some laws and adopt provisional measures with the force of law.⁶⁴ The President has a line-item veto power permitting him to demand the removal of separate words or even special expressions or marks.⁶⁵ The later constitutions also

⁵⁶ CONST. BOL. (1945) amended by Law on the Constitutional Reform, No. 1585 (Aug. 5, 1994) (Bol.) reprinted in 2 CONSTITUTIONS OF THE COUNTRIES (Gisbert H. Flanz ed., 1995) (Release 99-3, issued May 1999).

⁵⁷ See *id.* 1967 CONST. BOL. as amended in 1994, Art. 70 sec. III. Bolivia's Constitution of 1945 provided for a vote of censure, requiring the vote of an absolute majority of the members present, but did not specify the result of censuring the executive. Art. 63, translated in PEASLEE, *supra* note 50, at 188.'

⁵⁸ 1967 Constitution as Amended in 1994.

⁵⁹ *Id.* art. 87.

⁶⁰ *Id.* art. 90. See also CONST. BOL. of 1945 art. 88, translated in PEASLEE, *supra* note 50, at 191.

⁶¹ The main author of the Constitution was Ruy Barbosa. See THE CONSTITUTIONS, *supra* note 42, at 58.

⁶² The later Constitutions provided also for the election of three Senators from each state. See CONST. BRAZIL (1946) art. 60, § 1, translated in PEASLEE, *supra* note 50, at 218.

⁶³ The Seventeenth Amendment was proposed by Congress on May 13, 1912 and ratified on May 31, 1913. EDWARD F. COOKE, A DETAILED ANALYSIS OF THE CONSTITUTION 131 (5th ed. 1984).

⁶⁴ CONST. BRAZIL (1946) art. 67, § 2, translated in PEASLEE, *supra* note 50, at 219. See also CONST. BRAZIL (1988) art. 61, § 1, translated in NORTH-SOUTH CENTER, A PANORAMA OF BRAZILIAN LAW 425-26 (Jacob Dolinger & Keith S. Rosenn eds., 1992) [hereinafter BRAZILIAN LAW]; CONST. BRAZIL (1988) art. 62, translated in BRAZILIAN LAW, *supra* at 426.

⁶⁵ CONST. BRAZIL (1946) art 70, § 1, translated in PEASLEE, *supra* note 50, at 220. See also David Fleischer, *Brazil*, in WORLD ENCYCLOPEDIA OF PARLIAMENTS AND LEGISLATURES 95 (George Thomas Kurian ed., 1998).

introduced the countersignature requirement.⁶⁶ In comparison to his U.S. counterpart, the Brazilian President's veto is weaker; it is considered in a joint session of the Chambers of Congress and may be rejected by secret ballot of an absolute majority of the Deputies and Senators.⁶⁷ Although the Brazilian Congress has the right to create and abolish Ministries and agencies of public administration, the right to appoint and dismiss Ministers is vested in the President.⁶⁸ Deputies and Senators appointed to ministerial positions do not lose their mandates but receive leaves of absence and are temporarily replaced by alternates.⁶⁹

A similar tendency may be observed in Chile, which already experimented with the parliamentary system from 1891-1924.⁷⁰ The 1925 Constitution retained the co-signature requirement with regard to the President's acts,⁷¹ but allowed Congress only to scrutinize the acts of the government. The "suggestions" of Congress required a written response from the President but did not trigger the dismissal of the Ministers.⁷² The Constitution of 1980, as amended on July 30 1989, vested in the President the right of appointment of Ministers, imposed on the members of the Government the obligation to co-sign the President's acts,⁷³ and repeated, half-heartedly, drafted statements about "questioning" rather than "censuring" the Ministers.⁷⁴ The Constitution confirms that the "observations" of the Congress do not undermine political responsibility of the Ministers and that the duties of the Government will be fulfilled simply by a Presidential response to the Chamber.⁷⁵ To enhance the powers of the President, the Constitution grants him exclusive (but lim-

⁶⁶ See CONST. BRAZIL (1946) art. 91, § 1, translated in PEASLEE, *supra* note 50, at 224.

⁶⁷ CONST. BRAZIL (1988) art. 66, § 4, translated in BRAZILIAN LAW, *supra* note 64, at 427. See also CONST. BRAZIL (1946) art. 70, § 3, translated in PEASLEE, *supra* note 50, at 220 (providing for a two-thirds majority to reject the veto).

⁶⁸ CONST. BRAZIL (1946) art. 65, § IV, translated in PEASLEE, *supra* note 50, at 218-19; CONST. BRAZIL (1946) art. 87, § 3, translated in PEASLEE, *supra* note 50, at 223; CONST. BRAZIL (1988) art. 48, translated in BRAZILIAN LAW, *supra* note 64, at 416-17; CONST. BRAZIL (1988) art. 84, § 1, translated in BRAZILIAN LAW, *supra* note 64, at 432.

⁶⁹ CONST. BRAZIL (1988) art. 56, II §1, translated in BRAZILIAN LAW, *supra* note 64, at 422.

⁷⁰ See Nino, *supra* note 2, at 130.

⁷¹ CONSTITUCIÓN POLÍTICA DE LA REPUBLICA DE CHILE (1925) [CONST. CHILE] art. 75, translated in PEASLEE, *supra* note 50, at 497.

⁷² CONST. CHILE (1925) art. 39, § 2, translated in PEASLEE, *supra* note 50, at 489-90.

⁷³ CONST. CHILE (1980) art. 35, translated in 4 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 48 (Albert P. Blaustein & Gisbert H. Flanz eds., 1991).

⁷⁴ *Id.* art. 48, translated in 4 CONSTITUTIONS OF THE COUNTRIES, *supra* note 73, at 51.

⁷⁵ *Id.* art. 48, § 1, translated in 4 CONSTITUTIONS OF THE COUNTRIES, *supra* note 73, at 51.

ited to certain types of actions) right of legislative initiative and the right to dissolve the Chamber of Deputies once during his eight year term of office.⁷⁶

The 1933 Constitution of Peru also provided for the institution of a Prime Minister (President of the Council of Ministers) who chaired the Council of Ministers and presented the names of candidates for ministerial positions to the President of the Republic.⁷⁷ Modifying the U.S. system, the drafters of the Peruvian Constitution left the President the right to appoint and remove the Prime Minister. Although the appointments of the Ministers had to be countersigned by the Prime Minister, they did not require the advice and consent of the legislature.⁷⁸ Still, Congress could censure the ministers and express no-confidence in the Council of Ministers.⁷⁹ In the cases of a vacancy of the Presidency of the Republic, the 1933 Constitution provided for the election of a President by the Congress.⁸⁰ This system was changed by the Amendment of 1936, which introduced into the Peruvian system the institution of two Vice-Presidents, First and Second, who would successively conclude the incomplete period of the President's office.⁸¹ In further deviation from the U.S. prototype, the President could take command of the armed forces only with the permission of Congress.⁸² Although the 1993 Constitution introduced significant changes, making Congress a unicameral body and again strengthening the presidential power,⁸³ it did not bring the Peruvian model much closer to the U.S. model.

The 1934 Constitution of Uruguay, breaking the fundamental precepts of the presidential system, granted the President the right to dissolve the legislature and Parliament the right to vote down the Ministers.⁸⁴ The 1966 Constitution, as amended through the Plebiscite of December 8, 1996, inserted in the basic law of the country more elements of the parliamentary model. The Constitution demands the Ministers' counter-signa-

⁷⁶ *Id.* art 62, translated in 4 CONSTITUTIONS OF THE COUNTRIES, *supra* note 73, at 55.

⁷⁷ CONSTITUCIÓN POLITICA DE PERU (1933) [CONST. PERU] art. 157, translated in AMOS J. PEASLEE, 3 CONSTITUTIONS OF THE NATIONS 150 (2d ed. 1956).

⁷⁸ *Id.* art. 157, translated in PEASLEE, *supra* note 77, at 150; *id.* art. 158, translated in THE CONSTITUTIONS, *supra* note 42, at 150. See also Nino, *supra* note 2, at 129.

⁷⁹ CONST. PERU (1933) arts. 172-73, translated in PEASLEE, *supra* note 77, at 151. The current Constitution of Peru, adopted in 1993, is the country's eighteenth Constitution and it upheld these provisions. *Id.* art. 132.

⁸⁰ CONST. PERU (1933) art. 147, translated in PEASLEE, *supra* note 77, at 148.

⁸¹ Amendment of April 1, 1936 is published in PEASLEE, *supra* note 77, at 159.

⁸² CONST. PERU (1933) art. 153, translated in PEASLEE, *supra* note 77, at 149.

⁸³ CONST. PERU (1993) art. 90, translated in 14 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 133 (Gisbert H. Flanz ed., 1995)

⁸⁴ CONSTITUCIÓN DE LA REPUBLICA DE URUGUAY (1934) [CONST. URU.] arts. 136-44, translated in THE CONSTITUTIONS, *supra* note 42, at 733-34.

tures for the President's acts,⁸⁵ but also vests in the Council of Ministers the right to reject, by absolute majority, the act of a Minister supported by the President.⁸⁶ The President's veto may be overruled by a three-fifths vote of the Deputies and Senators present at the time of voting.⁸⁷ The Constitution makes the government responsible before the President and before the Parliament, which may express no-confidence either in the entire government or a single Minister. The procedure is quite complicated. The Minister who was voted down by an absolute majority of a joint meeting of the Chambers (*Asamblea General*) must resign. The President can veto the decision dismissing the Minister if it was supported by less than two-thirds of the Chambers.⁸⁸ If, however, the Parliament insists on the dismissal of the Minister by the vote of at least three-fifths of all deputies, then to retain the Minister the President must dissolve the legislature. The President is limited by the constitutional rule that the Parliament cannot be dissolved during the last year of its term or more than once if the Parliament dismissed more than one Minister.⁸⁹

The drafters of the Uruguayan constitutional amendments of 1996 anticipated clashes between the President and the Parliament and incorporated into the Constitution several awkward and vague provisions. On the one hand, the President, acting without the cooperation of the Parliament, may issue a resolution blocking the operation of the government.⁹⁰ On the other hand, he may ask the Parliament to confirm its confidence in the government. If Parliament decides not to take any action, it is assumed that the legislature still supports the government. The President does have discretion to interpret the inactivity of the Parliament differently.⁹¹

This quick review of Latin American Constitutions triggers several observations. It confirms the intention of early Latin American leaders to draw from the U.S. constitutional model; the borrowings are well documented and unquestionable. The review also provides evidence that, in many instances, even in early stages of their political development the

⁸⁵ CONST. URU. (1996) art. 168, § 25, *translated in 20 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD* 34 (Gisbert H. Flanz ed., 1998).

⁸⁶ *Id.* art. 165, *translated in 20 CONSTITUTIONS OF THE COUNTRIES*, *supra* note 85, at 30. *See also* CONST. URU. (1934) art. 176, *translated in THE CONSTITUTIONS*, *supra* note 42, at 741.

⁸⁷ CONST. URU. (1996) art. 138, *translated in 20 CONSTITUTIONS OF THE COUNTRIES*, *supra* note 85, at 25.

⁸⁸ *Id.* art. 148, *translated in 20 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD*, *supra* note 85, at 26-28.

⁸⁹ *Id.*

⁹⁰ *Id.* art 174, *translated in 20 CONSTITUTIONS OF THE COUNTRIES*, *supra* note 85, at 35.

⁹¹ CONST. URU. (1996) art. 174, *translated in 20 CONSTITUTIONS OF THE COUNTRIES*, *supra* note 85, at 35; CONST. URU. (1996) art. 175, *translated in 20 CONSTITUTIONS OF THE COUNTRIES*, *supra* note 85, at 35-36.

Latin American countries adopted the U.S. prototype with numerous modifications. The sometimes heavy-handed attempts to experiment with U.S. institutions were often unsuccessful and appeared to be in disarray. The deviations provoked serious questions. Were the adjustments of the presidential system in Latin America caused by objective geo-political circumstances or by a doctrinal nostalgia of the constitutional drafters for the Latin American European legacy?⁹² Did the modifications of the presidential model promote anti-democratic effects or were such effects inherent in the U.S. prototype? These questions warrant further examination of the process of adoption in Latin America of some institutions, which in the United States contributed to the stability of the presidential system. Nothing was more important than the right of the U.S. courts to review the constitutionality of laws.

IV. LATIN AMERICAN EXPERIMENTS WITH JUDICIAL REVIEW

There are no doubts that, with regard to judicial review, the countries of this region seriously tried to duplicate the U.S. experience. As Allan Brewer-Carías wrote:

The constitutional system of the United States influenced many of the Latin American systems to adopt, during the nineteenth century, the diffuse system of judicial review. Alexis de Tocqueville's influential *Democracy in America*,⁹³ has been considered as having played a fundamental role in this adoption, particularly concerning the Latin American countries with a federal form of state. This was the case in Mexico in 1857, Venezuela in 1858, Argentina in 1860 and Brazil in 1890. The system was also adopted in other countries like Columbia in 1850 which had a brief federal experience, and even without connection with the federal form of state, in the Dominican Republic in 1844 where it is still in force.⁹⁴

The adoption of the U.S. decentralized system of judicial review in the civil law countries provided formidable challenges for the Latin American constitutional drafters. The fabric of law in civil law countries is stat-

⁹² As Jorge L. Esquirol wrote:

The force of this fiction [identifying Latin American law as essentially European] rests on the shadow of illiberality cast upon actual Latin American societies. Indeed, the notion of Europeanness is championed and defended precisely because of its perceived unreality in society. Latin American societies are not European, only their jurists pretend to be. The notion of Europeanness is rather a political aspiration. Its goal is assimilating illiberal Latin America to the culture of European democracy.

Jorge L. Esquirol, *The Fictions of Latin America Law (Part I)*, 1997 UTAH L. REV. 425, 470 (1997).

⁹³ Tocqueville's book was translated into Spanish in 1836. ALLAN R. BREWER-CARÍAS JUDICIAL REVIEW IN COMPARATIVE LAW 156 n.1 (1989).

⁹⁴ *Id.* at 156.

utory and judges are expected to apply law but are not allowed to formulate “rules” or regulatory decisions on the validity of the laws. Adoption of the U.S. decentralized system of judicial review, which would allow all judges to decide about the constitutionality of applied laws, carries a serious risk. The decentralized system requires judiciary qualifications usually lacked by most civil law judges who are appointed to judicial positions at the very early stages of their legal careers. In addition, the U.S. system assumes that the higher courts’ decisions of the constitutionality and validity of laws have been generalized through the principle of *stare decisis*. Without incorporation into the civil law model some elements of a precedential system, laws might be disqualified as unconstitutional by some courts, and yet still held valid by others. It could result in chaos, inconsistency and lack of certainty as to what the law really is.

Europeans, who seriously began to experiment with judicial control in the first decades of the twentieth century, usually followed the Austrian “centralized” type of control, confining the power to review to a single judicial organ, the Supreme Court or Tribunal specializing in constitutional challenges.⁹⁵ In Austria this model was first tested in 1867 and adopted in the Constitution of October 1, 1920.⁹⁶ The 1920 Constitution vested the power to review the constitutionality of laws in a single Constitutional Tribunal, and to review the legality of administrative actions in the Supreme Administrative Court. Following the Austrian experience, judicial control of constitutionality was adopted by the Czechoslovakian Constitution of 1920.⁹⁷ Czechoslovakia also established the Administrative Tribunal in Bratislava.⁹⁸ In 1921 the Supreme Administrative Tribunal was formed in Poland and, until the war, the Austrian model was adopted by most of the countries that had formally been under the influence of the Austrian-Hungarian Empire.⁹⁹

The “centralized” Austrian model was not especially helpful for post-colonial constitutional drafters in Latin America. It was seriously checked in practice much later than the U.S. model began making inroads in Latin America. The Latin American judges seem more eager to build

⁹⁵ *Id.* at 196-97; see also M. CAPPELLETTI, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD 50-51 (1971).

⁹⁶ The Constitution was amended in 1929. See Z. Czeszejko-Sochacki, *Trybunał Konstytucyjny w PRL* [The Constitutional Tribunal in the Polish People’s Republic] (1986), *Książka i Wiedza*, at 15-17.

⁹⁷ BREWER-CARÍAS, *supra* note 93, at 32.

⁹⁸ See L. GARLICKI, SADOWNICTWO KONSTYTUCYJNE W EUROPIE ZACHODNIEJ (CONSTITUTIONAL REVIEW IN WESTERN EUROPE) 42 n.76 (1987)

⁹⁹ Marek Wierzbowski, *Watching Law Obedience in Poland: Supreme Administrative Court, Constitutional Tribunal, and Representative of Citizens Rights*, in 8 MODERN LEGAL SYSTEMS CYCLOPEDIA 8.110.3, 8.110.5-6 (Kenneth Robert Redden et al. eds., rev. 2001)

on the early Greek experiments with the decentralized system.¹⁰⁰ In 1847 the Supreme Court of Greece reserved for itself the right to determine the constitutionality of all legislative acts. Although the Court did not claim the power to invalidate the acts, in the decisions in 1871 and 1879, it confirmed that “the court has the power not to apply [the questionable act] in the case that the court is hearing.”¹⁰¹ The right to declare the law “voidable” but not “void” became an important feature of the Latin American system, clearly splitting it from the U.S. prototype.

The second special component of the Latin American system of judicial review was incorporated from the Spanish concept known as a *doctrina legal*, or legal doctrine. This was a juristic doctrine that imposed on the lower courts a duty to follow the custom or general principles of law if the statutes left gaps. The general principles of law could be found in *opinio juris* or in *la jurisprudencia*, the high court’s opinions.¹⁰² This major deviation from the traditional concept and non-precedential character of the civil law system followed the Spanish Supreme Court’s decision of November 4, 1838, which permitted cassation on the basis that the lower court did not follow the “legal doctrine” established by the higher courts. Subsequently, the right to formulate the “legal doctrine” through “the established case law” was reserved exclusively to the Supreme Court.¹⁰³

The Iberian concept of legal doctrine made inroads in the Latin American legal systems. Although the *stare decisis* principle has not been formally recognized, the lower courts were expected to follow the position of the Supreme Court; otherwise, the violation paved the way for an appeal. The practice has been well confirmed by the laws of several countries adopted at the end of nineteenth century. For example, Article 4 of the Columbian Law 169 of 1896 provided that “[t]hree uniform decisions given by the Supreme Court in cassation on the same point of law constitute probable *doctrina*, and the judges should apply them in analogous cases, however the Supreme Court may change *doctrina* if it judges the previous decisions to have been erroneous.”¹⁰⁴ In the twentieth century, the similar power of the Supreme Court was recognized in Mexico. Richard D. Baker wrote:

Jurisprudencia (jurisprudence), in Mexico as elsewhere, is susceptible to a wide variety of definitions. We have seen, however, that in

¹⁰⁰ BREWER-CARIAS, *supra* note 93, at 168.

¹⁰¹ *Id.* (quoting Greek Supreme Court Judgments No.18 (1871) and No 23 (1897)). See also Epaminondas Spiliotopoulos, *Judicial Review of Legislative Acts in Greece*, 56 TEMP. L.Q. 463, 469-70 (1983).

¹⁰² L. Neville Brown, *The Sources of Spanish Civil Law*, 5 INT’L & COMP. L.Q. 364, 364-70 (1956).

¹⁰³ For more extensive examination of the 1938 decision and the Supreme Court’s subsequent decision of December 10, 1894, see Brown, *id.*

¹⁰⁴ Quoted in S.W. WURFEL, FOREIGN ENTERPRISE IN COLUMBIA; LAWS & POLICIES 286-87 (1965).

amparo the term carries the special, technical meaning of obligatory precedent. Although the Supreme Court has been assigned the power to establish such precedents in all of the *amparo* legislation since 1909, explicit constitutional recognition of this function was lacking until the amendments of 1950-1951 were adopted. As then written, article 107, section XIII, paragraph 1, of the Constitution provided that "the law shall specify the terms and cases in which the *jurisprudencia* of the courts of the federal judicial power is binding, as well as the requirements for modifying it."¹⁰⁵

Five consecutive decisions to the same effect, signed by the required number of judges, established *jurisprudencia* as a source of law.¹⁰⁶

The Latin American concept of judicial review has been founded on these two crucial elements: courts cannot apply unconstitutional law but can declare it "voidable," not "void," and with this respect, the lower courts may be bound by the case law established by the high courts. This concept has not been sufficiently clear and, in fact, has never worked smoothly with the high courts reversing their positions and the constitutional assemblies leaving the explanations of the basic elements of this system to the statutory laws. It is well illustrated even by the citations provided above from the Columbian and Mexican laws. As quoted, the Columbian Law 169 of 1896 has never explained what it means that the judicial opinions on the same point constitute a "probable doctrine."¹⁰⁷ Similar indecisiveness can be found in the policy of the Mexican legislature. Article 107 of the Constitution, explaining the protection of the rights through the proceeding of *amparo*, is excessively detailed and long; yet it does not decisively regulate the application of the precedent. It refers to the precedent but leaves for the law specification of "the terms and cases in which the precedent of the courts of the federal judicial branch are binding, as well as the requirements for their modification."¹⁰⁸ S.W. Wurfel observed:

The Judicial Gazette (*Gaceta Judicial*), published since 1887, prints the full text of the decisions of all chambers of the Supreme Court and other material as ordered by the court. This is published somewhat irregularly in periodic form and is not itself converted into bound volume form. There is nothing in Columbia comparable to the various official reporter series of the respective states of the United

¹⁰⁵ RICHARD D. BAKER, JUDICIAL REVIEW IN MEXICO: A STUDY OF THE *Amparo* Suit 251 (1971). The *amparo* proceeding in Mexico provides for the protection of the courts of any person's constitutional rights violated by public authorities. For further discussion on *amparo* see Barker, *supra* note 18, at 905-07; BREWER-CARIAS, *supra* note 93, at 163-67.

¹⁰⁶ BREWER-CARIAS, *supra* note 93, at 167.

¹⁰⁷ WURFEL, *supra* note 104.

¹⁰⁸ CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS [CONST. MEX.] art. 107, § XIII. See also BAKER, *supra* note 105, at 251.

States nor the West Publishing Company series of unofficial reports. There is no topical digest system and no case headnotes, except annotations to codes and texts by individual authors. . . . Official reporters of the Supreme Court or individual judges or lawyers, as a private enterprise, on occasion prepare digests of Supreme Court decisions for a period of years. These are not complete nor always consecutive. These works are known as *jusriprudencia*. They constitute the only readily available source of court decisions and are usually not current.¹⁰⁹

To sum up, the Latin American doctrine, lacking common law traditions, could not adopt the U.S. decentralized system of judicial review in its pure form, namely the one rooted in the concept of *stare decisis*. On the other hand, rather than attempting to adopt the prevailing European model of abstract and centralized review, the Latin Americans decided to experiment with a mixed model incorporating elements of decentralized and centralized review blended with the concept of acts being not-applicable, or voidable, but not entirely nullified. The high courts' *jusriprudencia* was not well registered or reported, and enforcement of the legal doctrine lacked consistency.¹¹⁰ The Latin American judicial system resulted in uncertainty, which further contributed to the lack of stability of the Latin American legal systems.

V. THE HYBRID MODEL: OBJECTIVE REASONS TO SEARCH FOR ALTERNATIVES

The comments presented above illustrate that a combination of civil and common law traditions worked against the full assimilation of the U.S. system in Latin American realities. Several additional factors strengthen the trend toward searching for alternative solutions.

First, it has to be noted that, in Latin America, U.S. presidentialism was tested in very special ethnic circumstances and cultural traditions much different than those of North America. Although the colonists in both Americas had to deal with the pre-Columbian population as well as imported African slaves, they resolved their ethnic problems differently. The North American colonists came from many parts of Europe but predominantly from Great Britain.¹¹¹ They brought with them English constitutional traditions, well rooted in developing concepts of parliamentary government.¹¹² They retained these traditions during the struggle for independence. Despite social fragmentation and a variety of

¹⁰⁹ WURFEL, *supra* note 104, at 286-88.

¹¹⁰ For the "limits of judicial review in fostering the rule of law" in Latin America, see Farer, *supra* note 20, at 1310-25.

¹¹¹ CARL BRENT SWISHER, *AMERICAN CONSTITUTIONAL DEVELOPMENT* 8-9 (1943)

¹¹² *Id.* at 9.

religious factions, the North American settlers remained much more homogenous than their South American counterparts.

The Iberian colonists brought relatively few women with them which resulted in a much stronger race mixture than in Northern America.¹¹³ Although the Spanish and Portuguese colonists retained their cultural dominance, Latin America produced communities that were a very specific blend of culture, races, religions, customs, languages, and legal traditions.

Tradition is one of the most stable components of political culture; cultural memories are not deleted or replaced overnight. The adoption of legal and political models requires high levels of public emotion, disputes, and moral sensitivities.¹¹⁴ The process of assimilating democratic models is particularly demanding and contingent on the elites' ability to animate politically passive groups of society. The efforts to achieve these results in Latin America were not successful enough. Although the evaluation of cultural phenomena is always controversial, one has to admit that, given at least the level of communication of social groups and degree of information spread among indigenous communities, the political and legal culture of Latin American societies was relatively less mature than in North America. The Latin American constitutional culture was dominated by elites who did not make a serious effort to increase political participation of indigenous groups, women,¹¹⁵ racial or religious minorities,¹¹⁶ or peasants.¹¹⁷ The attempts to transform Latin American constitutions into multicultural basic laws, protecting everyone's rights and

¹¹³ See Ralph L. Woodward, Jr., *Latin America*, in 15 FUNK AND WAGNALLS NEW ENCYCLOPEDIA 418 (1986). For more general comments on Latin American history, people and problems, see also RALPH WOODWARD, *CENTRAL AMERICA: A NATION DIVIDED* (1976).

¹¹⁴ For more comments see Rett Ludwikowski, *Constitutional Culture of the New East-Central European Democracies*, 29 GA. J. INT'L & COMP. L 1, 11-14 (2000).

¹¹⁵ For more comments see generally Michael Posner, *Human Rights and Non-Governmental Organizations on the Eve of the Next Century*, 66 FORDHAM L. REV. 627 (1997); Gaby Oré-Aquilar, *Sexual Harassment and Human Rights in Latin America*, 66 FORDHAM L. REV. 631 (1997).

¹¹⁶ For more comments on the protection of religious rights in Latin America, see Paul E. Sigmund, *Religious Human Rights in Latin America*, 10 EMORY INT'L L. REV. 173 (1996).

¹¹⁷ For more general comments on the protection of human rights in Latin America, see generally Victor Rodriguez Rescia & Marc David Seitles, *The Development of the Inter-American Human Rights System: A Historical Perspective and a Modern-Day Critique*, 16 N.Y.L. SCH. J. HUM. RTS. 593 (2000). See also Roseanne M. Latore, *Coming Out of the Dark: Achieving Justice for Victims of Human Rights Violations by South American Military Regimes*, 25 B.C. INT'L & COMP. L. REV. 419 (2002).

involving these groups into common social activities, have been noted, but their implementation still was not impressive.¹¹⁸

Since the early stages of the post-colonial history, the societies of Latin America were highly polarized and for this reason, in comparison with Northern America, the elites were more determined to look for efficient measures of control and less prepared to accept democratic institutions despite hardships accompanying the process of democratization. The Iberian leaders did not adopt the U.S. presidential system to protect the democratic foundations of their societies' political culture. They were rather searching for the system that would help them to unite the politically inexperienced and ethnically diversified societies.¹¹⁹ As Jacques Lambert wrote:

There was on the one hand the need for an executive power stronger than in Europe to prevent the disintegration of their young states, and on the other hand the need to prevent the head of the executive from being tempted to use his dominance as a stepping stone to dictatorship. The existence of caudillismo and the submissiveness of the backward populations to the person of their master made this temptation even stronger.¹²⁰

Although there is nothing inherently wrong in the tendency to favor strong personal managements,¹²¹ it must to be noted that the U.S. concept of presidential power was developed as a result of the intensive debate focusing not on the benefits of a strong executive, but rather on limitations or balance of a single executive officer's power.¹²² While the

¹¹⁸ The thesis on multicultural transformation of Latin American constitutionalism was most strongly illustrated by DONNA LEE VAN COTT, *THE FRIENDLY LIQUIDATION OF THE PAST: THE POLITICS OF DIVERSITY IN LATIN AMERICA* (2000). For the constructive criticism of this thesis, see Kirsten Matoy Carlson, Notice, *Premature Predictions of Multiculturalism?*, 100 MICH. L. REV. 1470 (2002).

¹¹⁹ Harry Kantor wrote:

The leaders of the victorious armies in the new Latin American republics seemed to see the need for a strong executive around which they could unite the various population in their new republics; yet they wanted to check the power of the new presidents, so they took the US system of checks and balances as their model.

Harry Kantor, *Efforts Made by Various Latin American Countries to Limit the Power of the President*, in *PRESIDENTIAL GOVERNMENT* *supra* note 2, at 101.

¹²⁰ Jacques Lambert, *Latin America. Social Structure and Political Institutions*, in JOHN HENRY MERRYMAN & DAVID S. CLARK, *COMPARATIVE LAW: WESTERN EUROPEAN AND LATIN AMERICAN LEGAL SYSTEMS* 346 (1978).

¹²¹ Juan J. Linz who wrote, "Even if one were to accept the debatable notion that Hispanic societies are inherently prone to *personalismo*, there can be little doubt that in some cases this tendency receives reinforcement from institutional arrangements." *The Perils of Presidentialism*, in *PRESIDENTIAL GOVERNMENT* *supra* note 2, at 100.

¹²² The scope of the presidential power was first addressed by Alexander Hamilton at the Philadelphia Convention on June 18, 1787. Hamilton's political concepts were not enthusiastically accepted by the delegates of the Convention who believed that his

North Americans wanted to have the executive well-balanced, and therefore unable to turn to dictatorship, the Latin Americans wanted their presidents to be strong, but non-dictatorial. The focus was clearly different; for drafters of the U.S. Constitution the presidential system meant, first of all, the developed concept of checks and balances; for Latin Americans it meant the model of governance concentrated around the executive power. The difference in approach significantly effected the Latin American reception of the U.S. model.

Second, it has often been argued that, in spite of the deficiencies of the governmental model and the abuses of presidential prerogatives, the Latin American court system worked and was able to protect individual constitutional rights.¹²³ As Jacques Lambert observed:

This independence of the judiciary exists on the national level in any case; when the regime is a federal one, the state courts may be of much lower quality. This is also true of certain states in the United States. The point to be kept in mind is that while in Latin America political freedom is often endangered, as in so many other developing regions, arbitrary action is always limited in the major and most representative countries. Latin American countries differ in this respect from developing countries in other parts of the world because their courts are determined to enforce the rule of law.¹²⁴

In fact, the courts' protection of the people's rights in Latin America, although admirable,¹²⁵ has not sufficiently safeguarded the operation of the presidential model. The courts of general jurisdiction in civil law countries are not well prepared to decide political issues dealing with the distribution of power.¹²⁶ The Latin American courts tried to exercise some of these functions, but tried inefficiently. They focused on the pro-

federal government would eliminate the states and that the president, being elected for life, would accumulate almost autocratic power, which would in turn create a monarchy. For a summary of the dispute, see Rett R. Ludwikowski, *Politicization and Judicialization of the U.S. Chief Executive's Political and Criminal Responsibility: A Threat to Constitutional Integrity or a Natural Result of the Constitution's Flexibility*, 50 AM. J. COMP. L. 405, 408-10 (2002).

¹²³ See Fernando Carrillo Flórez, *Supreme Courts of the Americas Organization: Judicial Independence and its Relationship with the Legislative Bodies*, 42 ST. LOUIS U. L.J. 1033, 1042 (1998) (commenting on the effectiveness of the Latin American courts' fight against corruption and organized crime).

¹²⁴ Lambert, *supra* note 120, at 342.

¹²⁵ For illustrating examples, see Barker, *supra* note 18, at 893. See also comments of Thomas C. Wright on the general improvement of the human rights protection in Latin America through the 1990s and in this century. Thomas C. Wright, *Human Rights in Latin America: History and Projections for the Twenty-First Century*, 30 CAL. W. INT'L L.J. 303 (2000).

¹²⁶ Some experts, reaching controversial conclusions, have been inclined to associate weaknesses of the judiciary with features of the parliamentary system rather than the civil law system. See, e.g., Flórez, *supra* note 123, at 1036 (stating "the

tection of civil liberties and were unable to protect the system of constitutional checks and balances. Some constitutions reserved for the Supreme Courts the right to decide cases and vertical conflicts between the federal, or central, and local governmental agencies; however, they rarely gave the courts clear authority to decide horizontal conflicts dealing with the distribution of power between the legislative and executive organs.¹²⁷ Even if the basic law vested in the courts general jurisdiction over all constitutional issues,¹²⁸ the courts were unable to stand up against the dictatorial Presidents and guarantee actual *equilibrium* of the constitutional system.¹²⁹

Third, it was often argued that the process of democratization of the Latin American presidentialism has been hampered by corporatism typical of this region.¹³⁰ Corporative groups, such as the military, the Church, trade unions, as well as cooperating and often affiliated companies, created mechanisms dysfunctional for presidentialism.¹³¹ The bureaucratic elites, often corrupted and operating at the back-stage of the system, crippled the creation of a healthy middle-class, the operation of political parties, and mechanisms of public participation in power. The social model, dubbed "praetorianism" by Samuel Huntington, can be characterized by "a low degree of institutionalization with a high degree of participation of mobile social forces that penetrate the political spheres, resulting in confrontations between new active social forces and between them and traditional establishment."¹³² Latin American adoption of some features of continental European systems of government,¹³³ namely "mixed" quasi-presidential models, have often been viewed as the best remedy for this problem. As the Council for the Consolidation of

parliamentary regime has denaturalized the judicial function and failed to recognize the disposition and nature of the power entrusted with carrying out such functions.").

¹²⁷ See, e.g., CONST. BRAZIL (1946), art. 101, §V, translated in THE CONSTITUTIONS, *supra* note 42, at 80-81.

¹²⁸ See CONST. ARG. (1853) art 100, translated in THE CONSTITUTIONS, *supra* note 42, at 30.

¹²⁹ Lambert, *supra* note 120, at 341

It would be naïve to think that independence of the judges could prevent dictatorships and revolutions, or that dictatorships and revolutions always respect the independence of the judiciary. Far from testifying to the servility of judges, the fact that the only way of subjugating them was to remove them, as Perón, Castro, and Paz Estenssoro did and as Cardenas wanted to do, proves on the contrary that the judges in their countries were traditionally independent.

Id.

¹³⁰ See generally Nino, *supra* note 2.

¹³¹ *Id.* at 47.

¹³² See Guillermo O'Donnell, *Corporatism and the Question of the State*, in AUTHORITY AND CORPORATISM IN LATIN AMERICA 56 (James M. Malloy ed., 1977).

¹³³ Nino was inclined to opt for the adoption in Latin America of some stabilizing features that were well-tested in Germany and Spain. Nino, *supra* note 2, at 60-61.

Democracy concluded with regard to Argentina, “[t]he main point of the institutional transformation proposed by the Council is to change our presidential system of government to a ‘mixed’ system.”¹³⁴ The conclusion warrants some additional commentary.

VI. ANTI-DEMOCRATIC FEATURES OF PRESIDENTIALISM? SEVERAL OBSERVATIONS ON PRESIDENTIALISM, AUTHORITARIANISM, AND TOTALITARIANISM

Observation that U.S. presidentialism does not fit Latin American needs has been often translated into full-fledged criticism of the presidential system *in toto*, and its portrayal as inherently “less democratic” than parliamentary or mixed systems. Juan J. Linz wrote that, “[a] careful comparison of parliamentarism as such with presidentialism as such leads to the conclusion that, on balance, the former is more conducive to stable democracy than the latter.”¹³⁵ Carlos S. Nino elaborated even further on this thesis:

In practical terms, this [counterbalancing corporate power] requires the promotion of broad popular participation in voting, discussion, and direct decisions, and political parties organized on the basis of principles and programs, with active and participative members and with an internal democracy whose results are enforced in a disciplined way. But this kind of a strong democracy is functionally incompatible with a presidentialist system of government, which tends to weaken political parties; further, even if this weakening does not occur for diverse historical and cultural factors, the difficulties inherent in the presidential system—the erosion of the presidential figure, blockages between powers, the difficulties of forming coalitions—are serious and dangerous threats to the stability of the system.¹³⁶

¹³⁴ The Report elaborated on the benefits of the transition. *Constitutional Reform in Argentina: Council for the Consolidation of Democracy*, in PRESIDENTIAL GOVERNMENT, *supra* note 2, at 158-61.

A mixed system, in turn, allows for the formation of the said alliances while maintaining the personalities of the parties involved—and consequently democratic pluralism—due to the temporary nature of the agreements. . . . In semi-presidential systems, it is of utmost importance to delineate precisely the functions of the President and those of the prime minister and his or her government.

Id.

¹³⁵ Juan J. Linz, *The Perils of Presidentialism*, in PRESIDENTIAL GOVERNMENT, *supra* note 2, at 119 (emphasizing that “[t]his conclusion applies especially to nations with deep political cleavages and numerous political parties; for such countries, parliamentarism generally offers a better hope preserving democracy.”).

¹³⁶ Nino, *supra* note 2, at 60.

Nino's observation brings to mind the chicken and egg game and the syllogism presented above raises a lot of reservations. Making a conjunction between statements that presidentialism is less democratic than other systems and presidentialism does not fit Latin America is at least debatable. The debate brings with it shadows of the dispute on "circulation" of political systems, namely inevitable transitions of presidentialism into authoritarianism from the one side of a spectrum, and transition of totalitarianism to authoritarianism from the other side. Very few of these "apparently inevitable" processes have been confirmed by practice.

The analyses of the last stages in the crisis of communism posed the question about a transition from a totalitarian system into an authoritarian model of government. The possibility of evolutionary, rather than revolutionary, change seemed to be supported by reformism and revisionism of the 1950s and later by the Gorbachev's reforms of the 1980s. The first period brought up the concept of communism with "a human face" or "reform from within." The second period opened a Pandora's Box of speculation on the effectiveness of *perestroika* and *glasnost*.¹³⁷

The predictions of evolutionary transformation of the Soviet totalitarian regime did not prove true. The crisis of communist ideology was irreversible. It undermined the rudiments of communist morality and corroded not only Marxist-Leninist values, but also the functioning of the pragmatic components of the system, namely the party bureaucracy and *nomenklatura* system. Without these key ingredients the system could be overturned but not reformed.¹³⁸

The question remains whether the recent Chinese experiments with market mechanisms provide arguments supporting the thesis on the possible transformation of totalitarianism into an authoritarian system of government. In the author's opinion, the evidence is still insufficient. The flirtation of the Chinese regime with the Western mechanisms did not replace totalitarian socialism; it only reduced the importance of one of the key elements that characterized the socialist economy, namely exclusive ownership of productive resources by the state. The other ingredients, such as general income redistribution controlled by the government, central planning, and democratic centralism, which combines a centralized decision-making process with initiative of local managers, remained largely intact. Several crucial elements of totalitarian rule still exist. The society is severely atomized despite the rhetoric emphasizing the values of "collective mentality." The communist ideology is used to verify the credibility of individuals, and the system of "negative selection," which promotes compliant, conformable "yes-men," still func-

¹³⁷ For further comment on communism and the Soviet Constitution see generally RETT R. LUDWIKOWSKI, *THE CRISIS OF COMMUNISM: ITS MEANING, ORIGINS AND PHASES* (1986); Rett R. Ludwowski, *Soviet Constitutional Changes of the Glasnost Era: A Historical Perspective*, 10 N.Y. L. SCH. J. INT'L & COMP. L 119 (1989).

¹³⁸ LUDWIKOWSKI, *THE CRISIS OF COMMUNISM*, *supra* note 137, at X.

tions.¹³⁹ The further transformation of the system toward authoritarianism cannot be ruled out but is by no means inevitable.

The post-socialist political transformation by countries of the region of former Soviet dominance has been more instructive. Crushing totalitarianism did not guarantee a smooth or automatic transition to democracy, rather a significant political vacuum was created by geopolitical circumstances and resulted in uncertainty, confusing the process of adopting an appropriate system of governance. The early expectations of the easy victory of parliamentarism over the presidential system in this region proved to be only partially true. These expectations were based on the assumption that the people of the post communist countries, disenchanted with the uni-personal communist leadership, would view strong presidents as potential dictatorial figures, and the presidential systems consequently less representative and democratic. It was also expected that the familiarity of constitutional drafters with the traditional socialist concept of sovereignty of parliament would contribute to the natural preference for parliamentary systems. In fact, while parliamentarism generally prevailed in the satellite states of the former Soviet bloc and in the Baltic States, it celebrated no successes in the other Soviet republics.¹⁴⁰ The new states of Caucasus and Central Asia followed the suit of Slavic republics of Russia, Ukraine and Belarus and clearly opted for an authoritarian system hidden behind presidentialist rhetoric. Still, the totalitarian system did not simply evolve into authoritarianism. It was crushed and replaced formally by presidentialism, which deviated into authoritarianism.

Early experiments with presidentialism by the new post-socialist countries seem to duplicate some of the Latin American experiences. As Jacques Lambert wrote,

In the most frequent, almost normal type of authoritarian regime in Latin America, the presidential regime operates in such a way that congress, although legally in possession of the powers provided by the constitution, is in fact subject to the president's will. Thus, the institutions provided by the constitution remained undiminished as instruments of government, but those who govern make unforeseen use of those instruments.¹⁴¹

This observation fits perfectly with the post-communist experience; however, it emphasizes only how little these regions have really taken from the U.S. model.

¹³⁹ For a more general discussion of the main ingredients of totalitarianism, see *id.* at 32-33.

¹⁴⁰ See WIKTOR OSIATYNSKI, *TWOJA KONSTYTUCJA (YOUR CONSTITUTION)* 82 (1997). See also Holmes, *supra* note 35, at 39; Ludwikowski, *supra* note 15, at 31-41.

¹⁴¹ Lambert, *supra* note 120, at 333.

As this article attempts to prove, the presidential system of the United States has its theoretical roots in the theory of the separation of powers.¹⁴² Its framework, however, was enhanced by the charismatic personalities of early presidents such as George Washington, Thomas Jefferson, and James Madison. Democratic components of the system were not only rooted in the Constitution of the United States but also solidified by the political culture of North American societies.

The experience of several post-socialist Soviet republics and Latin American states only prove that the presidential system may not fit countries without a functioning system of checks and balances; protected by a social consensus and maturity of political leaders; and mature political culture of the people, namely cultural foundations, traditions, instruments of social dialogue, developed systems of communication, and well-balanced emotions. Observation confirms the well-known understanding that democratization could not be accomplished overnight regardless of whether it is attempted within a parliamentary or presidential framework. This conclusion does not prove that the parliamentary or mixed systems would be a panacea for all the problems of the Latin American or post-communist societies; or that the presidential system is inherently "less democratic" than parliamentary systems of governance and for these reasons more exposed to traps of authoritarianism.

Analysis of the former Soviet republics' experiments shows that these countries replaced communist decorative, pseudo-democratic language by rhetoric of presidentialism. Most of the leaders of the new Central Asian or Caucasian republics claim that they picked a presidential model as more democratic than a parliamentary system. In fact, many of the new governments are already "mixed" in a way that does not have much in common with the U.S. model. Incorporation of features of a parliamentary system, such as the right of a head of the state to dissolve the legislature (in Armenia, Belarus, Russia, Ukraine, Kazakhstan, Kyrgyzstan, Uzbekistan), and the incorporation of an institution of Prime Minister controlled by the President, actually only contributes to strengthening the presidential power. The point is that, with the constitutions still having a window-dressing character, the constitutional "mixing" resulted in more, not less, power reserved for the Presidents and did not guarantee either stability or democratization of the system.

To sum up, neither the thesis about the stabilizing character of the "mixed" systems or about anti-democratic features of presidentialism *in toto* are sufficiently supported by solid arguments. This author is not inclined to univocally glorify the U.S. system; it has its own problems, which would require a separate commentary.¹⁴³ Saying this does not mean that the U.S. system is inherently "less democratic" than other systems. Without preparing a litmus-test of the level of sufficient "democra-

¹⁴² Verney, *supra* note 21, at 184.

¹⁴³ For more comments, see generally *Ludwikowski, supra* note 6.

tization” based on the comparative analysis of many factors, (such as active involvement of its citizenry in constitutional dialogue, development of mechanisms supporting civic society, development of institutions of direct public participation in power, everyday public political activity, influence of media on political life, and many others) the thesis about the non-democratic character of the presidential system is not well-founded. Moreover, it is more confusing than useful for the evaluation of projected reforms in Latin America.

VII. CONCLUSIONS: WILL MORE “MIXING” WORK FOR LATIN AMERICA?

The main goal of this Article was to report on the complexity of the process of adopting well-tested constitutional models of governance. The problems with a faithful assimilation of classic models usually result in searching for “mixed” systems that blend together features developed by a variety of geopolitical circumstances. Unfortunately, the hybrid models rarely work according to expectations of the governmental engineers. The following summaries wrap up the observations made above.

First, Latin American intentions to experiment with the U.S. presidential model are unquestionable. It is, however, equally clear that the countries of this region attempted to build this model into a civil law framework while wrestling with geo-political circumstances, which have been much different than those in the United States. The attempt resulted in early blending of the features of civil and common law systems, the attempt to reconcile the concepts of centralized and decentralized judicial review, and efforts to mix the presidential and parliamentary models of governance.

Second, the authoritarian experiences of Latin American countries, and many other problems faced by the region’s political communities, seemed to justify the reflection emphasizing inherent problems of the presidential system itself rather than the deficiencies in the adoption process. Whether the objective problems of the region or the inherent problems of the system to be adopted came first has never been clear. In fact, the explanation of this issue is not trivial at all. The diagnosis of the “disease” is not really a pure result of a chicken and egg game; it might weigh heavily on the Latin American future. It has to be clearly stated that the experiments with presidentialism proved only that the politics do not tolerate any vacuum. Presidentialism did not work well in this region, not because the system is not fundamentally democratic, but because the Latin American societies were not prepared for its assimilation. For example, widely discussed corporatism began replacing the democratic social mechanisms and hampering the process of democratic transformation in Latin America, not because this process was inevitable in the presidential framework, but because elements balancing the system, such as parties, court structures, judicial review, features of political and legal cul-

ture of these societies, and many others, did not work properly. Although the truth is usually somewhere between two extremes, the question of which of these phenomena came first is not meaningless. Favoring either “egg” or “chicken” suggests different remedies for Latin American problems.

Third, Latin American experiences with over-powerful presidencies are well known, and numerous remedies adopted to improve the system were tested repeatedly. *Opinio juris* suggested that reforms, such as no re-election schemes for presidents, experiments with collective executives, creation of independent agencies, elimination of corporatism or praetorians,¹⁴⁴ and many others, should be carefully checked in practice. The studies usually concluded that Latin America has already overplayed its “presidentialism card” and needs to borrow again from other systems that were well checked in practice. This time, the target is the mixed, European quasi-presidential or quasi-parliamentary system. These suggestions have to be carefully examined.

The operation of the “mixed systems” is not usually contingent on the introduction of new checks; the excessive number of limitations and restraints may contribute to governmental impotence. The mixed systems stay operational not when more checks are added but when the right number of checks results in the balance between powers. This observation is well illustrated by the political histories of France and Germany, the models from which the leaders of Latin America countries most often try to borrow.

On the one hand, it must be remembered that the French Third and Fourth Republics had a parliamentary system in which the predominant position of the Parliament resulted in instability.¹⁴⁵ On the other hand, the charismatic personality of Charles de Gaulle, in the Fifth Republic, seemed to contribute to an excessive centralization of administration around the President’s office.¹⁴⁶ The situation changed in the eighties and nineties of the twentieth century, when the effectiveness of the presidential leadership in France seemed to be undermined by the lack of the majority’s support in the Parliament for de Gaulle’s successors. In fact, however, the French experiences with *cohabitation* between politically different Presidents and Prime Ministers did not weaken the President’s prerogatives. Rather, the differences strengthened two important elements of a parliamentary government, the National Assembly and Prime Minister. In effect, surprisingly, the stronger legislature and a stronger Prime Minister contributed to the stability of this system. The stability results not from a further “mixing” but from bringing the French model closer to a well-tested parliamentary-cabinet system purged of “spas-

¹⁴⁴ For additional comments see Nino, *supra* note 2.

¹⁴⁵ See DRAGNICH, *supra* note 37, at 211.

¹⁴⁶ *Id.* 211-12

modic"¹⁴⁷ features of quasi-presidentialism or excesses of "pure" parliamentarism of the Third and Fourth Republic.

In a similar way, the personality of Konrad Adenauer, the first post-war chancellor, contributed to the development of a specific German "chancellor democracy."¹⁴⁸ The fact that the system did not evolve into excessive forms of personal leadership is due to a number of factors viewed as constitutional stabilizing institutions, such as: constructive vote of no-confidence, legislative emergency procedures, two-party system, existence of independent and very active courts of general jurisdiction, as well as the aggressive Constitutional Tribunal that is separated from the regular courts. The point is that, in both France and Germany, the constitutional balance was reached not solely through restraining one partner of a political drama but rather through enhancing temporarily weakened partners or creating new centers of power or authority lacked in the country. The success of the reforms was also contingent on the maturity of the political and legal culture of these societies.

The experiences of France and Germany, and many other countries that tested constitutional "mixing," suggest that most often these states ended up with slightly modified versions of parliamentarism. The real power of executive leaders was contingent on their personalities and geopolitical circumstances, rather than on institutionally guaranteed prerogatives. For this reason, Latin America may not need more but less "mixing." The countries of this region have to realize that many institutions that have been already tested, such as the possibility of the dissolution of the parliaments by the Presidents, the establishment of double executives with Prime Ministers responsible both before the heads of state and legislative bodies, the no-reelection schemes, joint parliamentary and cabinet appointments, are not features of a "mixed system." These factors simply transformed the presidential model into a parliamentary one.¹⁴⁹ The problem is that, as is well illustrated by the experience of many post-communist states, the parliamentary model does not automatically guarantee democratization of the system of governance. Neither presidential nor parliamentary systems work as a Santa Clause to bring the democratic results overnight.

Fourth, the discussion whether the introduction of new institutions can improve the actual performance of the political systems or whether the systems have to "grow" like trees or flowers and need time to find their

¹⁴⁷ For wider discussion of "a spasmodic character" of French quasi-presidentialism, see Maurice Duverger, *A New Political System Model: Semi-Presidential Government*, 8 EUR. J. POL. RES. 165, 171 (1980). See also SARTORI, *supra* note 39, at 122 (1994).

¹⁴⁸ DRAGNICH, *supra* note 37, at 267-68.

¹⁴⁹ For more comments on suggested further concessions toward a parliamentary system, such as the joint parliamentary and cabinet appointments, and coalition governments, see Farer, *supra* note 20, at 1327.

own “fertilizers” is as old as political philosophy itself. The extremes of both approaches have to be evaluated and they have to mitigate the Latin American trust in the “quick fixing” of all regional problems.

For example, Latin American countries definitely need a mature party system and it cannot be set up from above by a quick institutional reform; the development of parties requires active grass-root movements rather than decisions made at the center of political leadership.

Latin America, most likely, has to abandon its experiments with a mixed system of judicial review; it needs a centralized, European style model rooted in civil law traditions and vesting the power of review in one special tribunal, separated from regular courts. The regional decentralized model, based on a semi-*stare decisis* principle, has never worked properly.

The region also needs a well-balanced system of checks and balances founded on the steadily developed political and legal culture of the Latin American societies. It needs not only multicultural constitutions protecting everyone’s rights but it also needs implementing laws, active ombudsmen, and real social attitudes involving indigenous groups and racial minorities in the everyday politics.¹⁵⁰ This goal cannot be reached exclusively through spectacular changes in the distribution of power. Strengthening of the weakened power has to be accompanied by a simultaneous process of the building of Latin American civic societies. It requires new communication systems, developed social dialogue, and a mature and well-educated judiciary. Most importantly, it requires public determination to protect the rule of law.

¹⁵⁰ See VAN COTT, *supra* note 118, at 78-87, 175-78. As Kirsten Carlson claimed, “Van Cott asserts that the constitutions written in Latin America in the 1990s are multicultural but she never established any criteria for determining whether a constitution is truly multicultural. Her only evidence of multiculturalism resides in the existence of constitutional provisions giving rights to indigenous groups.” Carlson, *supra* note 118, at 1477.

