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# Constitutionalism Through the Looking Glass of Latin America

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# Constitutionalism Through the Looking Glass of Latin America

MIGUEL SCHOR<sup>†</sup>

## ABSTRACT

Professor Schor's article explores why constitutionalism in Latin America took a different path than in the United States. In the wake of independence, constitutions were adopted throughout the New World to effectuate republican government. Yet constitutionalism in Latin America led to dictatorship whereas constitutionalism in the United States led to republican government.

The conventional answer to this issue is that the constitution was entrenched in the United States because law is independent from politics, whereas constitutions were not entrenched in Latin America because law is subservient to politics. The conventional answer posits that the cure for the uncertain constitutional environment in Latin America lies in crafting independent courts.

Professor Schor argues, however, that the conventional view overly emphasizes the role of independent courts in making constitutions work, while ignoring the role of "We the people." Constitutions become entrenched against political inroads when citizens are willing to mobilize on behalf of the fundamental rules of the game. The key to successful constitutionalism lies not in the separation of law and politics, but rather in the separation of constitutional politics from ordinary politics. Constitutions become entrenched when citizens share a belief that constitutional change requires a higher degree of consensus than changing an ordinary law. Such beliefs are constructed when broad social movements arise that seek to effectuate rights.

The issue of how constitutions become entrenched is an important one as new democracies throughout the world struggle with the problem of creating order. The historical experience of Latin America teaches us that democracies cannot establish order unless constitutions have deep social moorings. Constitutions must be constructed by social movements that seek to effectuate rights if new democracies are to long endure.

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## I. INTRODUCTION

*The internal effects of a mutable policy are . . . calamitous. It poisons the blessings of liberty itself. It will be of little avail to the people that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man who knows what the law is to-day can guess what it will be tomorrow.<sup>1</sup>*

The United States and the nations of Latin America became independent in the late eighteenth and early nineteenth centuries. Independence movements throughout the Americas were motivated by similar ideological currents and, as a consequence, constitutions were framed throughout the Americas to cement the victory of liberalism.<sup>2</sup> Although constitutions throughout the Americas were designed to institute republican government, the United States clearly enjoyed a different political outcome than did the nations of Latin America. This Article explores why the founding of the Constitution led to republican government in the United States whereas the founding of constitutions led to oligarchy and dictatorship in Latin America for much of that region's history.

The answer to this question lies in the historical processes by which constitutions become entrenched so that they gain the political support they need to withstand the buffeting of politics. The issue of how constitutions become entrenched is of grave contemporary relevance as Latin America is undergoing profound transformations that were touched off by the crumbling of authoritarian regimes throughout the region in the

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1. THE FEDERALIST NO. 62, at 304 (James Madison) (Terrence Ball ed., 2003).

2. The best comparative account of independence in the Americas is LESTER D. LANGLEY, THE AMERICAS IN THE AGE OF REVOLUTION 1750–1850 (1996). Liberalism in Latin America was a more contested ideology than in the United States, however. It typically took the form of economic rather than political liberalism. See *infra* Part III; Jeremy Adelman & Miguel Angel Centeno, *Between Liberalism and Neoliberalism: Law's Dilemma in Latin America*, in GLOBAL PRESCRIPTIONS: THE PRODUCTION, EXPORTATION, AND IMPORTATION OF A NEW LEGAL ORTHODOXY 139 (Yves Dezalay & Bryant G. Garth eds., 2002); Charles A. Hale, *Political Ideas and Ideologies in Latin America, 1870–1930*, in IDEAS AND IDEOLOGIES IN TWENTIETH CENTURY LATIN AMERICA 133 (Leslie Bethell ed., 1996).

waning decades of the twentieth century.<sup>3</sup> Although politics democratized, there are deep concerns about the quality of democratic governance throughout the region.<sup>4</sup> Presidents are elected but often act and look much like the dictators or *caudillos* of the nineteenth century.<sup>5</sup> Elections are thriving, but power is not curtailed by constitutions. The seriousness of the failure to entrench constitutional rules cannot be underestimated. The legitimacy of a democracy rests on majority rule and on an agreed upon set of ground rules that limit the power of elected leaders. If democracies fail to institutionalize the fundamental rules of the game, support for democracy will erode.<sup>6</sup>

A commitment to the fundamental rules of the game in Latin America has clearly not been institutionalized. Constitutional law in Latin America, which formally is intended to limit political power,<sup>7</sup> behaves very differently than it does in the United States because of the remarkable ease with which constitutional provisions can be ignored or changed.<sup>8</sup> Elections have become the route to power but they do not guarantee stability as a number of elected presidents have been ousted from power before their terms expired.<sup>9</sup> Once in office, presidents find that constitutions provide little in the way of checks and balances. It took Ernesto Zedillo, the former president of Mexico, one month to amend the constitution

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3. See generally SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* (1991) (detailing the transition from authoritarianism to democracy in Latin America as part of a larger worldwide trend which has become known as the “third wave” of democratization).

4. For a fine overview of the problems of democracy in the region, see FORREST D. COLBURN, *LATIN AMERICA AT THE END OF POLITICS* (2002).

5. Guillermo O’Donnell, *Delegative Democracy*, 5 J. DEMOCRACY 55 (1994); see also Carlos S. Nino, *Hyper and Constitutional Reform in Argentina*, in *INSTITUTIONAL DESIGN IN NEW DEMOCRACIES* 161 (Arend Lijphart & Carlos H. Waisman eds., 1996); Bolivar Lamounier, *Brazil: The Hyperactive Paralysis Syndrome*, in *CONSTRUCTING DEMOCRATIC GOVERNANCE: LATIN AMERICA AND THE CARIBBEAN IN THE 1990s*, at 166 (Jorge Domínguez & Abraham Lowenthal eds., 1996). Obviously, not all of the presidents in the region have the powers of an elected despot. The more successful democracies in the region, such as Costa Rica, have presidents with more limited powers. See Scott Mainwaring & Matthew Soberg Shugart, *Conclusion: Presidentialism and the Party System*, in *PRESIDENTIALISM AND DEMOCRACY IN LATIN AMERICA* 394, 436 (Scott Mainwaring & Matthew Soberg Shugart eds., 1997).

6. The failure of constitutions to limit executive power is not the sole reason that support for democracy is waning in the region. The inability of the governments in the region to provide the public goods that citizens demand is also a source of dissatisfaction. COLBURN, *supra* note 4, at 33–44. The importance of effectuating constitutional constraints cannot be underestimated, however. It is, after all, easier to agree on a set of fundamental rules by which political decisions ought to be made, than it is to agree on the outcome of those decisions. In short, there are both practical and normative reasons why citizens support democracy.

7. See ANTONIO COLOMER VIADEL, *INTRODUCCIÓN AL CONSTITUCIONALISMO IBEROAMERICANO* (1990), for a good general discussion of constitutionalism in Latin America. See Jonathan Hartlyn & Arturo Valenzuela, *Democracy in Latin America Since 1930*, in *LATIN AMERICA SINCE 1930: ECONOMY, SOCIETY, AND POLITICS* 99 (Leslie Bethell ed., Cambridge History of Latin Am., Series No. 6, pt. 2, 1998), for an insightful, but brief, treatment of the topic. See ÁNGEL R. OQUENDO, *LATIN AMERICAN LAW* (2005) (manuscript on file with author), for a very fine reader on the issues of constitutional law in Latin America. See Mainwaring & Shugart, *supra* note 5, at 440–60, for a useful compendium of the formal powers found in the constitutions of the region.

8. A good illustration as to the ease with which constitutions can be changed is provided by the sheer number of constitutions that Latin America has experienced. Professor Rosenn dryly observes that if the world were to be destroyed and the only records left of constitutionalism in the Americas were the constitutions themselves, future archeologists would believe that constitutionalism was more successful in Latin America than in the United States—given the length and number of constitutions that could be found in Latin America! Keith S. Rosenn, *The Success of Constitutionalism in the United States and Its Failure in Latin America: An Explanation*, 22 U. MIAMI INTER-AM. L. REV. 1 (1990). In the nineteenth century alone, there were over one hundred constitutions. See BRIAN LOVEMAN, *THE CONSTITUTION OF TYRANNY: REGIMES OF EXCEPTION IN SPANISH AMERICA* 370 (1993).

9. The precise number of presidents forced from office since the region democratized in the 1980s is a moving target. Thirteen presidents had been forced from office as of 2004. Arturo Valenzuela, *Latin American Presidencies Interrupted*, 15 J. DEMOCRACY 5, 8–9 (2004). Since 2004, presidents have been forced from office in Ecuador, see *infra* note 15, and Bolivia, Juan Forero, *Bolivia Installs New Leader With Very Long “To Do” List*, N.Y. TIMES, June 11, 2005, at A7.

so as to fundamentally transform the manner in which the Mexican Supreme Court exercised constitutional judicial review.<sup>10</sup> President Hugo Chávez swore in his oath of office in 1998 that he would do away with Venezuela's existing constitution.<sup>11</sup> He cemented his power by using a constitutional convention to promulgate a new constitution in 1999.<sup>12</sup> Former president Alberto Fujimori of Peru mounted a popular coup against his own government by claiming, in part, that the judiciary was corrupt. He fired three justices who voted to uphold a constitutional prohibition against running for a third term.<sup>13</sup> Former president Carlos Saúl Menem of Argentina stacked the Supreme Court with his cronies who stoutly defended Menem's decree power to legislate as he wished without obtaining congressional approval.<sup>14</sup> President Lucio Gutiérrez of Ecuador was forced out of office because of widespread popular unrest caused, in part, by his decision to sack a Supreme Court that sided with his political opponents.<sup>15</sup> The ease with which constitutions can be changed or ignored is facilitated by the widespread mistrust of the judiciary that exists in Latin America.<sup>16</sup>

Latin America's experience with constitutions illustrates that democracy comes in more than one flavor. At one end of the spectrum are consolidated or liberal democracies that have both vertical and horizontal accountability.<sup>17</sup> Consolidated democracies have elections that provide vertical accountability and laws and constitutions that provide the mechanisms used by a complex web of actors to ensure horizontal accountability.<sup>18</sup> Elected leaders do not know *ex ante* what the outcome of any political dispute will be because disputes are mediated by relatively fixed rules.<sup>19</sup> At the other end of the spectrum lie

10. Jorge A. Vargas, *The Rebirth of the Supreme Court of Mexico: An Appraisal of President Zedillo's Judicial Reform of 1995*, 11 AM. U. J. INT'L L. & POL'Y 295 (1996).

11. OQUENDO, *supra* note 7. Until Chávez's election, Venezuela's 1958 Constitution was considered a successful example of constitution-making. Miriam Kornblith, *The Politics of Constitution-Making: Constitutions and Democracy in Venezuela*, 23 J. LATIN AM. STUD. 61 (1991).

12. Jennifer McCoy, *The Referendum in Venezuela: One Act in an Unfinished Drama*, 16 J. DEMOCRACY 109, 110–13 (2005).

13. LINN A. HAMMERGREN, *THE POLITICS OF JUSTICE AND JUSTICE REFORM IN LATIN AMERICA: THE PERUVIAN CASE IN COMPARATIVE PERSPECTIVE* 175–201 (1998).

14. See Daniel Brinks, *Judicial Reform and Independence in Brazil and Argentina: The Beginning of a New Millennium?*, 40 TEX. INT'L L.J. 595, 599–603 (2005); Christopher Larkins, *The Judiciary and Delegative Democracy in Argentina*, 30 COMP. POL. 423 (1998).

15. See Juan Forero, *Ecuador's President Vows to Ride Out Crisis Over Judges*, N.Y. TIMES, Apr. 18, 2005, at A12; Juan Forero, *Ecuador's Leader Flees and Vice President Replaces Him*, N.Y. TIMES, Apr. 21, 2005, at A3.

16. WILLIAM C. PRILLAMAN, *THE JUDICIARY AND DEMOCRATIC DECAY IN LATIN AMERICA: DECLINING CONFIDENCE IN THE RULE OF LAW* (2000).

17. See LARRY DIAMOND, *DEVELOPING DEMOCRACY: TOWARD CONSOLIDATION* 10–13 (1999); JUAN J. LINZ & ALFRED STEPAN, *PROBLEMS OF DEMOCRATIC TRANSITION AND CONSOLIDATION: SOUTHERN EUROPE, SOUTH AMERICA, AND POST-COMMUNIST EUROPE* 12–15 (1996); FAREED ZAKARIA, *THE FUTURE OF FREEDOM: ILLIBERAL DEMOCRACY AT HOME AND ABROAD* 17 (1st ed. 2003); Peter H. Smith, *The Rise of Illiberal Democracy in Latin America* (Oct. 18, 2004), available at [http://www.clas.berkeley.edu:7001/Events/fall2004/10-18-04-smith/Smith\\_Illiberal\\_Democracy\\_d2.pdf](http://www.clas.berkeley.edu:7001/Events/fall2004/10-18-04-smith/Smith_Illiberal_Democracy_d2.pdf).

18. *DEMOCRATIC ACCOUNTABILITY IN LATIN AMERICA* (Scott Mainwaring & Christopher Welna eds., 2003); *THE SELF-RESTRAINING STATE: POWER AND ACCOUNTABILITY IN NEW DEMOCRACIES* (Andreas Schedler et al. eds., 1999).

19. ADAM PRZEWORKSI, *DEMOCRACY AND THE MARKET: POLITICAL AND ECONOMIC REFORMS IN EASTERN EUROPE AND LATIN AMERICA* 10–50 (1991). It is rare for political leaders to seek to change the rules to dictate the outcome of a dispute in a consolidated democracy. The extraordinary political attention paid to Congress' attempt to intervene in a fully litigated state judicial decision to remove feeding tubes from Terri Schiavo illustrates, among other things, how unusual such political machinations are. See David K. Kirpatrick, *How Family's Cause Reached the Halls of Congress*, N.Y. TIMES, Mar. 22, 2005, at A1. The federal judges who dealt with the unusual jurisdictional statute in question frustrated the intent of Congress by refusing to reach the merits of the state court decision because they understood that the integrity of the rules that underpin the democratic process was at stake. See Adam Liptak, *Schiavo Lesson on Judiciary Trump Card*, N.Y. TIMES, Mar. 24, 2005, at A21; Abby Goodnough & William Yardley, *Federal Judge Condemns Intervention in Schiavo Case*, N.Y. TIMES, Mar. 31,

illiberal democracies where leaders are elected but constitutions fail to limit power. Elected leaders know *ex ante* the outcome of a dispute because the rules can be ignored or changed in the middle of a dispute.

The issue that this Article explores is how “governments of laws and not of men” might emerge in Latin America.<sup>20</sup> Democracies are consolidated when they become the “only game in town” and dictatorship becomes unthinkable.<sup>21</sup> What is needed is an attitudinal shift so that the citizens and elites become wedded to the rules of the political game.<sup>22</sup> The decisive step in democratic consolidation occurs when there is “devolution of power from a group of people to a set of rules.”<sup>23</sup> For democracy to work, citizens have to be willing to support the constitution against inroads by elected leaders. The recent transitions to democracy that have occurred in Latin America,<sup>24</sup> however, demonstrate that citizen support for elections does not necessarily translate into support for constitutional limits on the exercise of political power. Horizontal accountability does not emerge at the same time as does vertical accountability. A constituency for a constitution is more difficult to construct than is a constituency for electing leaders.

The process by which horizontal accountability emerges so that constitutions become behaviorally as well as formally entrenched against the shifting sands of politics is not well understood.<sup>25</sup> Constitutional law in Latin America has an almost surreal quality given that constitutions do not provide accurate maps to how power is distributed.<sup>26</sup> All legal orders have a gap between the law on the books and the law as practiced<sup>27</sup> but this gap is broader in Latin America than in the United States.<sup>28</sup> In Karst and Rosenn’s pioneering *Law and Development in Latin America: A Case Book*, the authors suggest that the enormity of the gap is captured by the Spanish and Portuguese maxim: “For our friends, everything; for strangers, nothing; and for enemies, the law!”<sup>29</sup> The anthropologist Roberto da Matta argues that hierarchical social relations provide a more accurate map to power in Brazil

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2005, at A14 (“A federal appeals court in Atlanta refused Wednesday to reconsider the case of Terri Schiavo, with one of the judges rebuking President Bush and Congress for acting ‘in a manner demonstrably at odds with our founding fathers’ blueprint for the governance of a free people.”).

20. *Marbury v. Madison*, 5 U.S. 137, 163 (1803) (“The government of the United States has been emphatically termed a government of laws, and not of men.”).

21. DIAMOND, *supra* note 17, at 65.

22. *Id.* at 64–73.

23. PRZEWORKSI, *supra* note 19, at 14.

24. The problem of electoral democracy and lack of constitutional entrenchment is not limited to Latin America, however. Many of the polities that democratized in the latter part of the twentieth century during the “third wave” of democratization suffer from this problem. ZAKARIA, *supra* note 17, at 17–18.

25. There is a rich literature dealing with the politics of transitions from authoritarianism to electoral democracy. See generally HUNTINGTON, *supra* note 3; GUILLERMO O’DONNELL & PHILIPPE C. SCHMITTER, *TRANSITIONS FROM AUTHORITARIAN RULE: TENTATIVE CONCLUSIONS ABOUT UNCERTAIN DEMOCRACIES* (1986). There is considerably less literature on the more difficult transition from illiberal to constitutional democracy. An invaluable study of the problem is RUTI G. TEITEL, *TRANSITIONAL JUSTICE* (2000).

26. A similar problem occurs in Africa. See H.W.O. Okoth-Ogendo, *Constitutions Without Constitutionalism: Reflections on an African Political Paradox*, in *CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD* 65, 70–80 (Douglas Greenberg et al. eds., 1993).

27. KARL N. LLEWELLYN, *THE BRAMBLE BUSH ON OUR LAW AND ITS STUDY* 13–18 (Oceana Publ’ns 1951) (1930).

28. The American Constitution is not immune to this gap. Karl N. Llewellyn, *The Constitution as an Institution*, 34 *COLUM. L. REV.* 1, 38–40 (1934); see Stephen M. Griffin, *Constitutionalism in the United States: From Theory to Politics*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 37, 56 (Sanford Levinson ed., 1995).

29. KENNETH L. KARST & KEITH S. ROSENN, *LAW AND DEVELOPMENT IN LATIN AMERICA: A CASE BOOK* 60 (1976).

than does the law.<sup>30</sup> Rather than the rule of law, Latin America is said to suffer from the “(un)rule of law.”<sup>31</sup> Given the magical nature of the formal constitutional rules in Latin America, this Article will peer through the looking glass of constitutionalism in Latin America to explore the process by which constitutions become entrenched against political inroads by examining three interrelated puzzles.

The first, which is discussed in Part II *infra*, concerns why the American Constitution limits political power. To understand why horizontal accountability has not emerged in Latin America, we first need to understand why the American Constitution limits political power. There are two competing answers to this question. The conventional account of constitutionalism posits that constitutions can become entrenched only if they operate as a species of law.<sup>32</sup> That is, only if constitutional law rests on “neutral principles” will it be respected by other actors.<sup>33</sup> The problem with the conventional account is that it confuses the end of a long historical process with the process itself. The constitution is not legitimate because the Supreme Court now enjoys the authority to issue orders that other political actors generally accept but because the constitution gained broad societal acceptance in a contingent, historical process.<sup>34</sup>

The other principal account of American constitutionalism is a realist one.<sup>35</sup> It posits that the secret of the success of the American Constitution lies not in a shared understanding that constitutional law must be kept distinct from politics by having the former rest on nonpolitical, neutral principles, as the conventional account argues, but rather in a shared understanding that constitutional politics is played under different rules than ordinary politics. American constitutionalism rests on a broad societal understanding that changing the constitution requires a greater degree of debate and citizen mobilization than is required for changing ordinary statutes. By bringing “We the people” back into the story of the constitution, the realist account rightly focuses attention on how constitutions are socially constructed over time. The constitutional enterprise is, as John Finn notes, an “effort to create a particular type of political community, a constitutional democracy that can survive the corrupting influences of time and fortune.”<sup>36</sup>

The second puzzle, which is discussed in Part III *infra*, explores why polities with similar constitutions sometimes enjoy very different governments. The newly independent nations of Latin America adopted constitutions that formally looked like that of the United States, yet the result was oligarchy and dictatorship, not democracy. The scholarly consensus is that constitutions operated differently in Latin America than in the United States because they were planted on a social soil that was inimical to democracy.<sup>37</sup> Laws are not, however, merely a reflection of the larger social, economic, political, and cultural

30. ROBERTO DA MATTA, CARNIVALS, ROGUES, AND HEROES: AN INTERPRETATION OF THE BRAZILIAN DILEMMA 187–88 (1991) (noting that the core of the Brazilian dilemma is that laws proclaim equality but that the laws are trumped by an inegalitarian and authoritarian social structure); *see also* ANTHONY W. MARX, MAKING RACE AND NATION: A COMPARISON OF SOUTH AFRICA, THE UNITED STATES, AND BRAZIL 166–76 (Cambridge Studies in Comparative Politics Series, 1998) (observing that Brazilian elites chose to rely on informal social norms rather than the law to maintain unequal racial relations).

31. THE (UN)RULE OF LAW & THE UNDERPRIVILEGED IN LATIN AMERICA (Juan E. Méndez et al. eds., 1999) [hereinafter THE (UN)RULE OF LAW].

32. *See infra* Part II.A.

33. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 9–10 (1959).

34. STEPHEN M. GRIFFIN, AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS 5–14 (1996); TEITEL, *supra* note 25, at 207 (noting that the process by which the U.S. Constitution was formulated was more piecemeal and less foundational than the leading accounts suggest).

35. *See infra* Part II.B.

36. John E. Finn, *The Civic Constitution: Some Preliminaries*, in CONSTITUTIONAL POLITICS: ESSAYS ON CONSTITUTION MAKING, MAINTENANCE, AND CHANGE 41, 42 (Sotirios A. Barber & Robert P. George eds., 2001).

37. *See infra* Part III.A.

environment in which they are embedded.<sup>38</sup> The gap between written constitutions and political reality in the region is not simply a result of the differing conditions that existed between Latin America and the United States at the time of independence.<sup>39</sup> The gap is also a result of how constitutions were socially constructed.<sup>40</sup> The elites or framers who shaped Latin America's constitutions believed that economic development had to occur before the masses could be allowed to participate in democracy. As a consequence, these elites opted for malleable constitutions. The decision to make constitutions malleable enhanced elite power as rulers knew in advance the results of any political outcome, but it came at the expense of the attitudinal shift needed for democracy to be consolidated. There was little reason for citizens to become wedded to rules that could be readily changed at the behest of their rulers. Constitutions are not entrenched in Latin America because political leaders do not fear citizen mobilization when the fundamental rules of the game are violated.

The third puzzle, which is discussed in Part IV *infra*, is why it has proven so difficult to entrench constitutions in Latin America. The formal rules of the game had to be malleable if elites were to retain power, but the consequences have been, as Madison surmised, "calamitous."<sup>41</sup> Every change in political leadership is a potential constitutional crisis if the selection of new leaders means that the fundamental rules of the game might be changed with the adoption of a new constitution.<sup>42</sup> The sheer number of constitutions adopted in Latin America stands mute testimony to the regularity of irregular accession to power by presidents and dictators. The logic of this constitutional cycle can only be broken if power is devolved from elites to rules. This in turn can occur only if constitutional politics become separated from ordinary politics. Societies gain the understanding that constitutions should be difficult to change when broad social movements arise that seek to effectuate rights.<sup>43</sup> The experience of the United States teaches us that rights become entrenched when they gain a constituency. The experience of Latin America, on the other hand, teaches us that without deep social moorings, constitutions can neither limit power nor withstand the test of time.

## II. CONSTITUTIONALISM IN THE UNITED STATES

*There is almost no political question in the United States that is not resolved sooner or later into a judicial question. Hence the obligation under which the parties find themselves in their daily polemics to borrow from the ideas and language of justice . . . . Judicial language thus becomes in a way the vulgar language; the spirit of the lawyer, born inside the schools and the courts, therefore spreads little by little beyond their precincts; it so to speak infiltrates*

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38. BRIAN Z. TAMANHA, *A GENERAL JURISPRUDENCE OF LAW AND SOCIETY* 209 (2001) (concluding that the view that law is a mirror of society has prevented "us from seeing the many other things that law . . . does and is used to do").

39. See Rosenn, *supra* note 8, for a brief overview of the salient differences. These differences are not, however, as great as is often imagined. See LANGLEY, *supra* note 2, at 154–55.

40. See *infra* Part III.B; see also TEITEL, *supra* note 25 (arguing that during transitional periods law can play an important role in constituting society).

41. THE FEDERALIST NO. 62, *supra* note 1, at 304.

42. See *infra* Part IV.A.

43. See *infra* Part IV.B.



*all society, it descends into the lowest ranks, and the people as a whole in the end contract a part of the habits and the tastes of the magistrate.*<sup>44</sup>

The rise of democracy throughout the world had a profound impact on legal scholarship as comparative constitutionalism has become an important area of research.<sup>45</sup> Perhaps more importantly, it may help move constitutional theory away from a somewhat parochial focus on the normative limits of judicial review to more fertile issues such as the role that constitutions play in maintaining democracy.<sup>46</sup> Throughout the world, new democracies have sought to strengthen national high courts in a bid to entrench constitutions,<sup>47</sup> but it is not clear whether or how those constitutions will garner the political support they need to limit power successfully. Alexis de Tocqueville's observation concerning the attitudinal shift by the citizenry that was a necessary prerequisite for successful constitutionalism in the United States<sup>48</sup> has become a pressing research issue given that it has proven easier to elect leaders than to make constitutions work.

The United States has had a successful democracy for over two centuries, moreover, so it makes sense to search for an answer to this question in the American experience. American constitutionalism is, as Professor Griffin argues, a “distinctive political practice that deserves closer study than it has so far received.”<sup>49</sup> There are two competing accounts of what makes the American Constitution work.<sup>50</sup> One account posits that constitutions have the legitimacy they need to cabin political power only if they operate as a species of law and that constitutionalism, therefore, rests on a shared understanding that politics is distinct from law. This view comports with our conventional understanding of the role of the constitution in American democracy and is discussed in Part II.A *infra*. The weakness of the conventional account is that it assumes that courts are able to play the key role in maintaining constitutional limits on political power because citizens believe that the constitution should be treated as law. The notion of American exceptionalism<sup>51</sup>—that the constitution works because the United States is a liberal society with shared values—is deeply ingrained, but it does not provide an accurate picture of the political practices that sustain American constitutionalism. The reality of American politics is that citizens do not act as if constitutional maintenance should be the sole domain of courts<sup>52</sup> and are very

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44. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 257–58 (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. of Chi. Press 2000) (1835).

45. The advent of two casebooks and a major journal devoted to the subject illustrates the attention the subject is getting. Refer to *COMPARATIVE CONSTITUTIONAL LAW* (Vicki C. Jackson & Mark Tushnet eds., 1999); *COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS* (Norman Dorsen et al. eds., 2003); and the *INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW*, which is published in association with the New York University School of Law.

46. See Christopher L. Eisgruber, *Dimensions of Democracy*, 71 *FORDHAM L. REV.* 1723, 1747 (2003) (arguing that constitutional theory should “restore the dimensions of democracy that have for so long been absent from American constitutional scholarship” because of the issues raised by the worldwide expansion of democracy).

47. *THE GLOBAL EXPANSION OF JUDICIAL POWER* (C. Neal Tate & Torbjörn Vallinder eds., 1995) (examining the conditions necessary for the expansion of judicial power and analyzing the experiences of various countries, with particular attention given to European democracies and post-communist states).

48. DE TOCQUEVILLE, *supra* note 44, at 257–58.

49. *AMERICAN CONSTITUTIONALISM*, *supra* note 34, at x.

50. Finn, *supra* note 36, at 42. Professor Finn argues that one account emphasizes that the Constitution is law whereas the other principal account emphasizes the rule that a constitution plays in constituting a nation. Finn's analysis differs from that used in this Article, since his point of departure is how scholars view the constitution rather than the political practices that make constitutionalism possible.

51. LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION* (1955).

52. LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

much engaged in constitutional discourse.<sup>53</sup> The realist account of constitutionalism, which is discussed in Part II.B *infra*, provides a very different and better analysis of the political practices that underpin American constitutionalism because it moves courts away from the center of the constitutional universe by bringing “We the people” back into the story of American constitutionalism. It also does a better job of explaining how different polities and cultures may enjoy constitutional democracy because the focus is on the political practices that sustain constitutionalism rather than the law of the constitution. While the institutions of American government are not readily exported to other polities, as the constitutional experience of Latin America demonstrates,<sup>54</sup> the mechanisms by which citizens become wedded to constitutions are universal.

#### A. *The Conventional Account of Constitutionalism*

The conventional account of constitutionalism rests on two heroic assumptions: (1) the successful founding of the American Constitution was due to the propitious circumstances of American history and (2) the Constitution was the legal engine that maintained American democracy over time. The former rests on a triumphalist view of American history which holds that the United States enjoyed an equality of social conditions that made possible a democratic revolution that led to the promulgation of the Constitution. The latter posits that key to the success of American democracy in enduring for over two centuries is the legitimacy of the Constitution which in turn rests on maintaining a wall between law and politics. The key actor in this republican drama is the judiciary. Constitutions safeguard democracy by creating a system of checks and balances that are maintained over time by courts. Courts play the key role in maintaining constitutions whereas the task of transforming constitutions via amendment is political in nature. Amendments are the tool used to change these foundational documents to accommodate their strictures to evolving social, political, and economic conditions. The conventional account, in short, emphasizes a sharp break between law and politics and provides courts, principally the U.S. Supreme Court, with the principal role in maintaining the vigor of the Constitution over time.

Richard S. Kay in *American Constitutionalism*<sup>55</sup> provides a fine exposition of the conventional understanding of constitutionalism. He defines constitutionalism as the “trust . . . men repose in the power of words engrossed on parchment to keep a government in order.”<sup>56</sup> This trust flows from a particularly American innovation when it came to constitutionalism which was to fix the fundamental rules used to limit the power of government by putting those rules in writing.<sup>57</sup> Constitutions are able to maintain order because they are promulgated based on a “widely shared political consensus as to the nature

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53. MICHAEL KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE* xi, 217–54 (1986) (documenting the “perceptions and misperceptions” as well as the “knowledge and ignorance of ordinary Americans” regarding the Constitution).

54. *See infra* Part III.

55. Richard S. Kay, *American Constitutionalism*, in 2 *CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS* 16 (1998).

56. *Id.* (quoting Walton H. Hamilton, *Constitutionalism*, in 4 *ENCYC. SOC. SCI.* 255 (Edwin R.A. Seligman & Alvin Johnson eds., 1931)).

57. *Id.* at 27. A written constitution is clearly not a *sine qua non* of successful constitutionalism; England has managed to limit political power without one. Giovanni Sartori, *Constitutionalism: A Preliminary Discussion*, 56 *AM. POL. SCI. REV.* 853 (1961). Written constitutions differ from unwritten ones, however, in that written constitutions open the door to originalist interpretations that obviously make little sense with unwritten constitutions. ERIC BARENDT, *AN INTRODUCTION TO CONSTITUTIONAL LAW* 26–34 (1998) (arguing that the United Kingdom has a common law constitution that has evolved over time).

of the constituent authority in a polity”<sup>58</sup> and are interpreted in accordance with written rules. The key to keeping these rules fixed is to create an agency, namely the supreme court, which lacks political motivation and will interpret these rules, therefore, according to the “‘original intent’ of the constitutional enactors.”<sup>59</sup> In short, the success of American democracy in enduring for two centuries rests on the legitimacy of the constitution which, in turn, can only be maintained by a supreme court that observes interpretational niceties.<sup>60</sup>

Although the conventional account of constitutionalism emphasizes the role of the U.S. Supreme Court in explaining the success of American constitutionalism to the exclusion of almost all other factors, the conventional account also provides us with an idea of the sort of soil on which constitutions must be planted if they are to be successfully implemented. What is required is a society that is relatively egalitarian and enjoys a fair amount of ideological consensus.<sup>61</sup> Louis Hartz’s *The Liberal Tradition in America*,<sup>62</sup> for example, argues that the remarkable success of the Constitution and the subsequent power of the Supreme Court rest on the fact that the United States lacks a feudal past. As a result, the American Revolution was far gentler than in other parts of the world that experienced feudalism, such as Europe or Latin America.<sup>63</sup> The revolutionary wave that swept the North Atlantic world in the late eighteenth and early nineteenth centuries sought to usher in profound transformations. The difficulties that these transformations entailed cannot be underestimated as they required deep and profound political, economic, and social changes. The goals of these transformations were to replace monarchy with republican government; mercantilism with capitalism; and an inegalitarian, hierarchical social structure with egalitarianism. Hartz argues that the American Revolution was successful because the colonies did not need to undergo these transformations. The United States was exceptional because liberalism lacked any challengers. The Constitution worked because there were no fundamental struggles over values in the United States:

For the solution the constitutionalists offered to the frightful conflicts they imagined was a complicated scheme of checks and balances which it is reasonable to argue only a highly united nation could make work at all. Delay and deliberate confusion in government became intolerable in communities where men have decisive social programs that they want to execute.<sup>64</sup>

In short, American revolutionaries inherited a liberal society, which explains the success of the Constitution.

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58. Kay, *supra* note 55, at 30 (citation omitted).

59. *Id.* at 31.

60. Although the conventional account of constitutionalism clearly borrows from originalist interpretative methodology, the two are not the same. Originalism is a theory of how courts should interpret the constitution in a democracy. The argument is that courts must be originalist to maintain legitimacy. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Justice Antonin Scalia, *Common Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3 (Amy Gutmann ed., 1997). By contrast, the conventional account of constitutionalism has a deeper and broader target. It seeks to uncover the role that constitutions play in maintaining democracy over time.

61. A similar argument is often advanced to explain why Costa Rica has been Latin America’s most successful democracy. See JOHN A. BOOTH, *COSTA RICA: QUEST FOR DEMOCRACY* (1998).

62. HARTZ, *supra* note 51, at 9.

63. Latin America lacked a feudal nobility, which has led some scholars to argue that it lacks true feudalism. See, e.g., CLAUDIO VÉLIZ, *THE CENTRALIST TRADITION OF LATIN AMERICA* 16–28 (1980). Although Latin America lacked the formal legal structures of feudalism, there is no doubt that behaviorally it exhibited the key features of a feudal society. See IRVING A. LEONARD, *BAROQUE TIMES IN OLD MEXICO: SEVENTEENTH-CENTURY PERSONS, PLACES, AND PRACTICES* (1959).

64. HARTZ, *supra* note 51, at 85.

The importance given the Supreme Court in maintaining the Constitution by the conventional account of constitutionalism leads to a concrete set of policy prescriptions for the newly democratized nations of the world. If they wish to enjoy constitutional success, these nations must adopt the “best practices” of consolidated democracies, such as the United States.<sup>65</sup> These new democracies must seek to implement written constitutions by establishing and strengthening supreme or constitutional courts. The key to implementing constitutions is to have supreme courts with the independence to enforce constitutional guarantees without regard to political pressure to the contrary.<sup>66</sup> The power of the conventional account in our understanding of constitutionalism is illustrated by the extensive literature on judicial independence that has been written in the wake of the third wave of democratization.<sup>67</sup>

When it comes to providing advice for the new democracies of the world, the conventional account suffers from a latent but profound contradiction. These nations should adopt written constitutions and strengthen independent supreme courts, yet these institutions cannot work well when transplanted to societies that look markedly different than the United States.<sup>68</sup> The conventional account of constitutionalism rests on the notion of American exceptionalism, which, if correct, presents a fairly dim future for the new democracies of the world. Formal legal structures such as written constitutions and supreme courts that enjoy nominal independence are easy to transplant but what gives constitutional law its efficacy is a legal and political culture that cannot be transplanted. De Tocqueville’s observation that in the United States political issues eventually become judicial questions<sup>69</sup> presupposes, of course, that citizens are willing to accept the rule of law. Hartz makes a similar point when he concludes that the United States has little to offer the world when it comes to lessons about democracy by asking, “Can a people ‘born equal’ ever understand peoples elsewhere that have to become so? Can it ever understand itself?”<sup>70</sup> Yet the problem with the conventional account is that it does not tell us how constitutions may be implemented in other nations other than to wait for the mysterious process by which a people become acculturated to the rule of law.

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65. YVES DEZALAY & BRYANT G. GARTH, *THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES* 246 (2002); Miguel Schor, *The Rule of Law*, in *ENCYCLOPEDIA OF LAW AND SOCIETY: AMERICAN AND GLOBAL PERSPECTIVES* (David Clark ed., forthcoming 2006).

66. Peter H. Russell, *Toward a General Theory of Judicial Independence*, in *JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY: CRITICAL PERSPECTIVES FROM AROUND THE WORLD* 1, 13–21 (Peter H. Russell & David O’Brien eds., 2001).

67. See *JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH* (Stephen B. Burbank & Barry Friedman eds., 2002) [hereinafter *CROSSROADS*]; JENNIFER WIDNER, *BUILDING THE RULE OF LAW: FRANCIS NYALALI AND THE ROAD TO JUDICIAL INDEPENDENCE IN AFRICA* (2001); Russell, *supra* note 66; John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S. CAL. L. REV. 353 (1999); Christopher M. Larkins, *Judicial Independence and Democratization: A Theoretical and Conceptual Analysis*, 44 AM. J. COMP. L. 605 (1996); Mark J. Ramseyer, *The Puzzling (In)dependence of Courts: A Comparative Approach*, 23 J. LEGAL STUD. 721 (1994).

68. See Daniel P. Franklin & Michael J. Baun, *Introduction: Political Culture and Constitutionalism*, in *POLITICAL CULTURE AND CONSTITUTIONALISM: A COMPARATIVE APPROACH* 1, 2 (Daniel P. Franklin & Michael J. Baun eds., 1995) (arguing that constitutions do not work well if they are alien to a political and legal culture, but rather must evolve over time as a national identity is created).

69. DE TOCQUEVILLE, *supra* note 44, at 257–58.

70. HARTZ, *supra* note 51, at 309.

### B. *The Realist Account of Constitutionalism*

The third wave of democratization not only remade the political map of the world, but it also led to very different questions being asked about the American Constitution. The conventional account of constitutionalism is moored in a world where American exceptionalism is taken for granted. As a result, it conflates constitutional law with constitutionalism and focuses on how the constitution should be interpreted rather than the role it plays in building a nation.<sup>71</sup> A realist account, on the other hand, seeks to provide an account of the American Constitution that makes sense in a world which is populated with a number of nations that are seeking to build constitutional democracies. The starting point of any such theory is Karl Llewellyn's observation that a constitution is not just a set of rules but a somewhat peculiar institution, because "it involves . . . [the ways of living and doing] of a huge number of people—well-nigh the whole population."<sup>72</sup> A core argument of this Article is that any adequate theory of constitutionalism should turn not on normative theories of how the constitution should be interpreted but rather the pragmatic and empirical question<sup>73</sup> of what are the social practices that enable constitutions to limit political power.

Although how constitutions become entrenched is clearly the central question for constitutionalism in Latin America and in the developing world, the animating issue for realist accounts of American constitutionalism has been what are the political or democratic practices that sustain the founding, transformation, and maintenance of constitutions.<sup>74</sup> Bruce Ackerman's *We the People*<sup>75</sup> is a seminal, realist account of constitutionalism that breaks with the conventional account of constitutionalism in two respects. First, he provides an empirically grounded account of how the American Constitution was founded and transformed. He argues that the conventional account of constitutionalism that distinguishes the revolutionary underpinnings of the Constitution from the legal transformations that it underwent subsequent to the founding does not comport with our historical experience. Constitutions are made and changed as a result of "constitutional politics"<sup>76</sup> or political movements. Second, he turns the focus from the role of the Supreme Court in maintaining the Constitution to the societal understandings that undergird the Constitution. What made the American Constitution possible is not that the citizens

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71. A fine example of how conventional accounts of constitutionalism place the constitutional carriage before the democratic horse is Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455 (2002). The authors argue that maintaining the supremacy of the Supreme Court is the key to making democracy work. The difficulty that the democracies of the third wave have had in entrenching constitutions demonstrates, however, that societal acceptance of constitutions and supreme courts is the key to ensuring that these institutions operate in a satisfactory manner.

72. Llewellyn, *supra* note 28, at 18; *see also* GRIFFIN, *supra* note 34, at x (arguing that constitutionalism is a "distinctive political practice" that deserves close study).

73. Constitutionalism, therefore, differs from constitutional theory, which is more normative in focus. Richard H. Fallon, *How to Choose a Constitutional Theory*, 87 CAL. L. REV. 537, 540 (1999); David Strauss, *What is Constitutional Theory?*, 87 CAL. L. REV. 581, 587–88 (1999).

74. GRIFFIN, *supra* note 34; John Ferejohn et al., *Editor's Introduction*, in CONSTITUTIONAL CULTURE AND DEMOCRATIC RULE 1 (John Ferejohn et al. eds., 2001). The obvious reason that U.S. constitutionalism has not dealt with the issue of entrenchment is that we expect political actors to respect the Constitution. There are examples, however, of constitutional provisions that proved so politically unpalatable that they were not enforced. The civil rights amendments, for example, were used to protect the "liberty" of business interests but were dead letter law as to the equality of the recently freed slaves until the civil rights movement of the 1960s. Perhaps more common than the non-enforcement of constitutional norms is their underenforcement for prudential reasons. *See* Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

75. 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991) [hereinafter ACKERMAN, FOUNDATIONS]; 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998).

76. ACKERMAN, FOUNDATIONS, *supra* note 75, at 7.

believed that law was distinct from politics with the former resting on neutral, apolitical principles and the latter resting on the aggregation of votes, but that they understood that constitutional politics would be played differently than ordinary politics. A higher degree of mobilization and consensus is required to make and change constitutions than is required for ordinary law.

Ackerman's conclusion as to the importance of constitutional politics rests on important commonalities between three key constitutional moments: the founding of the Constitution, the Civil War amendments, and the Supreme Court's rejection of a role in meaningfully reviewing economic legislation in the wake of the New Deal. The conventional view is that the first is the result of the Revolution, the second the result of the amendment process, and the last is part of the normal pull and tug of interpretation as the Court adopted an earlier and correct view of the scope of congressional authority to regulate the economy. Ackerman argues that these are not different events but related because they are examples of constitutional politics which is the *sine qua non* of successful constitutional change:

Before gaining the authority to make supreme law in the name of the People, a movement's political partisans must, first, convince an extraordinary number of their fellow citizens to take their proposed initiative with a seriousness that they do not normally accord to politics; second, they must allow their opponents a fair opportunity to organize their own forces; third, they must convince a majority of their fellow Americans to support their initiative as its merits are discussed, time and again, in the deliberative fora provided for "higher lawmaking."<sup>77</sup>

Successful constitutional foundings and transformations, in short, rest on a bed of democratic politics.

The realist account rests on a very different understanding of the democratic beliefs and practices that sustain American constitutionalism than does the conventional account. Constitutionalism does not require an exceptional culture that lacks serious disagreement as Hartz argued, but rather a shared belief that individuals can disagree profoundly while agreeing that their disputes will be settled by a set of ground rules that can be changed over time. American democracy manages to combine deep ideological divisions with a shared commitment to a set of constitutional ground rules.<sup>78</sup> It is easier, after all, to agree on procedures to settle disputes than it is to agree on values. The most important procedure that has been agreed upon is that the Constitution should be difficult to change. Constitutional changes do not always occur by formal amendment but they do involve a high level of social mobilization.<sup>79</sup> Constitutional politics differs from ordinary politics because of the degree of mobilization that is required for change to be effectuated. In short, the support the American Constitution enjoys is evidenced by the political mechanisms through which the Constitution has changed over time.

Moving courts away from the center of the constitutional universe has important implications for developing nations. The conventional account paints a bleak picture for whether constitutions can limit power in developing nations because it assumes that democracies evolve over a very long time span and that without shared values, constitutions

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77. *Id.* at 6.

78. Ferejohn, *supra* note 74, at 1–8; Finn, *supra* note 36, at 54–60; James T. Kloppenburg, *In Retrospect: Louis Hartz's The Liberal Tradition in America*, 29 REVS. AM. HIST. 460, 466 (2001).

79. ACKERMAN, FOUNDATIONS, *supra* note 75, at 7.

are unlikely to work. The realist account, on the other hand, suggests that constitutionalism may work in a number of different settings, even in nations with deep ideological divisions and without a long tradition of democratic governance, as long as citizens become attached to institutions. The American Constitution became entrenched not because it is a clever engineering feat or because courts maintain the boundary between law and politics, but because vibrant political practices sustain and nourish the formal provisions of the Constitution.<sup>80</sup> The key to making democracy work, therefore, lies in nurturing the political practices by which institutions gain social support.<sup>81</sup>

The experience of Latin America teaches us, however, that simply adopting a constitution—no matter how well-crafted—does not ensure that the political practices needed for constitutions to limit political power will emerge. American constitutionalism rests on the shared understanding that constitutional change requires a high degree of consensus. Latin American constitutionalism, on the other hand, rests on a very different understanding, which is that constitutions should be malleable and as readily changed as ordinary legislation. Latin America provides a mirror through which we can see a parallel constitutional universe that has important similarities and differences to our own. Once institutions are invented, they can be copied by other polities but they are transformed in the process.<sup>82</sup> Part III traces the path of constitutionalism in Latin America to examine the consequences of fusing constitutional politics with ordinary politics that occur when constitutions are not entrenched.

### III. THE PATH OF CONSTITUTIONALISM IN LATIN AMERICA

*There is nothing more difficult to arrange, more doubtful of success, and more dangerous to carry through than initiating changes in a state's constitution. The innovator makes enemies of all those who prospered under the old order and only lukewarm support is forthcoming from those who would prosper under the new. Their support is lukewarm partly from fear of their adversaries, who have the existing laws on their side, and partly because men are generally incredulous, never really trusting new things unless they have tested them by experience.*<sup>83</sup>

Machiavelli's insight into the political difficulties facing the founding of new constitutions suggests that Latin America's experience following independence is the norm whereas the United States' experience is the exception.<sup>84</sup> Independence in Latin America was followed by unrelieved civil war for almost half a century throughout most of the

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80. George Reid Andrews & Herrick Chapman, *The Social Construction of Democracy, 1870–1990: An Introduction*, in *THE SOCIAL CONSTRUCTION OF DEMOCRACY, 1870–1990*, at 1, 6 (George Reid Andrews & Herrick Chapman eds., 1995); ACKERMAN, *FOUNDATIONS*, *supra* note 75, at 6–7; Llewellyn, *supra* note 28, at 17–40.

81. Charles Tilly, *Democracy Is a Lake*, in *THE SOCIAL CONSTRUCTION OF DEMOCRACY, 1870–1990*, *supra* note 80, at 365, 367–68; James Johnson, *Inventing Constitutional Traditions: The Poverty of Fatalism*, in *CONSTITUTIONAL CULTURE*, *supra* note 74, at 71, 93.

82. BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 155–56 (rev. ed. 1991).

83. NICCOLÒ MACHIAVELLI, *THE PRINCE* 51 (George Bull trans., Penguin Books 1961) (1532).

84. The uncertainty generated by constitutional change and the political violence that may follow in the wake of such change is nicely illustrated by current events in the Middle East, particularly in Iraq. Steven R. Weisman, *The Great Middle East Shake-Up*, N.Y. TIMES, Jan. 30, 2005, § 4, at 1.

continent<sup>85</sup> whereas the United States enjoyed a series of peaceful presidential transitions throughout its history and did not face a civil war until the middle of the nineteenth century. From the early days of the Republic, the Constitution was an important locus of power as the Supreme Court of the United States creatively used the power of judicial review to enhance national power.<sup>86</sup> There was political conflict, but there was also a shared understanding that those conflicts would play out under the rules provided by the Constitution.<sup>87</sup> In Latin America, on the other hand, constitutions were not the source of power. Rather caudillos or strong leaders with a basis of popular support provided the glue that held the newly independent nations of the region together.<sup>88</sup> In short, law mattered in determining political outcomes in the United States in a manner that was not the case in Latin America.

Constitutions, as well as the laws more generally, took a different path in Latin America than they did in the United States. The different path that the law took in Latin America provides us with a window that can be used to explore the puzzling relationship between law and the larger political, social, economic, and cultural structures in which law operates. The framers of Latin America's constitutions and drafters of her civil codes borrowed from the United States and Europe.<sup>89</sup> Scholars are divided on why the constitutions that were adopted in the wake of independence failed to regulate political life in any meaningful sense. One view among scholars is that Latin America's constitutions did not work well because they were borrowed and failed to fit the social, political, economic, and cultural realities of the region.<sup>90</sup> According to this view, the constitutions of the region were adopted with the intent of instituting liberalism but failed to do so because of the marked social inequality in the region, the control that the colonial state exercised over the economy, and the lack of experience with self-government. The opposing view is that constitutions were not adopted to institute liberalism but were simply façades for dictatorship.<sup>91</sup> That is, independence was simply a power grab by local elites who sought to maintain the old order by using liberal constitutions to mask their true intentions. Both views are united, however, in the belief that the explanation for the course of constitutionalism in Latin America lies not in human agency or constitutional design but

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85. The classic account of nineteenth century Latin American history is DAVID BUSHNELL & NEILL MACAULAY, *THE EMERGENCE OF LATIN AMERICA IN THE NINETEENTH CENTURY* (2d. ed. 1994).

86. See, e.g., ROBERT G. McCLOSKEY, *THE AMERICAN SUPREME COURT* (Sanford Levinson ed., Univ. of Chi. Press, 2000) (1960).

87. The one obvious exception was the U.S. Civil War. The constitutional claim of the secessionists was based on popular sovereignty which can be "profoundly disruptive of the constitutional order." Keith E. Whittington, *Yet Another Constitutional Crisis?*, 43 WM. & MARY L. REV. 2093, 2124 (2002).

88. The best study is JOHN LYNCH, *CAUDILLOS IN SPANISH AMERICA, 1800–1850* (1992). Dictatorship and democracy are generally thought to be polar opposites yet it is clear that caudillos were dictators with popular support. See *id.* at 3–9. An interpretive history that emphasizes the democratic roots of *caudillismo* is provided by BRADFORD E. BURNS, *THE POVERTY OF PROGRESS: LATIN AMERICA IN THE NINETEENTH CENTURY* (1980).

89. ALLAN R. BREWER-CARÍAS, *JUDICIAL REVIEW IN COMPARATIVE LAW* 67–70 (1989); DAVID BUSHNELL, *REFORM AND REACTION IN THE PLATINE PROVINCES 1810–1852*, at 101 (1983); COLOMER VIADEL, *supra* note 7; Larry Diamond, Jonathan Hartlyn, & Juan J. Linz, *Introduction: Politics, Society, and Democracy in Latin America*, in *DEMOCRACY IN DEVELOPING COUNTRIES: LATIN AMERICA* 1, 39–40 (Larry Diamond et al. eds., 2d ed. 1999); Robert J. Kolesar, *North American Constitutionalism and Spanish America: "A Special Lock Ordered by Catalogue which Arrived with the Wrong Instruction and No Keys"?*, in *AMERICAN CONSTITUTIONALISM ABROAD: SELECTED ESSAYS IN COMPARATIVE CONSTITUTIONAL HISTORY* 41 (George A. Billios ed., 1990); M.C. MIROW, *LATIN AMERICAN LAW: A HISTORY OF PRIVATE LAW AND INSTITUTIONS IN AMERICA* 97–101 (2004); CARLOS RAMOS NUÑEZ, *EL CODIGO NAPOLEONICO Y SU RECEPCION EN AMERICA LATINA* 134–35 (1997).

90. Rosenn, *supra* note 8.

91. Glen Dealy, *Prolegomena on the Spanish American Political Tradition*, 48 HISP. AM. HIST. REV. 37 (1968); VÉLIZ, *supra* note 63, at 141–62; HOWARD J. WIARDA, *THE SOUL OF LATIN AMERICA: THE CULTURAL AND POLITICAL TRADITION* (2001).



rather in how the environment of the region modified or trumped the constitutions and laws that were adopted. This scholarly debate, discussed in Part III.A *infra*, rests on the assumption that law is shaped by its environment, and consequently, laws that are foreign to a particular environment will fail to take root and flourish.

There is little doubt that the environment in Latin America was not as conducive to liberalism as the environment in the United States. Liberal constitutions in the eighteenth and nineteenth centuries were revolutionary. These constitutions marked a turning point from the ancient regime of monarchical governments, hierarchical societies, and mercantilist economies to a new world of republican governments, egalitarian societies, and free markets. Spain was more successful than England in transplanting the foundations of the ancient regime to the New World.<sup>92</sup> Spain yoked the conquistador and the friar to build a socio-legal environment where status was the key to power.<sup>93</sup> As a consequence, a “neomedieval civilization” consisting of the “minorities of the State, Church, and landed proprietors, aided and abetted by a small but influential group of merchants and entrepreneurs chiefly engaged in the extractive industries, collaborated to preserve a fixed and constant order in a world of accelerating change.”<sup>94</sup> In short, the inability of liberal constitutions to transform Latin America provides a strong argument for the importance of environmental factors in determining whether borrowed laws succeed or fail.

Yet it would be a mistake to conclude, as does the scholarly debate concerning why constitutions failed to implement republican government discussed in Part III.A *infra*, that the environment is the sole factor we must take into account in explaining Latin American constitutionalism and that constitutional politics played no role in shaping the region’s political culture. Spain’s success in fashioning a New World in its image cannot explain the remarkable persistence of an environment that remains inimical to liberalism.<sup>95</sup> Presidential government has replaced monarchy, but presidents continue to act more like elected despots than leaders bound by constitutions.<sup>96</sup> Free markets have proven difficult to implement.<sup>97</sup> Social and economic inequality remains pervasive.<sup>98</sup> An environment does not endure for over two centuries without being watered by human agency. In short, the constitutional politics of Latin America, discussed in Part III.B *infra*, has played as important a role in shaping the environment of the region as has Spain’s legacy.

The framers of Latin America’s constitutions and laws understood that environmental factors were not conducive to the implementation of liberal constitutions. Simón Bolívar, for example, argued in his *Discourse at the Congress of Angostura*:

Does not *L’Esprit des lois* state that laws should be suited to the people for whom they are made; that it would be a major coincidence if those of one nation

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92. MARK A. BURKHOLDER & LYMAN L. JOHNSON, COLONIAL LATIN AMERICA (3d ed. 1998); Jeremy Adelman, *Introduction: The Problem of Persistence in Latin American History*, in COLONIAL LEGACIES: THE PROBLEM OF PERSISTENCE IN LATIN AMERICAN HISTORY 1, 3–4 (Jeremy Adelman ed., 1999); COLONIAL SPANISH AMERICA (Leslie Bethell ed., 1987); JAMES LOCKHART & STUART B. SCHWARTZ, EARLY LATIN AMERICA: A HISTORY OF COLONIAL SPANISH AMERICA AND BRAZIL (Cambridge Latin Am. Studies, Series No. 46, 1983).

93. LEWIS HANKE, THE SPANISH STRUGGLE FOR JUSTICE IN THE CONQUEST OF AMERICA 173–78 (Little, Brown, 1965) (1949).

94. LEONARD, *supra* note 63, at 222–23.

95. The persistence of political, social, and economic structures is remarkable even if the nature of these continuities and the reasons for them are disputed. For example, Professor Adelman argues that the “notion of deep continuities in Latin American history” is as much an intellectual construct as it is a description of social reality. Adelman, *supra* note 92, at 3.

96. See O’Donnell, *supra* note 5.

97. JUDITH A. TEICHMAN, THE POLITICS OF FREEING MARKETS IN LATIN AMERICA: CHILE, ARGENTINA, AND MEXICO (2001); HERNANDO DE SOTO, THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD (June Abbott trans., 1989).

98. DA MATTA, *supra* note 30.

could be adapted to another; that laws must take into account the physical conditions of the country, climate, character of the land, location, size, and mode of living of the people; that they should be in keeping with the degree of liberty that the Constitution can sanction respecting the religion of the inhabitants, their inclinations, resources, number, commerce, habits, and customs? This is the code we must consult, not the code of Washington!<sup>99</sup>

Part III.B discusses how a desire among the elites to develop and transform the region which they believed to be backward<sup>100</sup> led to the adoption of constitutions and laws that provided significant power to the central state.<sup>101</sup> The cure for underdevelopment was oligarchy and dictatorship today, a more inclusive republican government tomorrow. Law in Latin America did not take a failed path,<sup>102</sup> but, as this Article argues, a different path which comported not only with the legacy of Spain but also the manner in which constitutions and the laws more generally were constructed in the region.

#### A. *The Scholarly Debate*

Until the third wave of democracy, Latin America provided a paradox: constitutions throughout the region guaranteed democracy,<sup>103</sup> yet dictatorship or oligarchy was the political reality. One possible answer to this paradox is to concede that although liberal ideals have not been fully implemented, they remain a permanent aspiration.<sup>104</sup> The issue then becomes why liberal aspirations failed to become political reality.

Professor Keith Rosenn seeks to answer this question in *The Success of Constitutionalism in the United States and its Failure in Latin America: An Explanation*.<sup>105</sup> He provides a fine summary of the principal factors that might explain why Latin America experienced oligarchy and dictatorship whereas the United States enjoyed democracy. He argues that three factors principally explain these differences. First, the colonists in the United States had considerable experience with self-government whereas the colonists in Latin America lacked such experience. Spain gave little power of self-government to its colonies and chose to staff its bureaucracy with Spanish born officials rather than those

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99. Simón Bolívar, Address Delivered at the Second National Congress of Venezuela in Angostura (Feb. 15, 1819), in 1 SELECTED WRITINGS OF BOLÍVAR 173, 179–80 (Harold Bierck, Jr., ed., Lewis Bertrand trans., 1951). The writings of many political actors in the region reveal a fine understanding of the need to adopt legal institutions reflecting the social, political, and economic realities of the region. See, e.g., ANDRÉS BELLO, REFORM TO THE CONSTITUTION (1833), reprinted in SELECTED WRITINGS OF ANDRÉS BELLO 255 (Iván Jaksic ed., Frances M. López-Morillas trans., 1997); Letter from Juan Manuel de Rosas to Don Juan Facundo Quiroga (Dec. 20, 1834), in THE ARGENTINA READER: HISTORY, CULTURE, AND POLITICS 75 (Gabriela Nouzeilles & Graciela Montaldo eds., 2002); Mariano Otero, *Considerations Relating to the Political and Social Situation of the Mexican Republic in the Year 1847*, in THE MEXICO READER: HISTORY, CULTURE, AND POLITICS 226 (Gilbert M. Joseph & Timothy J. Henderson eds., 2002).

100. NICOLA MILLER, IN THE SHADOW OF THE STATE: INTELLECTUALS AND THE QUEST FOR NATIONAL IDENTITY IN TWENTIETH-CENTURY SPANISH AMERICA (1999). The classic expression of this view is DOMINGO F. SARMIENTO, FACUNDO: OR, CIVILIZATION AND BARBARISM (Mary Mann trans., 1998) (1845).

101. LOVEMAN, *supra* note 8, at 368–75.

102. Miguel A. Centeno & Fernando López-Alves, *Introduction*, in THE OTHER MIRROR: GRAND THEORY THROUGH THE LENS OF LATIN AMERICA 3, 10 (Miguel A. Centeno & Fernando López-Alves eds., 2001) (noting that the “Black Legend of Latin American failures to develop economic and political institutions is elaborate and deeply engrained” among academics).

103. A very useful overview of the major constitutions of the region is provided by Hartlyn & Valenzuela, *supra* note 7, at 99.

104. *Id.*

105. Rosenn, *supra* note 8.

with roots in the colonies. Second, the United States Constitution was an “original creation, specially tailored to fit the fundamental values of American society,” whereas Latin America’s constitutions “reflect inherent tensions between fundamentally conflicting traditions that continue to exist in Latin American society” between a consciously imported liberal tradition and the native authoritarian and corporatist Hispanic tradition.<sup>106</sup> This problem was compounded by a very different legal tradition. Common law judges, unlike civil law ones, had the freedom and independence to creatively construe the United States Constitution.<sup>107</sup> Thirdly, the United States experienced a social revolution that led to equality following independence whereas Latin America did not. The *criollo* elite engineered independence to gain power—not to restructure society—and the “wealth, power, and privileges of the aristocracy have persisted largely intact since independence.”<sup>108</sup> In short, constitutions in Latin America sought to effectuate republican government but failed to do so because they were planted in an environment that was inimical to liberalism.

Another possible answer to this paradox is to conclude that Latin America failed to implement liberalism because that was not the goal of independence.<sup>109</sup> The constitutions of the region were not a failed attempt to establish republican government but a successful attempt to preserve Hispanic absolutism using liberal forms.<sup>110</sup> There was little experience with, or faith in using, institutions to check power which is why “power was . . . vested in one body.”<sup>111</sup> Rather than heir to the liberal tradition, argues historian Claudio Véliz, Latin America is the heir of the centralist tradition.<sup>112</sup> The political regimes of the region, whether on the left or right, are bureaucratic and highly centralized.<sup>113</sup> The revolutionary wave that swept the North Atlantic world in the late eighteenth century failed to change this tradition. As a consequence of this deep-rooted political tradition, Latin America has achieved “electoral democracy but not . . . liberal democracy.”<sup>114</sup>

The problem with the scholarly analysis of why Latin America failed to achieve republican government is that it focuses on the environment in which constitutions were planted while deemphasizing the role of human agency in constructing that environment. The distance between the ideals imbued in these foundational documents and the political, social, and economic reality of the region helps explain why the transplant of republican government did not thrive in the region. Yet it is a mistake to ignore the role played by the liberal constitutions and laws that were adopted in the wake of independence.<sup>115</sup> Law played an important role in shaping the political culture of the region in two important respects. First, the framers of the region’s constitutions understood the social problems of the region and were clearly worried about the possibility of civil unrest. To deal with this problem, they designed constitutions that placed too much power in one central figure, namely the president.<sup>116</sup> The idea was to centralize power to facilitate economic development so that liberalism could be effectuated later when development had transformed the conditions of the region. One consequence of this degree of centralization

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106. *Id.* at 12, 24; *see also* Kolesar, *supra* note 89.

107. See Alejandro M. Garro, *On Some Practical Implications of the Diversity of Legal Cultures for Lawyering in the Americas*, 64 REV. JUR. U.P.R. 461 (1995), for a perceptive study of the differences in legal traditions between Latin America and the United States.

108. Rosenn, *supra* note 8, at 21.

109. Dealy, *supra* note 91, at 41–42; VÉLIZ, *supra* note 63; WIARDA, *supra* note 91.

110. Dealy, *supra* note 91, at 51–52, 58.

111. *Id.* at 46.

112. VÉLIZ, *supra* note 63.

113. *Id.* at 238.

114. WIARDA, *supra* note 91, at 113.

115. This is a point made by BUSHNELL, *supra* note 89, at 102.

116. LOVEMAN, *supra* note 8, at 368–70.

was that laws became mutable which facilitated elite control but meant that no one could trust having someone else run the government. Excessive presidential power led to greater, not less, unrest as the transition from a government of men to one of laws became impossible. Second, the linkages between constitutions and the people that are necessary if constitutions are to effectively cabin political power could not be created in such an environment. The people had little trust in constitutions that could be changed so readily. Without popular support, constitutions could not provide the institutional matrix needed for political accommodations to be reached. To understand these consequences, however, we need to understand the historical processes that fashioned the legal culture of the region.

### B. *The Historical Path of the Law in Latin America*

The excessive concentration of political power that led to law being subordinated to politics did not begin in the sixteenth century after the conquest of Spanish America by the Hapsburg monarchs, as the scholarly debate assumes, but during the 1750s when the Bourbon monarchs who succeeded the Hapsburgs to the Spanish throne sought to facilitate economic development by centralizing power.<sup>117</sup> When the Spaniards under the Hapsburg monarchs erected the colonial state on the ruins of indigenous civilizations, they created a remarkably flexible and stable political system in which law was an important part of the glue that held together the largest empire that the world had ever seen.<sup>118</sup> The legitimacy of the system can be measured by the simple fact that no army was required to hold the Hapsburg empire together.<sup>119</sup>

The Hapsburgs governed through the Council of the Indies, which employed a procedure that, though cumbersome, ensured that all interested parties had a chance to participate and that decisions were made strategically, “with an eye toward the anticipated reaction.”<sup>120</sup> Strategic behavior was facilitated at the local level by two principles of political governance: (1) officials could selectively ignore royal edicts that would cause too much damage to local interests and (2) the jurisdiction of officials overlapped so that ambition could check ambition.<sup>121</sup> Spanish colonial administration was a “government of judges, where nearly every appointed official exercised some sort of judicial authority. . . . The legal system served as a constant venue of negotiation between distinct groups and individuals who comprised this hierarchical society.”<sup>122</sup>

The accommodations facilitated by the formal elements of Hapsburg governance rested on an informal alliance, based on ties of kinship and interest, between local elites and royal bureaucrats. These ties made it difficult for the Crown to pursue policies that conflicted with the oligarchy’s wishes. When the Bourbons came to power in 1713, they

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117. A useful corrective to this view is supplied by COLIN MACLACHLAN, *SPAIN’S EMPIRE IN THE NEW WORLD: THE ROLE OF IDEAS IN INSTITUTIONAL AND SOCIAL CHANGE* 123–34 (1988).

118. J.H. Elliott, *Spain and America Before 1700*, in *COLONIAL SPANISH AMERICA*, *supra* note 92, at 59; C.H. HARING, *THE SPANISH EMPIRE IN AMERICA* (1947); MACLACHLAN, *supra* note 117, at 123.

119. Many scholars would disagree with characterizing colonial governance and law under the Hapsburgs as reasonably legitimate. Professor Adelman argues, for example, that many of the current problems of Latin America—such as states that lack legitimacy—are colonial legacies. Adelman, *supra* note 92. The problem with this view is that the creation of a military to maintain social order occurred after independence. The Hapsburgs, on the other hand, did not need an army to maintain internal order. Elliott is right when he concludes that “judged by the criterion of its ability to maintain a fair degree of public order and a decent respect for the authority of the crown, Spanish government . . . must be accounted a remarkable success.” Elliott, *supra* note 118, at 64.

120. MACLACHLAN, *supra* note 117, at 46.

121. Elliott, *supra* note 118, at 64–69.

122. CHARLES R. CUTTER, *THE LEGAL CULTURE OF NEW SPAIN, 1700–1810*, at 31 (1995).

inherited a “system which might best be described as self-rule at the king’s command.”<sup>123</sup> The complex series of compromises on which the legitimacy of Hapsburg rule rested were viewed by the Bourbons as corrupt and as preventing the reforms needed to accelerate economic growth both in Spain and the colonies. The intelligently inefficient, redundant, and legalistic Hapsburg system was overhauled by the introduction of intendancies whose jurisdictions were clearly demarcated so that conflicts did not impede royal desires. Revenue collection was enhanced by appointing a salaried fiscal bureaucracy. A military was built up to fend off foreign incursions. The Bourbon reforms resulted in an “administrative revolution” which “created a new absolutist state, based, as in Europe, on a standing army and a professional bureaucracy.”<sup>124</sup> The pronounced centralism that characterized the Latin American state until the 1980s began, therefore, with the Bourbon reforms.

Colonial governance was toppled by the revolutionary wave that swept through the Atlantic world at the end of the eighteenth and beginning of the nineteenth centuries.<sup>125</sup> Monarchies were replaced by republics, while a legal system in which rights were determined by one’s place in society gave way to a legal system in which citizens enjoyed equal rights. Law, not status, would henceforth determine rights.

Latin America, however, did not fully participate in this revolutionary wave. Spanish America adopted constitutions and civil codes, but these new institutions did not transform society. Law regulated neither public nor private behavior because formal rights were trumped by social norms. Monarchy was replaced by republican government, but contract did not replace status, and it was status that determined where power lay. The legal foundations of the post-independence state were subordinated to the social bonds between powerful families, which were the real basis of power.<sup>126</sup> Latin America remained a clientelistic, patrimonial society in which status determined which rights one enjoyed.

The reason that independence did not result in revolutionary transformations lies in the ambivalence that Creole elites had towards liberalism. They looked favorably on being able to control their own economic destiny but had deep-rooted fears of empowering the masses. It is no accident that those nations where the lower classes posed the greatest threat to the upper class, such as Peru and Mexico, were the last to achieve independence whereas independence on the periphery of the Spanish empire, where the indigenous population was smaller, was achieved with less effort.<sup>127</sup> Latin American independence did not come about so much as the result of the revolutionary wave that swept the North Atlantic world but as a result of the power vacuum created by the forced abdication of the Spanish monarchy and the unhappiness of the Creole elites with the Bourbon reforms.<sup>128</sup> The masses were mobilized to fight for independence, but Latin American elites, unlike their counterparts in the United States, crafted institutions that precluded the realization of citizen rights.

The twin legal pillars of the nineteenth century—liberal constitutions and civil codes—masked how power was exercised. Suffrage was generally limited to free men with

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123. Elliott, *supra* note 118, at 110.

124. D.A. Brading, *Bourbon Spain and its American Empire*, in COLONIAL SPANISH AMERICA, *supra* note 92, at 112, 131.

125. See generally LANGLEY, *supra* note 2.

126. See, e.g., MICHAEL P. COSTELOE, THE CENTRAL REPUBLIC IN MEXICO, 1835–1846: *HOMBRES DE BIEN* IN THE AGE OF SANTA ANNA 1–30 (Cambridge Latin Am. Studies, Series No. 73, 1993); TULLIO HALPERÍN-DONGHI, POLITICS, ECONOMICS, AND SOCIETY IN ARGENTINA IN THE REVOLUTIONARY PERIOD *passim* (Richard Southern trans., Cambridge Latin Am. Studies, Series No. 18, 1975).

127. LOCKHART & SCHWARTZ, *supra* note 92, at 419.

128. See LANGLEY, *supra* note 2, at 147–213; John Lynch, *The Origins of Spanish American Independence*, in THE INDEPENDENCE OF LATIN AMERICA 1, 30 (Leslie Bethell ed., 1987).

property. The military, which had grown in size during the wars of independence, was used to protect against internal unrest. Elections were rigged, and strong leaders, whose power rested on personal bonds with their followers, were the true source of power. As Halperin-Donghi observes: “Among the many ways of overthrowing the government practiced in postrevolutionary Spanish America, defeat at the polls was conspicuously absent.”<sup>129</sup> Stability, when it was achieved, did not rest on impersonal constitutions but on pacts which bound the real actors that exercised power in a polity.<sup>130</sup> Caudillos, not constitutions, provided order by relying on personal loyalty, rather than law, to glue society together.<sup>131</sup>

The acceleration of economic growth in the late nineteenth century strengthened the power of this small elite as it manipulated legal institutions to retain the benefits of growth.<sup>132</sup> Throughout Latin America, land tenure laws were changed to weaken corporate (e.g., Indian and religious) ownership of land, and labor laws, such as debt peonage and vagrancy laws, were used to force those who had been dispossessed of their land to work on large commercial estates.<sup>133</sup> Power was centralized in the hands of the few and the legal system was not afforded the power to accommodate disputes between different interest groups. As a result, the legal system was marginalized from the process of nation building.<sup>134</sup>

The economic growth that occurred under liberal regimes in late nineteenth century Latin America led to their demise as new social groups, such as a middle class and industrial workers, emerged and sought political representation.<sup>135</sup> Liberal regimes were replaced by corporatist regimes in the twentieth century, which sought to provide some representation to these new social groups while controlling the demands they could articulate. Government grew in size and complexity as more services were provided to newly mobilized social groups, but these services were selectively applied to enhance centralized control.<sup>136</sup> Constitutions, beginning with Mexico’s in 1917, were also transformed since individual rights, which had formally been paramount in the liberal constitutions of the nineteenth century, were subordinated to social rights. Social guarantees increased in quantity and complexity, which added to the length of the typical Latin American constitution.<sup>137</sup>

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129. TULLIO HALPERÍN-DONGHI, *THE AFTERMATH OF REVOLUTION IN LATIN AMERICA* 116 (Joseph S. Tulchin, ed., Josephine de Bunsen trans., 1973).

130. See François-Xavier Guerra, *The Spanish-American Tradition of Representation and its European Roots*, 26 *J. LATIN AM. STUD.* 1, 28–29 (Lidia Lozano trans., 1994).

131. LYNCH, *supra* note 88, at 3.

132. See BUSHNELL & MACAULAY, *supra* note 85, at 186–87; JOEL S. MIGDAL, *STRONG SOCIETIES AND WEAK STATES: STATE-SOCIETY RELATIONS AND STATE CAPABILITIES IN THE THIRD WORLD* 80 (1988).

133. See Jeremy Adelman, *Institutions, Property, and Economic Development in Latin America*, in *THE OTHER MIRROR*, *supra* note 102, at 27, 38; Friedrich Katz, *The Liberal Republic and the Porfiriato, 1867–1910*, in *MEXICO SINCE INDEPENDENCE* 49–124 (Leslie Bethell ed., 1991); John Lynch, *From Independence to National Organization*, in *ARGENTINA SINCE INDEPENDENCE* 1, 1–4 (Leslie Bethell ed., 1993); ROBERT G. WILLIAMS, *STATES AND SOCIAL EVOLUTION: COFFEE AND THE RISE OF NATIONAL GOVERNMENTS IN CENTRAL AMERICA* 100, 144–46 (1994).

134. See Jorge Correa Sutil, *Judicial Reforms in Latin America: Good News for the Underprivileged?*, in *THE (UN)RULE OF LAW*, *supra* note 31, at 255, 258–59 (noting that “[f]or nearly two centuries of independent history, the judicial systems of Latin American countries . . . [were] highly politicized, too weak to enforce the law against the government or any other dominant groups, and frequently weakened by corruption”).

135. THOMAS E. SKIDMORE & PETER H. SMITH, *MODERN LATIN AMERICA* 39 (6th ed. 2005).

136. See Laurence Whitehead, *State Organization in Latin America Since 1930*, in *LATIN AMERICA SINCE 1930: ECONOMY, SOCIETY, AND POLITICS*, *supra* note 7, at 3, 11–12.

137. Hartlyn & Valenzuela, *supra* note 7, at 110–11.

The tendency towards greater executive authority was a global one in the wake of the world economic depression: the “power of presidents, prime ministers and dictators expanded as central governments became managers of vast bureaucratic organizations aimed at providing welfare and promoting economic development.”<sup>138</sup> The oligarchic state was replaced by a modernizing state that increasingly turned to bureaucratic control of virtually all aspects of the economy as a means of achieving development. The state sought to promote industrialization by selecting imports on which to raise tariffs, by manipulating exchange rates to selectively aid local industry, by providing capital for certain industries, and by manipulating labor.

Although the intent of these policies, known as import-substitution industrialization,<sup>139</sup> was to promote development, the unintended but principal consequence was to deepen the entanglement of states and elites.<sup>140</sup> The adoption of import-substitution industrialization deepened the intertwining of state and elites by increasing the range of activities over which the state could extend privileges to those with connections.<sup>141</sup> Politics became a zero sum game in which elites competed to obtain privileges from the state. The result was a society in which businesses sought favors in the political arena rather than competed in the market. New laws flowed from the state at a prodigious rate as elites competed for privileges.<sup>142</sup> In short, the rise of the corporatist state in the twentieth century, although a logical response to demands for economic development, strengthened elite power.

Since the bureaucracy was the locus of power which settled economic disputes, there was no need for an impartial judiciary to settle disputes between private litigants.<sup>143</sup> Instead, the judiciary became a rich source of patronage for the executive.<sup>144</sup> Those who were unable to compete for bureaucratic privileges, the poor, were forced into the informal or “black” sector of the economy. In the twentieth century, the rural poor sought a better life by migrating in large numbers to cities throughout Latin America.<sup>145</sup> They found a legal system hostile to their interests and, as a result, were forced to build homes on land they did not own and engage in a variety of trades for which they lacked proper legal authorization.<sup>146</sup>

The shantytowns that rim Latin America’s cities, and the chaotic nature of much of their traffic and trade, are a direct consequence of this failure of law. The poor choose to invest less in their homes and businesses than they would if the law protected their property.<sup>147</sup> Without a means of protecting contractual rights, the poor choose to buy from those they know rather than engage in arms length transactions. They are also unable to grow their businesses since more complex forms of business enterprises, such as

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138. *Id.* at 112.

139. THOMAS E. SKIDMORE & PETER H. SMITH, *MODERN LATIN AMERICA* 51–55 (5th ed. 2001).

140. *See* PETER EVANS, *DEPENDENT DEVELOPMENT: THE ALLIANCE OF MULTINATIONAL, STATE, AND LOCAL CAPITAL IN BRAZIL* 74 (1979); DE SOTO, *supra* note 97, at 190–91 (Peru).

141. *Cf.* STEPHAN HAGGARD, *PATHWAYS FROM THE PERIPHERY: THE POLITICS OF GROWTH IN THE NEWLY INDUSTRIALIZING COUNTRIES* 161 (Peter J. Katzenstein ed., Cornell Studies in Political Econ. Series, 1990).

142. DE SOTO, *supra* note 97, at 190–91.

143. Sutil, *supra* note 134, at 261. *See generally* Joseph R. Thome, *Heading South but Looking North: Globalization and Law Reform in Latin America*, 2000 WIS. L. REV. 691 (2000), for an incisive analysis of the historical role of the judiciary in Latin America.

144. *Cf.* HAMMERGREN, *supra* note 13, at 18 (noting that, while patronage does exist, “[i]n the case of the courts . . . the relationship [with the executive] has been more nuanced and variable over time and among different countries”).

145. Orlandina de Oliveira & Bryan Roberts, *Urban Social Structures in Latin America, 1930–1990*, in *LATIN AMERICA: ECONOMY AND SOCIETY SINCE 1930*, at 241, 241–312 (Leslie Bethell ed., 1998).

146. DE SOTO, *supra* note 97, at 10–13; *see* Sutil, *supra* note 134, at 268–69.

147. DE SOTO, *supra* note 97, at 158–59.

partnerships and corporations, require access to the legal system. Without a system of tort law, accident rates increase because there is no legally imposed financial incentive to use care when engaged in business or daily activities.

The collapse of the overly centralized Latin American state in the 1980s was caused by its inability to provide the sorts of public goods that citizens demand of government. This failure is intimately connected to the deficient Latin American institutional environment which failed to facilitate the sort of cooperative behavior needed to make government work. As a consequence of the failure of the developmental state, the policy prescriptions advocated to implement development changed dramatically in the 1980s. Latin America has moved from the model of a strong government that uses the law to command that certain changes be made to promote development to a model in which leaders are elected, power is decentralized, and law facilitates the sort of activities—economic, social, and political—needed to promote development.

One of the important lessons to be learned from the role of law in Latin America is that closed political systems can be buttressed by relatively open legal structures that facilitate the accommodation of various interests, whereas ostensibly pluralistic political systems can be undermined by elitist legal structures. The colonial state was able to endure without relying on a military because law under the Hapsburgs allowed individuals to reach accommodations. The various authoritarian regimes that populated independent Latin America, on the other hand, failed to provide legal systems that accommodated different interests.<sup>148</sup> None of the institutions of these authoritarian regimes worked as one might expect. Militaries were designed to maintain internal order rather than provide defense from external enemies, constitutions legitimated dictatorship,<sup>149</sup> and the judiciary was designed to maintain control over marginalized sectors of the populace rather than settle disputes.

Today's current batch of democracies, therefore, enjoys an authoritarian legality that is a legacy of policies designed to achieve development that began with the Bourbons and continued through the 1980s.<sup>150</sup> Democratic consolidation requires a transition from this deep-rooted authoritarian legality to a more democratic legality. Democratic legal systems differ from authoritarian systems in that the rules facilitate cooperative behavior rather than mistrust. De Soto argues persuasively:

We have spoken of good laws and bad laws, a good law being one that guarantees and facilitates the efficiency of the economic and social activities it regulates and a bad law, one that disrupts or totally prevents it.

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148. Although the authoritarian regimes that governed independent Latin America had “authoritarian” legal systems, these legal systems displayed significant variations. Argentina, Brazil, and Chile experienced severe military repression in the latter half of the twentieth century before the current wave of democratization. Brazil relied much more on legal mechanisms in shoring up political power than did either Argentina or Chile. As a consequence, Brazil’s military government lasted longer than did the military dictatorships of Chile and Argentina. ANTHONY PEREIRA, *POLITICAL (IN)JUSTICE: AUTHORITARIANISM AND THE RULE OF LAW IN BRAZIL, CHILE, AND ARGENTINA* (2005). The longest lasting authoritarian regime in the region was Mexico’s Partido Revolucionario Institucional (“PRI”), which governed for most of the twentieth century. The source of its longevity was that it was remarkably open for an authoritarian regime and provided considerable space for courts to fashion accommodations between different actors. See STEPHEN D. MORRIS, *POLITICAL REFORMISM IN MEXICO: AN OVERVIEW OF CONTEMPORARY MEXICAN POLITICS* 20, 184–85 (1995); Pilar Domingo, *Judicial Independence: The Politics of the Supreme Court in Mexico*, 32 J. LATIN AM. STUD. 705, 717 (2000).

149. See LOVEMAN, *supra* note 8, at 398–405.

150. Adelman & Centeno, *supra* note 2, at 140 (“Much of Latin America’s [current] turmoil can be traced to the failure of the rule of law in Latin America.”).



[Good laws] must facilitate the specialization and interdependence of individuals and resources.

. . . . However, this specialization of individuals and resources cannot take place if individuals are isolated and do not trust one another . . . . There can be no denying that the law, and the institutions safeguarding it, are the principal source of this trust.<sup>151</sup>

Understanding the process by which “good” laws emerge requires that we examine the puzzle of institutional emergence. Institutions are not static. Authoritarian regimes become democratic more readily than bad laws become good because there are significantly fewer institutions to change. Only a handful of key players need to agree to make the initial transition to democracy whereas legal institutions are so diffused throughout society that the masses as well as elites must be engaged for law to be transformed. Democratic consolidation, unlike democratic transition, requires an attitudinal shift in the citizenry. The answer to the puzzle of institutional emergence lies in examining why some institutions fail and why others succeed. The next section takes up this issue by examining why constitutionalism succeeded in changing the status quo in the United States but failed to do so in Latin America.

#### IV. A TALE OF TWO CONSTITUTIONS

*[I]n Peru, . . . we have very good laws, but one is missing: a law that says that all the other laws should be complied with.*

—Nicolás de Piérola, President of Peru, 1895–1899<sup>152</sup>

Although constitutions are designed to regulate government, nations with similar constitutions have governments that can and do behave differently. The nations of Latin America adopted constitutions that formally looked like that of the United States,<sup>153</sup> but Latin America’s constitutions facilitated authoritarianism whereas the Constitution of the United States helped consolidate democracy. These different outcomes rest on how constitutions were socially constructed. Constitutional politics in the United States is democratic because it rests on citizen mobilization and involvement in constitutional change.<sup>154</sup> Governments and elites pay attention to the rules of the game because they

151. DE SOTO, *supra* note 97, at 182–83.

152. Domingo García Belaunde, *Constitutional Processes in Latin America*, in CONTEMPORARY CONSTITUTIONAL CHALLENGES 28 (César Landa & Julio Faúndez eds., 1996).

153. Scholars disagree on the source of the constitutional models that were borrowed by Latin America. Professor Jaime Rodríguez, for example, argues that the Cádiz Constitution of 1812 is the true source of Latin American constitutionalism. JAIME E. RODRÍGUEZ O., *THE INDEPENDENCE OF SPANISH AMERICA* (Cambridge Latin Am. Studies, Series No. 84, 1998). The problem with this view is that the United States loomed large in the imagination of Latin American elites. The United States, after all, had overthrown a colonial power and become a successful republic. JOHN LYNCH, *THE SPANISH AMERICAN REVOLUTIONS, 1808–1826*, at 29–30 (1986) (“In the years before and after 1810 the very existence of the United States excited the imagination of Spanish Americans . . . . The works of Tom Paine and Franklin, the speeches of John Adams, Jefferson and Washington all circulated in Spanish America . . . . Copies of the Federal Constitution and the Declaration of Independence, conveniently translated into Spanish, were carried into the area by United States traders . . . .”). The functional similarities between Latin American constitutionalism and that of the United States, moreover, are very strong. Constitutions throughout the Americas rest on presidentialism, judicial review, and separation of powers. See BREWER-CARIAS, *supra* note 89, at 71–72; COLOMER VIADEL, *supra* note 7, at 98.

154. See *supra* Part II.B.

understand that citizens might mobilize on behalf of the rules.<sup>155</sup> As a consequence, the Constitution could change slowly over time through negotiations and compromise. Constitutional politics in Latin America, on the other hand, led to a divorce between the citizenry and formal constitutional rules of the game.<sup>156</sup> The decision to centralize power and make rules malleable to promote development enhanced elite power but at the expense of citizen allegiance to the fundamental rules of the game. There was little reason for citizens to mobilize on behalf of rules that could be readily changed by those in power.<sup>157</sup> As a consequence, peaceful negotiations and compromises proved difficult and the solution to many political disputes became the *golpe de estado*.

The issue is how Latin America might start on the road towards a more democratic constitutional politics by making the difficult transition from a government of men to one of laws. One appealing answer claims that the institutions Latin America adopted are defective and the solution lies in adopting better ground rules. A number of scholars have become busy in the wake of the third wave of democratization writing and arguing about how to better design the bits and pieces of democracy in Latin America—the executive,<sup>158</sup> the judiciary,<sup>159</sup> the legislature,<sup>160</sup> and state and local government<sup>161</sup>—to provide the sort of pay-off to the citizenry that is needed if democracy is to endure.

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155. A fine example of the interplay between citizen support for the fundamental rules of the game and elite behavior is provided by President Roosevelt's court-packing plan in 1937. The norm against increasing the size of the Court to have it change course is an informal one, but its power was illustrated when Roosevelt announced his plan to pack the court and a storm of protest arose. See Charles Gardner Geyh, *Customary Independence*, in CROSSROADS, *supra* note 67, at 160, 166–68. Editorials were written against the plan even in papers that otherwise supported the President and public opinion polls showed the American public clearly opposed to the President's plan. BARBARA A. PERRY, *THE PRIESTLY TRIBE: THE SUPREME COURT'S IMAGE IN THE AMERICAN MIND* 14–21 (1999).

156. See *supra* Part III.B.

157. The mechanisms that were used to circumvent the formal rules entrenching constitutions are varied. In Mexico, one political party controlled all three branches of government, which allowed it to change the constitution almost at will. When President Zedillo, for example, sought to amend the constitution to strengthen the Mexican Supreme Court by proposing a number of fundamental changes, his proposals were ratified in less than one month! Vargas, *supra* note 10, at 295–97. In Argentina, it was customary for each new president to pack that nation's Supreme Court with his cronies. Cf. Carlos S. Nino, *On the Exercise of Judicial Review in Argentina*, in TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY 309, 317, 319 (Irwin P. Stotzky ed., 1993).

158. The prevalence of dictatorship in the region has led some scholars to argue that reforming the executive is the key to improving democratic prospects in the region. Juan Linz touched off an important scholarly debate by arguing that presidential democracy was the root cause of dictatorship in the region and parliamentary government was superior in making democracy endure for the long haul. Juan J. Linz, *Presidential or Parliamentary Democracy: Does It Make a Difference?*, in 1 THE FAILURE OF PRESIDENTIAL DEMOCRACY: COMPARATIVE PERSPECTIVES 3 (Juan J. Linz & Arturo Valenzuela eds., 1994). Others have questioned whether parliamentary government is superior to presidential government and concluded that presidential government with a more constrained executive than has been the norm in Latin America is the best form of governance for the region. See, e.g., Mainwaring & Shugart, *supra* note 5, at 436.

159. The marginalization of laws and judges from the process of nation building in the region led many scholars to explore and question the efficacy of the various judicial and legal reforms that have occurred in the region. See, e.g., HAMMERGREN, *supra* note 13; THE (UN)RULE OF LAW, *supra* note 31; PRILLAMAN, *supra* note 16; MARK UNGAR, *ELUSIVE REFORM: DEMOCRACY AND THE RULE OF LAW IN LATIN AMERICA* (2002).

160. See, e.g., LEGISLATIVE POLITICS IN LATIN AMERICA (Scott Morgenstern & Benito Nacif eds., 2002); LEGISLATURES AND THE NEW DEMOCRACIES IN LATIN AMERICA (David Close ed., 1995).

161. The pronounced centralism that has characterized Latin American politics since the 1750s led many scholars to emphasize the importance of decentralization in enhancing democratic governance in the region. See, e.g., TIM CAMPBELL, *THE QUIET REVOLUTION: DECENTRALIZATION AND THE RISE OF POLITICAL PARTICIPATION IN LATIN AMERICAN CITIES* 9 (2003); DECENTRALIZATION AND DEMOCRACY IN LATIN AMERICA (Alfred P. Montero & David J. Samuels eds., 2004); FEDERALISM AND DEMOCRACY IN LATIN AMERICA (Edward L. Gibson ed., 2004); R. ANDREW NICKSON, *LOCAL GOVERNMENT IN LATIN AMERICA* (1995); George E. Peterson, *Decentralization in Latin America: Learning Through Experience* (World Bank, Latin Am. & Caribbean Studies,

The problem with engineering solutions is that if the history of constitutional politics in Latin America teaches us anything, it is that tinkering with constitutions alone cannot construct democracy. The history of the region is littered by reforms that failed because they did not transform local power structures.<sup>162</sup> As Professor Thome notes, how reforms play out depends on a “hard-to-unravel socio-legal tapestry.”<sup>163</sup> The operation of rules is mediated by the environment in which they are placed and which they help create. Liberal constitutions in the nineteenth century were not simply trumped by a hostile environment but paradoxically played an important role in creating the very environment that set Latin America on a different path than the United States.<sup>164</sup>

Another appealing but very different answer to the problem of why Latin American constitutional politics took a different path than the United States contends that engineering solutions are unimportant since the key to understanding the efficacy of constitutional rules lies in the attitudes of the citizens towards those rules. Professor Putnam argues that legal reforms are not the key to making democracy work since such reforms cannot transform deeply entrenched attitudes.<sup>165</sup> Rather, it is the habits and mores of the citizenry that explain why some parts of the world are authoritarian and others democratic. No doubt a civic culture is important in sustaining democracy much as the lack of such a culture facilitates authoritarianism.<sup>166</sup> The problem with contending that the nature of civil society is the sole determinant of the efficacy of legal reform<sup>167</sup> is that making new constitutions—as well as amending and maintaining constitutions—sometimes succeeds in creating the societal attitudes needed for constitutions to become entrenched.<sup>168</sup>

This Article argues that to understand how constitutions may become entrenched, we need to steer a path between the Scylla that better laws can transform society and the Charybdis that societal attitudes determine the success or failure of legal reforms. The new constitutionalism in Latin America, the reforms currently being undertaken to effectuate democracy, will suffer the same fate as the old constitutionalism—the liberal constitutions adopted in the nineteenth century—unless we understand how the transition from a government of men to one of laws may occur.<sup>169</sup> To understand how Latin America might

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Viewpoints Series, 1997). See JUDITH TENDLER, *GOOD GOVERNMENT IN THE TROPICS* (1997), for a very fine study exploring how decentralization may have a positive impact on democratic functioning.

162. See DELEZAY & GARTH, *supra* note 65, at 246–50.

163. Thome, *supra* note 143, at 693.

164. See *supra* Part III.B.

165. ROBERT D. PUTNAM WITH ROBERT LEONARDI & RAFFAELLA Y. NANETTI, *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY* 83–120 (1993).

166. See Ronald Inglehart, *Culture and Democracy*, in *CULTURE MATTERS: HOW VALUES SHAPE HUMAN PROGRESS* 80, 81 (Lawrence E. Harrison & Samuel P. Huntington eds., 1st ed. 2000).

167. Oddly, one potential solution to the problem of transforming Latin America’s constitutional politics by means of transforming the attitudes of the citizens has been tried and found wanting. Domingo Sarmiento, the president of Argentina from 1868 to 1874, argued that it was the mentality of the common folk of Argentina that prevented development and what was needed was immigration by Europeans to cure the nation’s ills. Sarmiento, *supra* note 100, at 18–21. Sarmiento’s views were shared by many elites in Argentina and as a consequence a constitutional environment was built in nineteenth century Argentina that was designed, in part, to promote immigration. Immigrants came in unprecedented numbers with undoubtedly different attitudes than the native inhabitants. This immigration did not secure democracy for Argentina, but contributed to the demise of Argentina’s political order, which was unable to build a national identity in the face of this massive wave of immigration. See GINO GERMANI, *POLITICA Y SOCIEDAD EN UNA EPOCA DE TRANSICION: DE LA SOCIEDAD TRADICIONAL A LA SOCIEDAD DE MASAS* 304–05 (Biblioteca Am. Latina, Serie Menor, Series No. 13, 1968).

168. TEITEL, *supra* note 25, at 191–211 (arguing that constitutions in transitional democracies are not only based on the past but also seek to change the future).

169. A number of scholars are pessimistic about the possibility of constitutional and legal reform in the region given the failure of past reform efforts. See, e.g., Adelman & Centeno, *supra* note 2, at 139; DELEZAY & GARTH, *supra* note 65, at 250. This Article argues, however, that reforms that are based on a transformation of societal attitudes are possible. See *infra* Part IV.B.

begin on the path of a more democratic constitutional politics, we need to unravel the legal and social tapestry of Latin American constitutionalism. First, we need to understand why it has proven so difficult to entrench constitutions in Latin America. Part IV.A *infra* argues that though the conditions that led to the adoption of malleable constitutions no longer exist, those rules created an environment that makes reform difficult. The diffuse interest that citizens have in entrenching constitutions is trumped by the more intense preferences that political and social elites have in perpetuating the status quo. Simply because constitutional entrenchment is desirable does not mean that reform will occur. Institutional arrangements may be normatively irrational but socially rational. Second, we need to understand the processes by which the logic of Latin American constitutionalism might be transformed. Part IV.B *infra* explores how social movements sometimes succeed in transforming the logic of constitutional politics so that governments and elites pay greater attention toward rules. Social movements that succeed in entrenching constitutional rules do so by transforming the diffuse interests which citizens share in protecting their rights into more deeply held preferences. Revolutions that succeed do so by creating broad and deep support for rights.

#### A. *The Logic of Constitutionalism Without Constitutional Entrenchment*

There is a long and rich scholarly tradition of ignoring constitutions when explaining Latin American politics.<sup>170</sup> Given the obvious gap between written constitutions proclaiming limited government and individual rights and the reality of regimes that respect few limits on power, it is frequently and mistakenly argued that constitutions are meaningless abstractions in Latin America.<sup>171</sup> Although formal constitutions do not provide an accurate map of political power, this does not mean that political behavior does not respond to norms. Professor O'Donnell argues persuasively that formal rules fail to limit political power because they are trumped by informal rules, and that the proper inquiry, therefore, is to determine what the informal rules of political behavior are.<sup>172</sup>

To understand how these informal rules arose and why they have persisted, we need to understand the notion of path dependency. In *Chaos and Evolution in Law and Economics*, Professor Roe explains path dependency with a metaphor.<sup>173</sup> Imagine that when a path was originally laid out, the road builders feared dangerous animals that lived in the forest. The path meandered to avoid this danger. Towns and cities grew up along this path. Although over time it became clear that a straight path would lower transportation costs, it also became difficult to create a consensus on changing the path because those who

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170. Many scholars argued that authoritarian government and economic underdevelopment could best be explained by Latin America's structural connection to capitalism. That is, polities on the "periphery" of global trade were fated to remain poor and provide raw materials for wealthier nations such as the United States and those in Western Europe, which were at the center of the world economy. See FERNANDO HENRIQUE CARDOSO & ENZO FALETTO, *DEPENDENCY AND DEVELOPMENT IN LATIN AMERICA* 16–21 (Marjory Mattingly Urquidí trans., 1979); ANDRE GUNDEL FRANK, *CAPITALISM AND UNDERDEVELOPMENT IN LATIN AMERICA: HISTORICAL STUDIES OF CHILE AND BRAZIL* (1967); STANLEY J. STEIN & BARBARA H. STEIN, *THE COLONIAL HERITAGE OF LATIN AMERICA: ESSAYS ON ECONOMIC DEPENDENCE IN PERSPECTIVE* (1970). This school of thought known as dependency has fallen out of favor because it cannot explain why the region has democratized. Democratization has led to a renewed interest in the study of institutions. See, e.g., Karen L. Remmer, *Theoretical Decay and Theoretical Development: The Resurgence of Institutional Analysis*, 50 *WORLD POL.* 34, 34 (1997).

171. Cf. Dealy, *supra* note 91, at 49; VÉLIZ, *supra* note 63, at 3; WIARDA, *supra* note 91, at 127.

172. GUILLERMO O'DONNELL, *COUNTERPOINTS: SELECTED ESSAYS ON AUTHORITARIANISM AND DEMOCRATIZATION* 180–82 (1999).

173. Mark J. Roe, *Commentary, Chaos and Evolution in Law and Economics*, 109 *HARV. L. REV.* 641, 643–44 (1996).

live along the crooked path would suffer from the loss of traffic that would result from any improvements. That is to say, institutions that were rational when initially designed persist even though they are no longer desirable because the political calculus has shifted in a manner that favors the suboptimal status quo. Path dependency, in short, explains why institutions that do not work well enjoy considerable political support and are very difficult to change.

Latin America's constitutions bear important birth marks that have proven very resilient. The dangerous animals that Latin America's constitution writers feared were the lower classes. Inequality made the masses potentially dangerous to the elites. Thus, constitutions were drafted that allocated significant power to the executive to deal with emergencies, with the hope that development would one day make republican governance possible.<sup>174</sup> Latin America's constitutions are, therefore, strongly presidentialist. Legislation typically originates with the president either through his formal decree power or his control over the legislature.<sup>175</sup> Virtually all the constitutions in Latin America authorize elected leaders to declare states of siege in an emergency.<sup>176</sup> These provisions have provided the "juridical foundation for dictatorship and tyranny."<sup>177</sup> In short, as Professor O'Donnell argues, Latin America does not have constitutional democracy but a variant of democracy that he calls delegative democracy because it rests on "the premise that whoever wins election to the presidency is thereby entitled to govern as he or she sees fit, constrained only by the hard facts of existing power relations and by a constitutionally limited term of office."<sup>178</sup>

The decision in the nineteenth century by the framers of Latin America's constitutions to allocate excessive power to presidents had two very important but unintended consequences. First, constitutionalism in Latin America shortened the time lines of political actors, making it difficult to reach the sort of accommodations needed to solve pressing social problems. Given the malleability of rules, presidents quite naturally fear coups and unrest. As a consequence, presidents frequently choose policies that strengthen their hold on power by placing cronies in political power over policies that might have a payoff in the future.<sup>179</sup> The excessive power given presidents also means that they fear the election of an opponent with markedly different views and are quite willing to bend rules to

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174. See *supra* Part III.B.

175. See Garro, *supra* note 107, at 472; Hartlyn & Valenzuela, *supra* note 7, at 13; Mainwaring & Shugart, *supra* note 5, at 395; see, e.g., DE SOTO, *supra* note 97, at 196 (Peru).

176. See Gabriel L. Negretto & José Antonio Aguilar Rivera, *Liberalism and Emergency Powers in Latin America: Reflections on Carl Schmitt and the Theory of Constitutional Dictatorship*, 21 CARDOZO L. REV. 1797, 1798 (2000); see also LOVEMAN, *supra* note 8, at 400–03.

177. LOVEMAN, *supra* note 8, at 373.

178. O'Donnell, *supra* note 5, at 59.

179. See BARBARA GEDDES, *POLITICIAN'S DILEMMA: BUILDING STATE CAPACITY IN LATIN AMERICA* 132–34 (1994). Professor Geddes argues that the short time lines of presidents presents them with the dilemma of choosing between policies that enhance their grip on power and policies that help build the nation. As an example of this dilemma, she notes that former President Allende of Chile had to decide whether to staff Chile's copper mines with political cronies who were incompetent managers or with professionals who had the technical expertise to run the mines. Allende was a socialist whose presidency occasioned severe turmoil in Chile. Although the long-term success of the mines was critical to Allende, he chose to reward his political supporters in managing the mines. *Id.* at 17. President Hugo Chávez of Venezuela recently made a similar decision to staff state run oil companies with political cronies who have little expertise in the oil business. Larry Rohter, *Venezuelan Leader Names an Ally as Head of Oil Monopoly*, N.Y. TIMES, Sept. 1, 1999, at A3.

Another example of a president choosing to shore up support over building institutions that would strengthen governance is former President Menem's decision to place political cronies on Argentina's Supreme Court. The court rubber stamped Menem's policies but the cost was high as the court understandably lost legitimacy. Larkins, *supra* note 14, at 427–29.

prevent such a result from occurring.<sup>180</sup> Democracy in Latin America combines the worst elements of authoritarianism and democracy as presidents have powers approaching those of a despot but must use those powers to shore up their political support at the expense of policies that have a long-term payoff. Building the infrastructure needed to create a system of checks and balances, however, requires a long-term perspective that can only be provided by effectuating reasonably firm constitutional principles.

Second, although constitutions are designed to be difficult to change, the reality is that strong leaders have been able to change them easily.<sup>181</sup> The constitutions of the region have been, behaviorally speaking, flexible rather than rigid. Rigid constitutions preserve the fundamental rules of the games from the workings of ordinary politics whereas flexible constitutions are no more difficult to change than ordinary legislation.<sup>182</sup> Flexible constitutions facilitate minority power over majorities by allowing those in power to rewrite the fundamental rules of the game in their favor.<sup>183</sup> Rules that are readily changed at the behest of those in power facilitate elite power but come at a high cost, which is that elites and the masses lose trust in the rules under which they are formally governed. One consequence of this lack of trust in constitutional rules is that political accommodations in the region typically come in the form of pacts or deals that bind the individuals who made them.<sup>184</sup> But pacts, unlike constitutions, are not intergenerational deals. Pacts work if the parties who make them trust each other, but constitutions require something more, which is a trust in the “power of words engrossed on parchment to keep a government in order.”<sup>185</sup>

In short, the drafters of Latin America’s constitutions sought to centralize power in the hands of the president in an attempt to steer a path between tyranny and anarchy. The paradox of Latin American constitutionalism is that it perpetuated the very ills that it sought to avoid. The elite’s mistrust of the masses and the desire to foment development led to the over-centralization of power in the hope that authoritarianism today would lead to republican government tomorrow. As a consequence, constitutions lack the social moorings they need if they are to serve as an effective counterweight to political power. The construction of the institutional infrastructure needed to cabin political power and effectuate republican government, however, is impossible without constitutional rules that

180. President Vicente Fox, for example, was embroiled in a political dispute intended to prevent the leftist, popular mayor of Mexico City, Andrés Manuel López Obrador, from becoming president in Mexico’s upcoming presidential elections. Charges were brought that the mayor’s administration did not respect a judicial order regarding construction that the city was undertaking and which could have prevented the mayor from running for the presidency. James C. McKinley, Jr., *The Explosive Mix in Mexico’s Politics*, N.Y. TIMES, Mar. 16, 2005, at A4. The calculation in bringing these charges was that it would serve the short-term interests of President Fox’s party if the mayor cannot run for the presidency. The cost would be long term, as any election without the participation of the popular Obrador would lose legitimacy. There was considerable public opposition to the charges, however, which has led President Fox to drop them. It is now quite possible that Obrador will become the next president of Mexico. Ginger Thompson, *Pursuer of Mexican Leader’s Opponent Quits Under Fire*, N.Y. TIMES, Apr. 28, 2005, at A10; Ginger Thompson, *Star Rising, Mexican Populist Faces New Tests*, N.Y. TIMES, May 4, 2005, at A1.

181. President Hugo Chávez of Venezuela, for example, was able to circumvent the limitations of Venezuela’s 1958 constitution by convening a constitutional convention and having a new constitution drafted that solidified his grip on power. See McCoy, *supra* note 12, at 109. Another less dramatic but equally effective means to transform constitutional rules is by replacing the membership of a nation’s supreme court with the president’s cronies.

182. BARENDT, *supra* note 57, at 8.

183. See AREND LIJPHART, PATTERNS OF DEMOCRACY: GOVERNMENT FORMS AND PERFORMANCE IN THIRTY-SIX COUNTRIES 216–23 (1999).

184. See Guerra, *supra* note 130, at 25, 30; Terry Lynn Karl, *Dilemmas of Democratization in Latin America*, in DEMOCRACY IN LATIN AMERICA: PATTERNS AND CYCLES 21, 31–34 (Roderic Ai Camp ed., Jaguar Books on Latin Am., Series No. 10, 1996).

185. Kay, *supra* note 55, at 16.

are beyond the reach of ordinary politics. One of the lessons of Latin American constitutionalism is that long-term political stability is impossible without entrenched constitutional rules.<sup>186</sup> Constitutionalism without constitutional entrenchment leads to instability and crises.<sup>187</sup>

### B. *The Social Construction of Constitutional Entrenchment*

Polities do manage to entrench constitutional rules. The leading account of how this occurs stresses the importance of elite pacts.<sup>188</sup> Professors North and Weingast note that any bargain may fall apart because the incentives for complying with the deal are different than the incentives for making the deal in the first place.<sup>189</sup> Constitutions work when they are “self-enforcing” so that the “major parties to the bargain” have an “incentive to abide by the bargain after it is made.”<sup>190</sup> Constitutional bargains stick when elites realize that it is in their self interest to cede power to constitutions and to the laws more generally by making a credible commitment that they will abide by those rules.<sup>191</sup> When other actors trust that these commitments will be kept, then the cooperation needed to ensure political stability may occur.

The problem with the elite-centered account of constitutional entrenchment is that it ignores the role of the people in making the commitments contained in constitutions credible.<sup>192</sup> A core argument of this Article is that constitutions cannot be entrenched without citizen attachment to constitutional rules. As Professor Whittington notes:

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186. The contemporary experience of Mexico illustrates this principle. Mexico was “exceptional” among the world’s dictatorships because it lasted longer than any other dictatorship in the twentieth century. It was, as Mario Vargas Llosa said, the perfect dictatorship. Mario Vargas Llosa, *Mexico: The Perfect Dictatorship*, NEW PERSP. Q., Winter 1991, at 23. The reason for Mexico’s success is that some important constitutional rules, such as the principle that no president could be reelected, were respected. See MORRIS, *supra* note 148, at 188, 224.

187. Whittington, *supra* note 87, at 2109 (observing that a crisis of “constitutional fidelity” occurs “when important political actors threaten to become no longer willing to abide by existing constitutional arrangements”).

188. The issue of constitutional entrenchment is analytically distinct from that of constitutional or institutional emergence. The scholarship on institutional emergence also stresses the role of elites but disagrees on the long-term implications that elite-led changes have for democratic governance. Compare MERILEE S. GRINDLE, AUDACIOUS REFORMS: INSTITUTIONAL INVENTION AND DEMOCRACY IN LATIN AMERICA 197–98 (2000) (claiming that elite consensus led to political decentralization in Argentina, Venezuela, and Bolivia and that such reforms might improve democratic governance), with Ran Hirschl, *The Political Origins of the New Constitutionalism*, 11 IND. J. GLOBAL LEGAL STUD. 71, 90 (2004) (arguing that the worldwide expansion of judicial power is a “byproduct of a strategic interplay” among political elites, economic elites, and judicial elites and that this expansion of judicial power is troubling because it is a veiled “attempt to insulate policymaking from the vicissitudes of democratic politics”).

189. Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, in THE ORIGINS OF LIBERTY: POLITICAL AND ECONOMIC LIBERALIZATION IN THE MODERN WORLD 16, 19 (Paul W. Drake & Mathew D. McCubbins eds., 1998) [hereinafter THE ORIGINS OF LIBERTY].

190. *Id.* (emphasis omitted).

191. *Id.* at 21.

192. The elite-centered account of how constitutions become entrenched bears obvious similarities to the leading account of how democracy emerges. Professor Dahl has argued that stable democracies emerge when elites first learn how to play by a more democratic set of rules before participation is extended to the masses. ROBERT A. DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION 36–37 (1971); see also DIAMOND, *supra* note 17, at 14, 172 (arguing that Dahl’s thesis is borne out by the experience of Latin America’s more successful democracies); Paul W. Drake & Mathew D. McCubbins, *The Origins of Liberty*, in THE ORIGINS OF LIBERTY, *supra* note 189, at 3, 12 (claiming that liberty emerges from the calculus of self-interested sovereigns rather than from pressure from the grass roots). Consolidated democracies emerge in two transitions: the first is the transition to democracy from authoritarianism, the second is longer and more difficult and involves building the institutions needed to limit political power. The elite consensus that lies at the root of the initial transition to democracy, however, is insufficient to institutionalize the habits and mores of democracy needed for democratic consolidation.

[C]onstitutions attempt to regulate the government itself and cannot rely on any external enforcement mechanism . . . . [T]he primary sanction available for a constitutional violation is simply publicity of the violation, which centrally depends for its effectiveness on the continued general commitment to the constitutional provisions that are being violated.<sup>193</sup>

Elite pacts may bring stability for the generation that made the deal in question, but the constitutional enterprise aims at creating a community “that can survive the corrupting influences of time and fortune.”<sup>194</sup> Credible constitutional commitments must not only be politically constructed by the elite bargaining that typically underpins the formal making of constitutions,<sup>195</sup> but must be also socially constructed by, as de Tocqueville noted, the subterranean process in which the “the spirit of the lawyer . . . spreads little by little . . . into the lowest ranks, and the people as a whole in the end contract a part of the habits and the tastes of the magistrate.”<sup>196</sup>

The differing constitutional fates of Argentina and the United States demonstrate that a constitution that is simply politically constructed by an elite pact cannot stand the test of time, whereas one that is socially constructed may indeed endure. Argentina experienced a period of sharp political conflict in the aftermath of independence in 1810<sup>197</sup> that ended when a dictator, Juan Manuel de Rosas, obtained sufficient power to impose order. He rejected the necessity of a constitution<sup>198</sup> and relied on a police force and the personal allegiance of his followers, who benefited from his governance, to maintain power from 1829 until 1852.<sup>199</sup> Rosas was overthrown by forces that sought to impose a constitutional order that would provide the basis for economic growth in Argentina.<sup>200</sup> Argentina’s economic growth had been stymied by its unstable institutional environment. Argentina had land in abundance but could not attract either the immigrants or the capital it needed to make the land productive when it was rent by civil war or governed by a dictator who used force to govern.

Professor Miller argues persuasively that the decision to adopt a constitution in 1853 modeled after that of the United States led to political stability and provided the institutional underpinnings for Argentina’s phenomenal growth in the late nineteenth

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The experience of Latin America conclusively establishes that consolidation requires fundamental ground rules with deep social moorings.

193. Whittington, *supra* note 87, at 2110.

194. Finn, *supra* note 36, at 42.

195. Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 364, 394–95 (1995).

196. DE TOCQUEVILLE, *supra* note 44, at 258.

197. The constitutional struggle that led to civil war in the aftermath of independence was motivated principally by the differing economic interests of political actors located in different regions of Argentina. See HALPERÍN-DONGHI, *supra* note 126, at 80; MIRON BURGÍN, *THE ECONOMIC ASPECTS OF ARGENTINE FEDERALISM, 1820–1852*, at 14–17 (Harvard Econ. Studies, Series No. 78, 1946).

198. See Letter from Juan Manuel de Rosas to Don Juan Facundo Quiroga, *supra* note 99.

199. JOHN LYNCH, *ARGENTINE DICTATOR: JUAN MANUEL DE ROSAS 1829–1852 passim* (1981). Rosas was an able and brutal dictator who, rather oddly, called himself the “Restorer of the Laws.” Rosas believed that he was restoring an older Hispanic order that had been rent by liberal ideals. He had no patience for laws in any formal sense, however, and personally reviewed the sentences handed down by his courts to determine which of his enemies should be put to death and which ones exiled. See *id.*

200. Cf. JEREMY ADELMAN, *REPUBLIC OF CAPITAL: BUENOS AIRES AND THE LEGAL TRANSFORMATION OF THE ATLANTIC WORLD* 127 (1999); LYNCH, *supra* note 88, at 263–74.



century.<sup>201</sup> Most scholars, as Professor Miller notes, ignore the importance of the 1853 Constitution because it failed to implement political democracy or indeed many of the provisions of the constitutional text.<sup>202</sup> Political rights remained uncertain since elections were rigged and there were numerous rebellions. Professor Miller concludes that Argentine constitutionalism was an:

enormous success, however, in terms of what its designers wished to accomplish—to encourage immigration and to stimulate economic growth. It was also successful in establishing a system of mutual security under which the political opposition, even in the absence of democratic elections, knew that it would suffer only limited oppression, and where the party in power knew that even if the opposition came to power, it would not do them serious harm.<sup>203</sup>

The 1853 Constitution was, however, only an elite bargain as evidenced by the failure to implement many of its provisions and by the lack of public deliberation that accompanied its adoption.<sup>204</sup> The sort of electoral fraud regularly practiced under the 1853 Constitution could not occur under a constitution with deeper social moorings. Informal agreements, or *acuerdos*, between elites were the real source of power.<sup>205</sup> This result was foreseen by the framers of the 1853 Constitution, who believed that civil society was a threat to order and that the “republican state should be autonomous from civil society as a whole.”<sup>206</sup>

The political order created in 1853 broke down in the early twentieth century under the weight of massive immigration and the inability of the Argentine state to find a means to incorporate these new citizens into the political system.<sup>207</sup> The constitutional system created in 1853 was unable to change to deal with these social transformations because the formal rules of the game lacked social moorings. The lack of support for the 1853 Constitution is evidenced by the course of Argentina’s twentieth century political history. When the military overthrew a popularly elected president in 1930, the citizens did not rise up to protest the overthrow of the Constitution. For the next fifty years, Argentine politics oscillated between dictatorship and democracy. Without a separation between ordinary and constitutional politics, the changes needed to deal with the social transformations caused by immigration were not possible within the framework of the 1853 Constitution.

The failure of Argentina’s 1853 settlement illustrates that elite pacts cannot withstand the test of time that is the acid test of successful constitutions. Argentina’s constitution lacked social moorings because it aimed only at ending political disputes between elites but failed to sweep away the authoritarian social and political order that Argentina inherited from Spain. The American Revolution, on the other hand, provides an example of how a constitution can obtain deep social moorings by sweeping away an authoritarian legal and social order. Colonial North America did not differ as much from Latin America as is

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201. Jonathan M. Miller, *The Authority of a Foreign Talisman: A Study of U.S. Constitutional Practice as Authority in Nineteenth Century Argentina and the Argentine Elite’s Leap of Faith*, 46 AM. U. L. REV. 1483, 1486 (1997).

202. *Id.* at 1485–87.

203. *Id.* at 1492.

204. See ADELMAN, *supra* note 200, at 208.

205. PETER H. SMITH, ARGENTINA AND THE FAILURE OF DEMOCRACY: CONFLICT AMONG POLITICAL ELITES, 1904–1955, at 8 (1974); see Lynch, *supra* note 133, at 39.

206. ADELMAN, *supra* note 200, at 195.

207. See GERMANI, *supra* note 167, at 304–05; DAVID ROCK, ARGENTINA 1516–1987: FROM SPANISH COLONIZATION TO ALFONSIN 166 (rev. & expanded ed. 1987); SMITH, *supra* note 205, at 11, 113.

commonly believed.<sup>208</sup> The British colonies were ruled by a monarchy and society was hierarchical and clientelistic. Patronage was the glue that held this society together because it provided a link between inferiors and superiors in which resources were exchanged for loyalty.<sup>209</sup> Law “reinforced dependencies of all sorts” since more than “half of the people in most of the settlements were legally unfree in some way—dependent on fathers or husbands, masters or landlords.”<sup>210</sup>

The disintegration of this inegalitarian, monarchical society was necessary for republicanism to succeed. Professor Wood argues that the American Revolution was the most radical in history if measured by the “amount of social change that actually took place.”<sup>211</sup> Wood concludes:

The revolutionaries aimed at nothing less than a reconstitution of American society. They hoped to destroy the bonds holding together the older monarchical society—kinship, patriarchy, and patronage—and to put in their place new social bonds of love, respect, and consent. They sought to construct a society and governments based on virtue and disinterested public leadership and to set in motion a moral movement that would eventually be felt around the globe.<sup>212</sup>

The key to the long-term success of the American Revolution was that it facilitated a peculiar form of politics that would help entrench the Constitution. Subsequent constitutional change was possible only if supported by a large majority of the citizenry. Such changes helped deepen citizen attachment to the Constitution since the people are directly involved in constitutional transformations. The social movements generated by constitutional struggles play a “jurisgenerative role,” as Professor Siegal notes, by ultimately deepening citizen attachment to the constitution.<sup>213</sup> Higher lawmaking forces citizens to take part in constitutional change which plays an important role in connecting civil society to the state.<sup>214</sup> Even the losers stay in the constitutional game because they can turn to “constitutional and higher-law arguments to articulate their deeply felt demands.”<sup>215</sup>

Constitutional politics within the framework of a constitution that has deep social moorings may not only deepen citizen attachment to the constitution but can also help solve the problem of the non-enforcement of constitutional provisions. Constitutional rules are sometimes trumped by social norms in the United States, no less than in Latin America. The Reconstruction amendments that promised political equality to the freed slaves were ignored for a century because of the intense desire of Southern whites to maintain an inegalitarian social structure.<sup>216</sup> Ordinary politics in a democracy cannot solve collective action problems where there is broad but diffuse support for a certain outcome and narrow

208. See generally LANGLEY, *supra* note 2. Langley notes in his introduction that his book “is a comparative history of the revolutionary age” of the Americas. *Id.* at 2.

209. MICHAEL SCHUDSON, *THE GOOD CITIZEN: A HISTORY OF AMERICAN CIVIC LIFE* 12–30 (1998).

210. PETER CHARLES HOFFER, *LAW AND PEOPLE IN COLONIAL AMERICA* x (rev. ed. 1998).

211. GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 5 (1991).

212. *Id.* at 229.

213. See Reva B. Siegal, *The Jurisgenerative Role of Social Movements in United States Constitutional Law* 22 (Seminario en Latinoamérica de Teoría Constitucional y Política (SELA), 2004), available at <http://islandia.law.yale.edu/sela/SELA%202004/SiegelPaperEnglishSELA2004.pdf>.

214. See James Gray Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287, 345–47 (1990).

215. Jules Lobel, *Losers, Fools & Prophets: Justice as Struggle*, 80 CORNELL L. REV. 1331, 1337 (1995).

216. See ROBERT J. COTTRILL ET AL., *BROWN V. BOARD OF EDUCATION: CASTE, CULTURE, AND THE CONSTITUTION* 34–48 (Landmark Law Cases & Am. Soc’y Series, 2003).

but intense support for a very different outcome.<sup>217</sup> Constitutional politics that rest on social movements, on the other hand, can operationalize non-enforced constitutional norms by transforming societal attitudes. The best example of how this may occur lies in the complex relationship between *Brown v. Board of Education*<sup>218</sup> and the U.S. civil rights movement. Professor Klarman argues that *Brown* did little to desegregate Southern schools directly as little changed in the South in the decade following the decision.<sup>219</sup> But *Brown* facilitated the realization of the promise of equality embedded in the Reconstruction Amendments by “invigorating a civil rights movement.”<sup>220</sup> The civil rights movement, in turn, led to massive and violent resistance in the South that transformed the diffuse support in the North for the political goal of equality to a more intense support. This change in intensity of preference in the North was critical to the enactment of important legislation such as the Civil Rights Act of 1964.<sup>221</sup> *Brown* is, as Professor Powe notes,<sup>222</sup> ultimately a majoritarian decision, but it is a peculiar one in that it helped fashion the very majority that provided the decision with the support it needed to be effectuated.

The reason that Latin America has not undergone similar constitutional transformations is clearly not for want of social movements but rather because the conditions that made possible the separation of constitutional from ordinary politics in the United States did not occur in Latin America until the recent wave of democratization that began in the 1980s.<sup>223</sup> The profound social inequality that marks the region led elites to opt for a specific form of liberalism that excluded the masses from power. Constitutions became flexible, behaviorally-speaking, to facilitate elite power, but the cost was that they lacked broad citizen support. As a consequence, the social movements that arose were typically revolutionary since there was no possibility of transforming the system without an armed struggle.<sup>224</sup> These social movements were similar to social movements in the United States, however, inasmuch as they sought to transform the obvious diffuse base of support for change into more intense preferences that were needed if a revolution were to succeed. The twentieth century witnessed a long struggle between a revolutionary left and conservative elements, made up of elites and militaries supported by the United States.

The end of the Cold War transformed Latin American politics as conservative elements gave up their iron grip on power and the left moved from revolution to political and grassroots organization. The end of revolutionary struggle also led the United States to abandon its support for dictatorship in the region. The combination of poverty and inequality has led to the triumph of the political left throughout most of the region.<sup>225</sup> The social construction of constitutionalism in the region is now possible as the political system has become responsive to societal pressure.<sup>226</sup> Grassroots movements in the region have

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217. See ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 48–50 (1956).

218. 347 U.S. 483 (1954).

219. Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 9–10 (1994).

220. *Id.* at 76.

221. See *id.* at 141–49.

222. See LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 36–37, 45 (2000).

223. Although political instability remains a problem, it has clearly lessened. Between 1930 and 1980, the nations of the region “underwent 277 changes of government, 104 of which (or 37.5 percent) took place via military coup.” Valenzuela, *supra* note 9, at 5. Between 1980 and 1990, on the other hand, there were only seven irregular changes of government. *Id.*

224. See JORGE G. CASTAÑEDA, UTOPIA UNARMED: THE LATIN AMERICAN LEFT AFTER THE COLD WAR 203–05 (1st ed. 1993).

225. See Larry Rohter, *With New Chief, Uruguay Veers Left, in a Latin Pattern*, N.Y. TIMES, Mar. 1, 2005, at A3.

226. Catalina Smulovitz & Enrique Peruzzotti, *Societal Accountability in Latin America*, 11 J. DEMOCRACY 147, 152–53 (2000).

led to a transformation of the public sphere as new linkages are being created between informal democratic practices and the institutions of governance.<sup>227</sup>

In short, it is not a law requiring that all the other laws be respected that Latin America needs for constitutionalism to work, even if that has been the hope of Latin American reformers from Simón Bolívar to President Hugo Chávez. What Latin America needs to make the transition from authoritarian to democratic legality is not more “good” laws imposed from above but social movements from below that press governments to respect rights. Social movements form to demand change when governments are not responsive to citizen demands.<sup>228</sup> Individual rights lie at the foundation of social movements<sup>229</sup> because they provide a trump card against government action. Social movements seek to have rights embedded in constitutions and other laws because the law dramatically lowers the cost of having rights enforced. Rights that require the mobilization of social movements to effectuate are difficult to exercise whereas rights that are protected by the government can be realized without the necessity of collective action. Successful social movements close the gap between the rhetoric of a legal order and the behavior of political actors. When a desire to have the fundamental rules of the game respected permeates society, rulers have an incentive to respect those rules. The fidelity to rules that democratic consolidation requires can be created in the very process of effectuating those rights.

## V. CONCLUSION

*Mirrors symbolize reality, the sun, the earth, and its four corners, its surface, its depths, and all of its peoples.*

. . . .

*Is not the mirror both a reflection of reality and a projection of the imagination?*<sup>230</sup>

Comparative constitutionalism clearly broadens and deepens our understanding of constitutional law.<sup>231</sup> It also forces us to think about the linkages between constitutional law and the larger social world within which it is embedded. Professor Scheppele writes that “[t]he urgent issue in constitutional studies typically is to know whether the experiences of some constitutional settings are helpful for understanding others . . . .”<sup>232</sup> The key to making a claim that the experience of one nation might help another is not to focus on specific laws but rather to understand the “logics of particular contexts as a way of illuminating complex interrelationships among political, legal, historical, social, economic,

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227. See LEONARDO AVRITZER, *DEMOCRACY AND THE PUBLIC SPACE IN LATIN AMERICA* 77–102 (2002).

228. Cf. SIDNEY TARROW, *POWER IN MOVEMENT: SOCIAL MOVEMENTS AND CONTENTIOUS POLITICS* 2 (2d ed. 1998).

229. Rights play an important role in revolutions throughout the world. See Lynn Hunt, *The Paradoxical Origins of Human Rights*, in *HUMAN RIGHTS AND REVOLUTIONS* 3, 3–8 (Jeffrey N. Wasserstrom et al. eds., 2000).

230. CARLOS FUENTES, *THE BURIED MIRROR: REFLECTIONS ON SPAIN AND THE NEW WORLD* 11 (1992).

231. Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 *YALE L.J.* 1225, 1309 (1999) (concluding that comparative constitutional law “can be part of the ordinary liberal education of thoughtful lawyers”).

232. Kim Lane Scheppele, *Constitutional Ethnography: An Introduction*, 38 *L. & SOC’Y REV.* 389, 390 (2004).

and cultural elements.”<sup>233</sup> Examining constitutionalism through the looking glass of Latin America allows us to unravel the linkages between constitutions and society.

This Article explores a deceptively simple question: why did constitutionalism in Latin America take a different path than in the United States? Constitutions were adopted throughout the New World in the wake of independence movements in the late eighteenth and early nineteenth centuries to effectuate republican government. Yet constitutionalism in Latin America led to dictatorship whereas constitutionalism in the United States led to republican government. The conventional answer to this issue is that the Constitution was entrenched in the United States because law is independent from politics,<sup>234</sup> whereas constitutions are not entrenched in Latin America because politics trump constitutions.<sup>235</sup> The problem with this view is that it conflates the end of a long historical process with the process itself. Presidents in the United States today must respect court orders. There is little doubt, however, that has not always been the case. Justice Marshall strained to avoid a dispute with President Jefferson to hand over the commission sought by William Marbury because the Supreme Court of 1803 lacked the authority to order a President to comply with its orders.<sup>236</sup> Presidents in Latin America, on the other hand, currently enjoy a rich repertoire of mechanisms they can use to circumvent constitutional restraints.<sup>237</sup> The issue facing new democracies in Latin America and throughout the world is not whether constitutions should be judicially enforced,<sup>238</sup> but how constitutions become entrenched against political inroads.

The answer to that question requires that we peer through the looking glass of constitutional law to determine how constitutional norms are socially constructed so that elected leaders must respect them. The devolution in power from political leaders to rules that is the key to consolidating democracy occurs when there is trust that the constitution will maintain order. The Constitution became entrenched in the United States not because law enjoys independence from politics but because constitutional politics is played under a different set of rules than ordinary politics.<sup>239</sup> The difficulty in amending the Constitution does not flow from its Article V amendment provisions. The Constitution has undergone important transformations outside the formal mechanisms of constitutional amendment. The Constitution is difficult to transform because there is a shared understanding that constitutional change requires debate and citizen mobilization.

Constitutions in Latin America are also constantly being changed by a variety of mechanisms outside the formal amendment provisions embedded in the region’s constitutions.<sup>240</sup> The difference, though, is that these changes do not rest on consensus.<sup>241</sup> Constitutionalism in Latin America facilitated dictatorship not because constitutions are meaningless abstractions but because constitutional politics were played under a very different set of understandings than in the United States. Elites, not citizens, dictated constitutional change, and as a consequence, constitutions became as easy to change as

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233. *Id.*

234. *See supra* Part II.A.

235. *See, e.g.,* ZAKARIA, *supra* note 17, at 96 (discussing Venezuelan President Hugo Chávez’s “referendum [in 1998] that would replace Venezuela’s constitution, eviscerate the powers of the legislature and the judiciary, and place governing authority under a ‘Constituent Assembly’”).

236. *See supra* Part II.A.

237. *See supra* Part III.B and Part IV.A.

238. Democracies throughout the world have opted to provide legal mechanisms to effectuate constitutional provisions. *See* C. Neal Tate & Torbjörn Vallinder, *The Global Expansion of Judicial Power: The Judicialization of Politics*, in *THE GLOBAL EXPANSION OF JUDICIAL POWER*, *supra* note 47, at 1, 1–6.

239. *See supra* Part II.B.

240. *See supra* Part IV.A.

241. *See supra* Part III.B.

ordinary legislation.<sup>242</sup> The differing founding experiences and subsequent constitutional fates of Latin America and the United States demonstrate that a constitution that is politically constructed by an elite pact without the support of the citizens cannot stand the test of time whereas one that is constructed with adequate social moorings may do so. The answer to the issue that underpins this Article then is that how constitutions are socially constructed determines political outcomes such as dictatorship or democracy.<sup>243</sup>

Louis Hartz concluded his magisterial *The Liberal Tradition in America* by arguing that American democracy had little to teach the world because it was exceptional.<sup>244</sup> Hartz was partially right. The United States has little to teach the world when democracy is viewed as an export from the developed world to the underdeveloped world. Law reform in the developing world has rested for too long on exports from the developed world. These borrowed laws have never quite worked in their new environment as they did in the old. The paradigm that provides the intellectual underpinnings for the project of borrowing needs to be reversed if we are to understand constitutionalism. Legal theory in the United States will be enriched if the attitude that the South must learn from the North is replaced by one that takes seriously the problems faced by the South in entrenching constitutions.<sup>245</sup> The comparative constitutional law enterprise, in short, has much to teach the United States about what makes democracy work.

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242. See *supra* Part IV.A.

243. See *supra* Part IV.B.

244. See HARTZ, *supra* note 51, at 309 (“Can a people ‘born equal’ ever understand peoples elsewhere that have to become so? Can it ever understand itself? These were the questions which appeared at the beginning of this book: inevitably also they are the questions which appear at the end.”).

245. A similar argument was advanced by Miguel Centeno and Fernando López-Alves in a different context. They argue that social science theory has failed to adequately comprehend Latin America because it has used theories derived from the historical experience of the West as a lens to view Latin America. The consequence of imposing these foreign models is that the region has been seen as a place where institutions borrowed from the West have failed to take root rather than as a region of alternative development. Centeno & López-Alves, *supra* note 102, at 4–7.

