THE CONSTITUTIONAL ADJUDICATION MOSAIC OF LATIN AMERICA

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This article maps current constitutional adjudication systems in 17 Latin American democracies. Using recent theoretical literature, the authors classify systems by type (concrete or abstract), timing (a priori or a posteriori), and jurisdiction (centralized or decentralized). This approach captures the richness and diversity of constitutional adjudication in Latin America, where most countries concurrently have two or more mechanisms. Four models of constitutional adjudication are currently in use. In the past, weak democratic institutions and the prevalence of inter partes, as opposed to erga omnes, effects of judicial decisions, prevented the development of constitutional adjudication. Today, democratic consolidation has strengthened the judiciary and fostered constitutional adjudication. After discussing the models, the authors highlight the role of the judiciary in the constitutional adjudication bodies, the broad range of options existing to initiate this adjudication process, and the prevalence of *amparo* (habeas corpus) provisions.

Keywords: *constitutional adjudication; tribunals; Latin American courts; judicial review*

A **central feature of the democratic** consolidation wave has been the strengthening of the judiciary. Together with a global expansion of judicial power (Tate & Vallinder, 1995), there has been an expansion of constitutional adjudication. Eastern Europe has deservedly captured scholarly interest.[1] Fortunately, in Latin America, the scant attention historically paid by those other than constitutional scholars to the role of the judiciary and to con-

1. See, for example, Schwartz (1999b); Harutyunyan and Mavcic (1999); Brunner (2000); Ludwikowski (1996); the *East European Constitutional Law Review*; and Epstein, Knight, and Shvetsova (2001).

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stitutional adjudication matters has been reversed in recent years (Couso, 2003; Domingo, 2000; Helmke, 2002; Hilbink, submitted; Stotzky, 1993), but a general guide that maps the state of constitutional adjudication is still lacking. This article intends to fill that gap. We map current constitutional adjudication systems in Latin American democracies, providing a framework that allows us to capture the wide variety of constitutional adjudication features existing in the region. We classify constitutional adjudication systems by type (concrete or abstract), timing (a priori or a posteriori), and jurisdiction (centralized or decentralized). Although we provide criteria that are not mutually exclusive—in fact, countries have different combinations of the aforementioned criteria—our approach captures the richness and diversity of constitutional adjudication presently existing in Latin America.

In what follows, we highlight the similarities and differences between the U.S. and European models and present a typology that adequately captures the chief characteristics of constitutional adjudication in Latin America. We then highlight the context of weak democratic institutions and prevalence of inter partes features that prevented the development of constitutional adjudication in the past. We contrast it with the present context of democratic consolidation and institution building that has strengthened a judiciary that strives to combine inter partes with erga omnes provisions in its rulings. As judiciaries gain independence and begin to exercise significant policy-making power, their role becomes an important element for those who seek to understand how democracy works in Latin America and how it can be strengthened.

We classify Latin American countries using our typology and then exemplify the different models using individual countries' experiences. We highlight the role of the judiciary in the constitutional adjudication bodies, the broad range of options existing to initiate the constitutional adjudication process, and the prevalence of *amparo* (sometimes translated as "habeas corpus" but encompassing more than what that term implies in English) provisions. Together with mapping the status of constitutional adjudication in Latin America, we emphasize some lessons that can be learned for constitutional adjudication experiences elsewhere and point to some shortcomings that presently hinder the strengthening and legitimacy of constitutional adjudication in Latin America.

THE U.S. AND EUROPEAN MODELS

In the United States, the executive, legislative, and judiciary are formally equal, and judicial review is a checks-and-balances tool (Stone Sweet, 2000,

p. 32). Judicial review is decentralized and concrete, because "any judge of any court, in any case, at any time, at the behest of any litigating party, has the power to declare a law unconstitutional" (p. 32).

Because constitutional adjudication emerged in Europe only after 1920 (whereas in the United States, it emerged in 1803) and many European judiciaries were part of previous authoritarian regimes, the creation of constitutional adjudication bodies independent of the judiciary was well warranted. Kelsen (2001) forged the idea of the constitutional tribunal as guarantor of the constitution. The hierarchy of laws gave Kelsen the possibility of differentiating constitutional law from other ordinary (lower) laws. For Kelsen, because of its supreme character, the constitution rules on every body of the state and on every law of the state. But if the constitution is itself a law, it has to rule particular actions and objects, and a judge is needed to adjudicate according to this law. Because conflicts between laws and bodies of the state and the constitution always emerge, constitutional judges and a constitutional tribunal are needed to adjudicate those conflicts.

Kelsen (2001, p. 43) believed that the concrete, decentralized adjudication approach of the U.S. system failed to produce unity and uniformity in the decisions and thus created legal insecurity among the citizens. In fact, when constitutional adjudication is centralized, the ominous and inefficient inter partes effects of tribunal decisions can also be abandoned. But such power, even capable of striking down a law passed by parliament, can be given only to a centralized supreme institution (p. 44). For Kelsen (p. 100), constitutional adjudication serves two goals: to channel conflicts among powers in a federal state and to protect the minority from the oppression of the majority. Kelsen gives preeminence to the first goal because constitutional adjudication arises naturally when there is a plurality of jurisdictions (as in a federal state). Table 1 summarizes the European model of constitutional adjudication and the U.S. approach to judicial review. In the next section, we discuss how Latin American countries have creatively combined features from both systems to develop their own mechanisms to interpret the constitution.

LATIN AMERICA

Scholars have gone beyond the traditional orthodox dichotomy (concrete vs. abstract, centralized vs. decentralized) to identify differences within Europe or within countries that have followed the U.S. model. But the innovations tried in Latin America test the limits of any previously existing categorization. Latin America has "mixed systems," whereby judicial review and constitutional adjudication are combined. In all countries except Peru and to

Table 1
U.S. and European Constitutional Adjudication Models

Characteristic	American Model	European Model
Institutional structure (who has the power to engage in judicial review?)	Decentralized: ordinary courts can engage in judicial review	Centralized: only a single court (i.e., constitutional court); other courts are usually barred from doing so, though they may refer to constitutional court
Timing (when can judicial review occur?)	A posteriori	A priori and a posteriori; some courts have a priori review over treaties or government acts; others have both, and some have either but not both
Type (can judicial review take place in the absence of a real case or controversy?)	Concrete	Abstract and concrete; most constitutional courts can exercise review in the absence of a real case, and many can also exercise concrete review
Standing (who can initiate disputes?)	Litigants engaged in a case or controversy who have personal stakes in the outcome	The range can be broad, from governmental actors (including executives and members of the legislature) to individual citizens

Source: Epstein et al. (2001, p. 121); Favoreau (1990a, pp. 111-112, 1990b) and Stone Sweet (2000, p. 34) also provide frameworks to compare both models, but their frameworks can be safely considered as subsets of the one outlined here.

a limited extent Chile, the constitutional organ belongs to the judicial power (Brewer-Carías, 1997). It can either be the supreme court or a special constitutional court or chamber. That is different from the European model, with its independent constitutional tribunals, and from the American system, which is conducted by the entire judiciary (pp. 129, 134-135).

It is true that mixed systems that actually work are rare, and when they do function, "they evolve toward one or the other of the two principal models" (Favoreau, 1990a, p. 106). But Brewer-Carías (1997) contends that in many countries, "a mix of centralized and diffuse systems of judicial review has been adopted with the aim that both can function simultaneously" (p. 123). Using Cappelletti's (1989) typology, Rosenn (1974) distinguishes centralized from decentralized judicial review. Stressing the "distinctiveness" of regional systems, Rosenn notes that

> the great bulk of the Latin American countries fall into neither the centralized nor the decentralized camp. Rather they are curious hybrids, reflecting the persistence of the United States model, the difficulties of implementing such a

model in civil law countries, and the special difficulties of launching constitutionalism in the Latin American *ambiente* [environment]. (p. 788)

HOW DID CONSTITUTIONAL ADJUDICATION BODIES EMERGE IN LATIN AMERICA?

Latin American mixed systems both were "created," in the sense of being explicitly designed, and evolved in autonomous ways. As in the United States, early Latin American constitutions did not include provisions for judicial review, but the practice of constitutional adjudication evolved from what some judges considered to be implicit in the constitution, the power of the judiciary to check constitutionality (Gargarella, 2002). However, Latin American judiciaries have been weak and highly dependent on the politics of the moment (Gargarella, 2002, p. 5; see also Aguilar Rivera, 2000). Yet despite this weakness, the recent development of constitutional adjudication bodies constitutes the core of the evolution of judicial review in the past decades (Brewer-Carías, 1997, p. 136).

Different reasons have been advanced to explain the past weakness of judicial institutions. Some have blamed a colonial past that failed to foster self-government and strengthened an authoritarian political culture (Eder, 1960, p. 613; Rosenn, 1974, p. 785). In describing early judicial review experiences, authors have mostly described procedures and legal instruments through which the constitution was supposed to be protected. Occasionally, some have stressed the need for strong checks-and-balances provisions that foster the separation of powers (Eder, 1960, p. 613). The judiciary can play a more active role than under the "boundaries" theory of division of power (Manin, 1997). In addition, because Latin American constitutions are so broad and comprehensive (Rosenn, 1974, p. 791), they lend themselves to internal contradictions and provide solid ground for many more challenges to the constitutionality of laws and decrees (Eder, 1960, p. 614).

Constitutional scholars have highlighted the normative (desired principles and values) and positive (actual instruments through which power is exercised) components of the region's constitutions. The constitutions' normative components are overwhelming, whereas the positive parts are often not accurate reflections of reality. Therefore, there is a large gap between the real constitution and the written constitution (Lösing, 1997, p. 106). It was only when erga omnes effects replaced, or began to coexist with, inter partes effects that judicial review could be said to have begun to exist in Latin America. In the past two decades, despite the existing shortcomings in constitutional adjudication provisions, there is consensus that the situation has

improved dramatically. Today, there are "challenges" for the constitutional courts to increase their authority and legitimacy, whereas in the past, the concern was with the independence of judges and the creation of constitutional tribunals (Lösing, 1997).

Although some constitutional adjudication issues were raised in the 19th and early 20th centuries (Deener, 1952; Eder, 1960; Grant, 1948), constitutional adjudication can occur only when the power charged with it can pass judgment independently of the executive and legislative. Latin American democracies in the early 20th century failed to develop strong and independent judiciaries. Later, democratic breakdowns in the 1960s and 1970s rendered constitutional adjudication useless. When governments are free to choose which constitutional provisions to honor and which to discard, either because they are dictatorial or because they govern with emergency powers, the issue of constitutional adjudication loses relevance.

The wave of democratization that led to a decade of uninterrupted democratic governments in the 1990s also brought about a push to strengthen judiciary independence (Frühling, 1998). Efforts to "make institutions work" have put the independence of the judiciary at the forefront of the efforts to consolidate democracy. In many regards, the existence of an independent judiciary has become a litmus test of democratic consolidation. As judicial power strengthens, the issue of constitutional adjudication has reemerged with renewed strength. If courts are indeed in charge of applying and often interpreting the law, and as individuals and groups seek a stronger defense of their rights (human and civil), the battle over what the constitution really means has gained a central role in Latin American politics.

Courts can be truly independent only within a framework of democratic governments with periodic elections and institutionalized balance of power. Those conditions have been present in Latin America, even if to a limited extent in several cases, only since the wave of democratization of the mid-1980s (Huntington, 1993). As Domingo (1999) argues,

> a constitutional text may well prescribe an optimal balance of independence and judicial review powers, but these might not effectively [be] put into practice for reasons that range from lack of resources, to regime instability, to the powerful presence of undemocratic practices and forces. (pp. 154-155)

True, a good institutional design is not a panacea. A constitutional court might not become a positive component, regardless of how well it is designed, if other conditions for democratic consolidation are not met. Our claim here is that those conditions are more likely to be met today than in the past.

WHEN DO LATIN AMERICAN CONSTITUTIONAL ADJUDICATION SYSTEMS MATTER?

There is only scant evidence as to whether this mixture of features of the U.S. and European constitutional adjudication models works well. Yet constitutional adjudication systems have been questioned for their historical irrelevance in the political process rather than for the challenges posed by their hybrid nature. Recent findings allow us to advance one hypothesis to explain under what conditions Latin American constitutional courts matter. Before stating our hypothesis, we rule out two alternative hypotheses that do not appropriately explain why constitutional adjudication has strengthened in recent years.

"Diffuse" public support is a necessary condition for the effective judicial control of a state's constitution (Gibson & Caldeira, 1995; Staton & Strahan, 2002).[2] However, only 26% of Latin Americans expressed "much" and "some" confidence in the judiciary between 1996 and 2001 (Latinobarómetro, 2002). Although *confidence* is not a synonym for *popular support*, it is unlikely that alternative measurement tools[3] would point to diffuse popular support for the judiciary as an explanation of courts acquiring a stronger role. Others have highlighted the need for "an external and direct force" that can support the existence of effective institutions (Maravall & Przeworski, 2003, pp. 1-16). For instance, the Italian judiciary became an effective check only when it was backed by big business and the media (Burnett & Mantovani, 1998, pp. 261-263). However, because Latin American courts have traditionally been subordinated to the executive, why would a rational political actor invest in them? It seems that the conditions under which Latin American courts are more likely to matter lie somewhere else.

We contend that the separation-of-powers approach, which considers judges as political actors who are constrained by other institutional actors, offers a good alternative hypothesis. This approach has been used to study the conditions under which U.S. judges are more likely to engage in policy making (Ferejohn, 2002; Ferejohn & Weingast, 1992; Spiller & Gely, 1990). Others have used it to study the conflictive relation between the judiciary and the other organs of government (Epstein et al., 2001; Harvey & Friedman, 2004; Helmke, 2002; Iaryczower, Spiller, & Tomassi, 2002; Vanberg, 2000).

2. Diffuse popular support "consists of a 'reservoir of favorable attitudes of good will that helps members to accept or tolerate outputs to which they are opposed or the effects of which they see as damaging to their wants'" (Easton, 1975, p. 444).

3. Gibson and Caldeira (1995) suggest ways to identify precisely how to assess diffuse support, such as whether judicial review should be maintained despite unsatisfactory decisions, whether jurisdiction stripping should be used, and the like.

The common assumption in separation-of-powers analysis is that judges behave strategically in decision-making roles, taking into account not only legal constraints (such as precedence and legal coherence) but also political circumstances. Fragmentation in the other political organs has important consequences for the courts because it becomes more difficult for those organs to successfully coordinate among themselves when enacting policies. Fragmentation occurs when no single political party controls the two legislative chambers and the presidency. The higher the degree of fragmentation, the more courts would be involved in policy making, because people seeking the resolution of conflicts will tend to gravitate to institutions from which they can get solutions (Ferejohn, 2002). The higher the degree of fragmentation, the higher the probability that courts will decide against the government. A fragmented government cannot easily overrule a judicial decision against the government (Helmke, 2002; Iaryczower et al., 2002; Ríos-Figueroa, 2004).

The fragmentation hypothesis has been positively tested in Mexico after its adoption of constitutional adjudication in 1994. The probability that the Supreme Court would vote against Partido Revolucionario Institucional (PRI; the party in power from 1929 to 2000) went from .02 for the period when PRI controlled both chambers and the presidency (1994 to 1997) to .43 after PRI lost control of the Chamber of Deputies (1997 to 2000) and to .52 when PRI also lost the presidency and the Senate (2000 to 2003; Ríos-Figueroa, 2004). Something similar has been reported in Argentina (Helmke, 2002; Iaryczower et al., 2002) and Chile, where the Constitutional Tribunal created under military rule in 1981 acted with a significant degree of autonomy because of the fragmentation of power that existed between General Pinochet and the military junta (Barros, 2002). Although more empirical research is needed, we can safely hypothesize that Latin American constitutional courts matter when they face fragmented political systems. In that sense, working constitutional courts are initially a product of fragmentation in the concentration of power, but their emergence consolidates and further deepens the democratic process.

INSTITUTIONAL DESIGN CHALLENGES FOR CONSTITUTIONAL ADJUDICATION BODIES

We warn against some potential threats to effective constitutional adjudication. First, a popular trend in some countries is the merging of the supreme court and the constitutional tribunal. That trend might complicate the development and consolidation of constitutional adjudication. As Ferejohn and

Pasquino (2003) explain, there are good political reasons to put the constitutional tribunal outside the judiciary:

> Constitutional adjudication is inherently political in the sense that a constitutional court must deliberate and choose from among alternative normative rules for regulating social conduct. As a result, Kelsen thought that constitutional courts should be placed outside the judiciary as well as the other governmental departments. Their powers were to be exercised by politically appointed judges, usually drawn from people particularly competent at making abstract comparisons among texts, and with capacity to deliberate about norms and explain decisions and not necessarily from those with judicial experience. (pp. 251-252)

There are also efficiency considerations. Quoting Kelsen's (2001) explanation of why centralization is desirable, Schwartz (1999a) notes that "the most important fact, however, is that in Austria, the decisions of the highest ordinary court, considering the constitutionality of a statute or an ordinance had no binding force upon the lower courts" (p. 147). When the highest court makes nonbinding decisions on constitutional matters, the supremacy of the constitution cannot be ensured.

Schwartz (1999b) discusses the efficiency shortfalls of merging the supreme court and the constitutional tribunal. In addition to the supreme court (which generally is the highest appellate court), many countries have tax courts, labor courts, electoral courts, and military tribunals. Because the civil law tradition works with multiple issue-specific courts, their rulings are often not subject to appeals to the supreme court. In fact, sometimes supreme court rulings cannot be binding if drawing on issues that belong to the other high tribunals.

In addition, there is the issue of appointments. In the European model, the selection process for regular judges is drastically different than for constitutional judges. The former are selected by exams, seniority, and civil service career incentives and punishments. They are not the clever and foresighted politicians needed to resolve issues of constitutionality (Schwartz, 1999a, p. 148). On the other hand, constitutional judges are usually chosen by the parliament, with executive approval, from a pool of judges, law professors, and politicians. This difference posits a problem for merging constitutional tribunals and the judiciary. In most Latin American countries so far, there have not been major controversies between the supreme court and the constitutional tribunals because current supreme constitutional court members have primarily come from the judiciary. Yet when future generations are selected from a pool of candidates that includes law scholars and reputed

lawyers from outside the judiciary (as is already happening in some countries), problems might arise.

Blurring the difference between the constitutional and supreme courts might also work against the consolidation of constitutional adjudication. Democratic governments often inherited a judiciary that cooperated with former dictatorships. The new regime would prefer those judges not to rule on constitutional controversies. Yet because the constitutional tribunal is not separate from the judiciary, the government has to acquiesce to the judiciary as the supreme interpreter of the constitution. That has turned out to be a problem in many of the transitions to democracy, such as Chile (Barros, 2002). Those countries might find it useful to separate the constitutional tribunal from the judiciary.

In addition to using several models of constitutional adjudication concurrently, the question as to why Latin American countries have decided to create such powerful constitutional justice systems also looms large. Particularly noteworthy is the broad range of political actors who can send referrals to the constitutional organ combined with the erga omnes effects with which such organs have been entitled. The institutional choice to create diverse and broad forms of constitutional adjudication might respond to their limited past experience with constitutional adjudication. In the absence of an active and militant judiciary, Latin American countries might have underestimated the power granted to those in charge of constitutional adjudication.

OUR THREE DEFINING CRITERIA

Among the several criteria described as fundamental variations of constitutional adjudication (Epstein et al., 2001; Murphy, Pritchett, & Epstein, 2001), we have identified three that allow us to create a useful and efficient categorization of constitutional adjudication models in Latin America.

Type refers to whether the process of constitutional adjudication is concrete (when the review may not take place absent a real case or controversy) or abstract (when the review takes place absent a real case or controversy). Naturally, these ideal types are mutually exclusive, but countries can have provisions for constitutional adjudication to occur either with concrete or abstract controversies. Several Latin American countries combine concrete and abstract types of constitutional adjudication. However, there are several cases in which concrete adjudication is the only mechanism by which constitutional review may take place. Thus the first criterion, type, does not allow us to separate countries into two groups. There are countries that provide for

Table 2
Different Possible Combinations of Constitutional Adjudication

	Concrete		Abstract	
Jurisdiction/Timing	A Priori	A Posteriori	A Priori	A Posteriori
Centralized	Not possible	Yes	Yes	Yes
Decentralized	Not possible	Yes	Not possible	Not possible

abstract review, others provide for concrete review, and many provide for both.

Timing determines if constitutional review occurs a priori or a posteriori. If constitutional review can take place only before a law has been formally enacted, we speak of a priori review. In cases in which it occurs after the law has been adopted, a posteriori review is said to occur. Although one might be inclined to equate timing with type, abstract review might occur both a priori and a posteriori. Naturally, concrete review can only occur a posteriori.

Jurisdiction can be either centralized or decentralized. When there is only one court responsible for it, constitutional review is centralized. If more than one court can interpret the constitution and render laws, decrees, or regulations unconstitutional, we speak of decentralized jurisdiction. Logically, when there is abstract review, jurisdiction cannot be decentralized. Even if a local court challenges the constitutionality of a legislative initiative, there can be only one court that has the final say on whether there is a constitutional conflict.[4]

With these three features, there could technically be eight different types of constitutional adjudication. However, four of those combinations are impossible. For example, there cannot be concrete adjudication a priori, because concrete adjudication requires the review to occur after the law has entered into effect. Similarly, decentralized adjudication cannot occur with the abstract type, because decentralized adjudication requires the existence of a concrete controversy. For that reason, we are left with four different types of constitutional review (Table 2): (a) concrete centralized a posteriori, (b) concrete decentralized a posteriori, (c) abstract centralized a priori, and (d) abstract centralized a posteriori.

We have not included additional criteria used elsewhere to distinguish different forms of constitutional review. For example, "standing" refers to whether individual or corporate entities can bring about a constitutional chal-

4. In all cases, the final decision is eventually made by the supreme court. But sometimes, the initial decision can be made by local courts, and that makes a system decentralized.

lenge.[5] We have chosen to ignore it in our basic categories because standing matters only when there is abstract review. It is theoretically implausible to suggest that under concrete review, there can be significant restrictions on who can bring about a constitutional challenge.[6] Once a law has been enacted and it is being applied, challenges to a law or regulation can always be presented by those affected by it. Standing would appropriately differentiate countries where individuals, not just legislators, have the right to ask for a ruling on the constitutionality of a precept before it is enacted.

OUR CASES

We selected the 17 largest Latin American and Caribbean democracies. Logically, we left Cuba out but included Peru and Venezuela. We set the starting year in Peru as 2001, even though the system was outlined when the constitution was promulgated in 1993. We also include Venezuela, where President Hugo Chávez convened a constitutional assembly to write a new constitution, which was promulgated in 2000. Table 3 reports the formal name of the institution in charge of constitutional adjudication in each of those countries. When more than one institution is in charge, we list the more important one. We also include information about the number of members and the length of terms to which these members are appointed to capture whether these are lifetime positions or temporary appointments. In addition, we list the recruiting authorities, without specifying the particular and often complex procedures, used to fill vacant seats.

We have identified four different models of constitutional adjudication in Latin America: concrete centralized a posteriori (Model 1), concrete decentralized a posteriori (Model 2), abstract centralized a priori (Model 3), and abstract centralized a posteriori (Model 4). We also distinguish between erga omnes and inter partes effects in Models 2 to 4.[7] Generally, Model 1 has erga omnes effects. Yet Model 2 (concrete decentralized a posteriori) could con-

5. A typology of constitutional adjudication systems in Europe based on who can refer questions to the constitutional organ is proposed by Pasquino (2003).

6. As one anonymous reviewer appropriately reminded us, public law scholars highlight that the United States has experienced open and closed standing over the years.

7. The distinction between the inter partes and erga omnes effects may be tricky. For instance, should the decisions of the U.S. Supreme Court, which in the strictest sense refer to particular cases or controversies, be classified as having inter partes or erga omnes effects? However, we maintain this distinction for the classification of Latin American constitutional justice systems because it makes sense and is useful given the existence of individual complaints, as we will see.

Table 3
Constitutional Adjudication Bodies in Latin America

Country	Name of Institution[a]	Year Created (year constitution adopted)	Number of Members	Length of Term and Age Limits	Recruiting Authorities
Argentina	Supreme Court	1994 (1863)	9 since 1990	Lifetime	President with Senate
Bolivia	Constitutional Tribunal	1994 (1967)	5	10 years, not immediate reelection	Two thirds of both chambers
Brazil	Federal Supreme Tribunal	1988 (1890)	11	Lifetime (70)	Judiciary
Chile	Constitutional Tribunal	1990	7	8 years, renewable, 75	Supreme Court (3), president (1), Senate (1), National Security Council (2)
Colombia	Constitutional Court	1991	9 (odd)	8, no reelection, 75	President, court, and Council of State, with Senate approval
Costa Rica	Fourth Chamber, Supreme Court	1989 (1949)	7	8, with reelection	Two thirds of Legislative Assembly
Dominican Republic[b]					
Ecuador	Constitutional Tribunal	1998	9	4, with reelection	Supreme Court (2), president (2), Congress (2), labor (1), business (1), local authorities (1); all approved by Congress (majority)
El Salvador	Constitutional Chamber of Supreme Court	1983 (1950)	5	9, renewable	Judiciary with legislative approval
Guatemala	Constitutional Court	1985	5	5, renewable	Various bodies

(continued)

Table 3 (continued)

Country	Name of Institution[a]	Year Created (year constitution adopted)	Number of Members	Length of Term and Age Limits	Recruiting Authorities
Honduras	Supreme Court	1982	9	4, with reelection	National Congress (majority)
Mexico	Supreme Court	1995 (1917)	11	15, not renewable, 75	President, with two-thirds Senate approval
Nicaragua	Supreme Court	1987	12	7, with reelection	President with legislative approval
Panama	Supreme Court	1941	9	10, with reelection	President with congressional approval
Paraguay	Supreme Court Constitutional Chamber	1992	9, 3 in Sala Const	5, renewable, lifetime after 2 terms, 75	Judiciary with Senate and presidential approval
Peru	Constitutional Tribunal	2001	7	5, no immediate renewal	Two thirds of Congress
Uruguay	Supreme Court	1967	5	10, no immediate renewal, 70	Two thirds of both chambers of Congress
Venezuela	Constitutional Chamber, Supreme Tribunal	1999	Not specified	32 (augmented in July 2004), not renewable	Legislature

Source: The text of Latin American constitutions can be found at the Political Database of the Americas (http://www.georgetown.edu/pdba/Constitutions/constudies.html) and in *Anuario Iberoamericano de Justicia Constitucional* (1997).
Note: If a constitution was written during a dictatorship or if the country experienced a democratic breakdown after the constitution was written, we take the starting point to be the 1st year of democratic government. In the case of Mexico, we use 1994 as the starting point because that was the year of the constitutional reform that empowered the Supreme Court as the ultimate interpreter of the constitution.
a. If more than one body can exercise constitutional adjudication, we list only the most important one.
b. There is no constitutional adjudication specified in the constitution of 1994.

Table 4
Different Models of Constitutional Adjudication in Latin America and Selected Countries, 2001

Country	Model 1: Concrete Centralized a Posteriori (generally erga omnes)	Model 2: Concrete Decentralized a Posteriori[a] (can be either erga omnes or inter partes)	Model 3: Abstract Centralized a Priori (erga omnes)	Model 4: Abstract Centralized a Posteriori (erga omnes)	Total
France			X		1
Germany	X			X	2
Italy				X	1
United States		X			1
Argentina		X			1
Bolivia	X		X	X	3
Brazil		X	X	X	3
Chile		X	X	X	3
Colombia		X	X	X	3
Costa Rica	X		X		2
Ecuador	X	X		X	3
El Salvador		X	X	X	3
Guatemala		X	X	X	3
Honduras	X	X	X		3
Mexico	X	X		X	3
Nicaragua		X		X	2
Panama		X	X	X	3
Paraguay	X	X			2
Peru		X		X	2
Uruguay		X			1
Venezuela	X	X		X	3
Total (Latin America only)	7	15	9	12	43

a. When the decision is made by the highest court of the nation, it is binding for all lower courts, but, as we discuss below, Model 2 can have either erga omnes effects or only inter partes effects, depending on the nature of the *amparo* over which the decision was being made. Model 2 is often called *amparo*, although the meaning and legal implications of the term vary from country to country.

ceivably have either erga omnes or inter partes effects. But wherever Model 2 exists, there are only inter partes effects.

As we report in Table 4, these models are not mutually exclusive. Unlike the cases of France, Italy, and the United States, where there is only one model, several Latin American democracies experiment with more than one model concurrently. Notice the contrast with the different European designs and with the American model. Only 2 Latin American countries, Argentina and Uruguay, have one model of constitutional adjudication. Four other countries have two models of constitutional adjudication (Costa Rica, Nicaragua, Peru, and Paraguay), and the remaining 11 nations have three different models of constitutional adjudication functioning concurrently.

The most common form of constitutional adjudication in the region is Model 2, concrete decentralized a posteriori. All Latin American democracies have adopted it except Bolivia and Costa Rica. Model 4, abstract centralized a posteriori, is in use in 12 countries, whereas Model 1, Concrete Centralized a Posteriori, exists in only 7 countries. In total, there are 43 occurrences of the four models in the 17 Latin American nations included in our study.

We now discuss the particularities of each model using Mexico as an example and contrasting that country with the experiences of other Latin American democracies. We do so because Mexico is one of the two most populated countries in the region, because it combines three of the four models of constitutional adjudication we identify, and because it is one of the few countries for which research on the effects of constitutional adjudication has been produced. The institutional design mechanisms currently existing in Mexico for constitutional adjudication correspond to Models 1, 2, and 4.

MODEL 1: CONCRETE CENTRALIZED A POSTERIORI

In Mexico, this is called "constitutional controversy," and only the Supreme Court hears such cases. Constitutional controversies involve problems between different levels of government, both horizontal and vertical. Thus, any dispute between a state and the federal government or the legislative and the executive, generally with regard to attributions, can be brought to the Supreme Court. In cases against the federal government that are deemed important for the interest of the union, the Supreme Court can also take on the role of an appellate court, by using the power of attraction (*facultad de atracción*) to get involved and make a ruling. Other cases involving the federal government can also reach the court through a request by a lower tribunal

or by the attorney general (Mexican constitution, Article 105).[8] Constitutional controversies can be referred to the Supreme Court by state governors, municipal presidents, the three powers of the union, and the three powers of any state. Constitutional controversies are always filed regarding a particular action by an authority deemed unconstitutional, generally on lack of legal competence grounds. Obviously, such claims arise only after an encroaching action has taken place, a posteriori.

Mexican Supreme Court decisions in cases of constitutional controversies may have general or specific effects. In particular, Supreme Court resolutions are valid erga omnes only when no fewer than 8 of the 11 justices agree on the decision. Otherwise, a decision has legal consequences only for the specific case. In other words, if the case is decided by a majority of fewer than 8 justices, it has inter partes effects. This is a unique feature of the Mexican system because it introduces a requisite for the Supreme Court's decision to have general effects, the supermajority vote.

The other countries with concrete centralized a posteriori provisions are Bolivia, Costa Rica, Ecuador, Honduras, Paraguay, and Venezuela. In the cases of Costa Rica and Honduras, the provisions are similar to those of Mexico. In the rest of the countries, the provisions were drawn following the German constitution. Yet in all cases except Paraguay, those countries also have abstract centralized constitutional adjudication, either a priori or a posteriori, which helps obscure the effect of concrete centralized provisions. Thus, in addition to being the least common form of constitutional adjudication in Latin America, Model 1 is also often overshadowed by Model 3.

MODEL 2: CONCRETE DECENTRALIZED A POSTERIORI

All countries use this model except Bolivia and Costa Rica. In those two countries, the concrete a posteriori provisions are also centralized (Model 1). This model is commonly called *amparo* in most countries, although the definition of *amparo* differs significantly from country to country. Likewise, the way it is applied and acted on is not the same even within countries, because it depends on the type of *amparo* and the circumstances in which it is used. In addition, depending on the country, *amparo* can either have erga omnes or inter partes effects.

8. For a study of constitutional controversies, see Castro (1997).

In Mexico, *amparo* is the second legal instrument available to challenge the constitutionality of a law.[9] This individual grievance is possible only when an individual right has been violated by an "act or law of the authority" (Article 103). The *amparo* can be ruled on only after an explicit petition by the aggravated party. Thus an *amparo* can be referred to the Supreme Court if a law or act of authority has violated individual rights. Regular *amparos* (not against the constitutionality of a law, but those that deal with the legality of acts by the authorities or with the application of general norms) are heard in lower courts. Those rulings cannot be appealed unless they pertain to the constitutionality of a law. In these latter cases, an appeal can be made to the Supreme Court provided that it deals exclusively with constitutional issues (Article 107).

An alternative way for an *amparo* to reach the Supreme Court is when there are contradictory theses in the *amparo* suits on the competence of lower courts or tribunals. In that case, Supreme Court justices, the attorney general, the tribunals themselves, or the parties involved in the case can denounce the contradiction before the Supreme Court. The Supreme Court decides which thesis prevails. It can do this either by working *en banc* (*pleno*) or in benches (*salas*). And when different benches sustain contradictory theses, the Supreme Court *en banc* makes the final decision.

The *amparo* can be classified as what Stone Sweet (2000) calls "individual complaints." In Western Europe, there have been legal instruments for individual complaints in Germany since 1951 (*Verfassungsbeschwerde*) and in Spain since 1958 (*amparo*). In those countries, as in Mexico, those instruments are a means to protect constitutional individual rights and liberties. In the three countries, complaints cannot be filed by individuals against other individuals.[10] However, whereas in Germany and Spain, only the respective constitutional organ has the authority to hear such complaints, in Mexico, an *amparo* can be filed on any federal court and then reach the Supreme Court through appeals or by the power of attraction of the Supreme Court. Therefore, in Germany and Spain, the individual complaint is thought of as a subsidiary instrument, filed once judicial remedies have been exhausted. Only then do individuals have the right to go directly to constitutional judges (Stone Sweet, 2000, p. 46).

Mexican Supreme Court decisions on *amparo* cases apply only to particular individuals and only to the specific cases. The sentence is not intended to

9. There are five different kinds of *amparo*: cassation, habeas corpus, against laws, agrarian, and administrative. These are confounded in the constitution and the law that regulates *amparo* but are differentiated analytically by law professors (cf. Fix-Zamudio, 1999). Here, we focus on the *amparo* against laws because it is the only one that deals with the constitutionality of laws.

10. In Germany, public entities such as universities can also file *amparo* suits.

set jurisprudence with regard of the law or act that motivated it unless there are at least five decisions on the same issue in the same sense (Article 107). When the Supreme Court rules in favor of an individual's *amparo*, the particular law affected remains in use for the rest of society. In other words, the *amparo* only has inter partes effect. This rather awkward constitutional provision has been the target of criticisms and also the source of many problems in Mexico and other countries where it is in effect.

Most recently, the Argentine government responded to the economic crisis by ordering a freeze on all bank accounts to prevent a massive withdrawal of the rapidly depreciating Argentine peso. Local judges and even Supreme Court rulings allowed individual citizens to have access to their bank accounts, but each person, and in most cases each bank account, required a specific judicial ruling. Thus, the *amparo* does not set jurisprudence. In the rest of Latin America, the effect of the *amparo* varies according to the cases, existing legislation, and the interpretations of the *amparo* that courts have made over the years. In 2001 in Chile, the Supreme Court ruled the use of the "day-after pill" unconstitutional. Previously authorized by the Ministry of Health, the Supreme Court ruling was a setback for those who sought to introduce additional birth control methods to the Chilean market. The Ministry of Health, narrowly interpreting the Supreme Court's decision, authorized the distribution of a similar version of the day-after pill but required medical authorization. The Supreme Court did not rule the new pill unconstitutional, narrowly interpreting that its previous ruling applied only to the originally authorized pill and not to all types of day-after pills.[11]

MODEL 3: ABSTRACT CENTRALIZED A PRIORI

Popularized by the French Conseil Constitutionnel, this model centralizes the power to rule on the constitutionality of laws in a single body and restricts that power to before the law is actually enacted. Unlike in France, many Latin American nations that incorporated constitutional tribunals into their legal framework gave the judicial power a role in appointing tribunal members, indirectly making the supreme court a player in constitutional adjudication. In some countries, such as Chile, the supreme court appoints some of the

11. This case has not finished, however. A lower court judge decided against the new pill. The government is appealing that decision again, and eventually, the case will reach the Supreme Court. The inter partes effects of judicial decisions in these cases promote the multiplication of similar cases.

members of the constitutional tribunal from among sitting justices. Those justices serve for 8-year periods in the tribunal or until they retire at age 75.

The variations adopted by Latin American countries have given constitutional tribunals a role that is not enjoyed by the French Conseil Constitutionnel. Eight of the nine countries that have the abstract centralized a priori model also have some form of a posteriori review. For that reason, the importance of the constitutional tribunals in Latin America does not come even near the role played by the Conseil Constitutionnel in France. Even after being upheld by the constitutional tribunals, legislation in Latin America can be constitutionally challenged through other means. In many cases, those challenges can also have erga omnes effects.

Yet in recent years, constitutional tribunals have acquired a more prominent role in certain countries. In Chile, where the Constitutional Tribunal was first created in 1969 (but dissolved after the 1973 military coup), the 1980 constitution provided for a very powerful constitutional tribunal (Articles 81 to 83). During the transition to democracy, several reforms were adopted to strip some constitutional provisions that gave the military a tutelary role. Because the Constitutional Tribunal was packed with appointees from the outgoing dictatorship, the democratic forces sought to reduce its power. Yet the tribunal maintained many attributions that have converted it into a key political actor since 1990. More than 225 rulings by the tribunal between 1990 and 2001 have forced the legislature to modify or rewrite legislation after it was voted, but before it was enacted, because a group of deputies or senators challenged the constitutionality of those laws before the Constitutional Tribunal.[12]

MODEL 4: ABSTRACT CENTRALIZED A POSTERIORI

Conceptually, Model 4 is the closest to the pure Kelsenian conception of constitutional tribunal. Unlike in the United States, these rulings can be based on abstract review, but unlike in France, these rulings occur after a law has been adopted.

In Mexico, the abstract centralized a posteriori model is known as *acción de inconstitucionalidad*. The Supreme Court also has exclusive jurisdiction over these "actions of unconstitutionality." They involve cases in which there is a contradiction between a general rule or executive order and the national constitution. An action of unconstitutionality can be referred to the Supreme

12. For a list of all rulings, see http://www.tribunalconstitucional.cl/sentencias.html.

Court by one third of deputies or senators, the attorney general, one third of any state legislature (against state laws that contradict the federal constitution), officially registered political parties (only against federal or local electoral laws), and locally registered political parties (only against local electoral laws) (Article 105). The action of unconstitutionality must be filed within the first 30 days after the law has entered into effect. Therefore, just as in the constitutional controversy, referral in actions of unconstitutionality is restricted to public authorities, not offered to individuals.[13]

In contrast with the constitutional controversy, the action of unconstitutionality grants the Supreme Court exclusive abstract review power over the constitutionality of state and federal laws. That means that a law can be challenged without the need to have concrete cases to which it has been applied. Actions of unconstitutionality are also a posteriori. Parties may resort to it only within 30 days after the enactment of a law.[14] The action of unconstitutionality is the Supreme Court's most powerful tool of judicial review, the only review mechanism that provides it general control over the republic's laws and treaties. Abstract constitutional control is the most powerful institutional means for the Mexican court to influence policy and thus affect the preferred policies of elected officials (Stone Sweet, 2000). The action of unconstitutionality is similar to other processes of abstract review that exist in European countries. Stone Sweet (2000) argues that "in practice, nearly all such referrals are made by members of opposition parties, against legislation proposed by the majority, or governing, party or parties" (p. 45). In Mexico, the actions of unconstitutionality were partially designed as an instrument to check the majority by the opposition in Congress (Castro, 1997). Supreme Court decisions on actions of unconstitutionality follow the same rule as in constitutional controversies. The challenged law or statute is void only with the concurrent vote of at least eight justices. Because actions of unconstitutionality are abstract instruments of constitutional adjudication, in these cases in which the requisite is not met, the Supreme Court decisions do not produce jurisprudence (Cossío Díaz, 1997, p. 69).

Eleven other countries in the region also have a form of abstract centralized a posteriori review. Some resemble the form applied in Mexico, but others rely on the constitutional tribunal to exercise such review. The Chilean constitution provides the Constitutional Tribunal with the power to rule political parties unconstitutional after they have been formed and acquired legal

13. For a study of the actions of unconstitutionality, see Castro (1997).

14. The action of unconstitutionality would be more effective without the 30-day limit. As Taylor (1997) puts it, "Raising a challenge to a statute within thirty days is illogical. Either a statute should be struck down for unconstitutionality or it should not, regardless of time. Surviving thirty days unchallenged should not make a law constitutional" (p. 163).

Table 5
Summary of Legal Instruments for Constitutional Adjudication in Mexico

	Model 1: Constitutional Controversy	Model 2: *Amparo* Against Laws	Model 4: Action of Unconstitutionality
Jurisdiction	Centralized	Diffuse	Centralized
Timing	A posteriori	A posteriori	A posteriori
Referral	Governmental actors	Individuals	Governmental actors
Type	Concrete	Concrete	Abstract
Nature of effects	Erga omnes or inter partes effects	Inter partes effects	Erga omnes or inter partes effects

status. The constitutional provision (Article 19.15) was designed to give the tribunal the power to ban leftist parties that registered using legal tricks. With the advent of democracy in 1989, the constitution was modified, making it more pluralistic and democratic, but the wording on the Constitutional Tribunal's power to declare political parties unconstitutional was maintained, although the grounds on which the tribunal could act were severely curtailed.

A WORD ON DIVERSE CONSTITUTIONAL ADJUDICATION INSTRUMENTS

When more than one model of constitutional adjudication exists, individuals have alternatives when deciding on how to best challenge the constitutionality of certain actions. Table 5 summarizes the three models of constitutional adjudication that coexist in Mexico. Individual Mexicans can only question the constitutionality of laws but cannot aspire to produce erga omnes effects in case the judiciary positively hears their cases. Government authorities can question the constitutionality of laws either with concrete or abstract arguments, but they cannot do it before the law or regulation has been enacted. Yet when government authorities question the constitutionality of a law or a government action, the decision always is centralized. The effect of those decisions can be either erga omnes or inter partes, depending on the nature of the controversy but also on the intensity (margin of victory) of the Supreme Court vote. Elsewhere in Latin America, the diversity of options available to those who seek to challenge the constitutionality of certain actions, decrees, or legislation might end up being confusing and perhaps might also make it less likely that less informed individuals will seek to challenge the constitutionality of certain acts. Or, as seems to be the case in some

countries, such as Costa Rica, individual instruments that require little effort or preparation might induce actors to an excessive—and sometimes trivial—use of constitutional complains (Rodriguez & Wilson, 2003).

CONSTITUTIONAL ADJUDICATION AND *AMPARO*

Individual instruments for the control of constitutionality are nowadays common throughout Latin America. But they have existed for a long time. For example, the state constitution of Yucatán in Mexico in 1843 already provided for *juicio de amparo* (Burgoa, 1962, p. 90). The *amparo* proceeded against any transgression of a constitutional principle to the disadvantage of an individual and could be introduced by any person whose rights had been violated. Current constitutional complaints throughout Latin America, and those in Germany and Spain, share the spirit of that *juicio de amparo*.

Table 6 summarizes basic features of individual instruments of constitutional adjudication in Latin America. As we discussed above, these are mixed systems because they allow for concrete and abstract review of legislation, and they combine centralized and decentralized mechanisms of constitutional review. All countries have mechanisms for individual complaints (often called *amparos*) that can be filed before any court (sometimes any federal court) when any law or act of authority has violated an individual right. The court's decision has effects only for the parties in the trial. In Bolivia, Chile, and Costa Rica, individuals can also present complaints to the constitutional tribunal. Whereas in Bolivia that provision applies to a wide range of situations, Chileans can go to the Constitutional Tribunal only to request that a political party be declared unconstitutional.

The particularities of Latin American cases are highlighted when contrasted with Germany and Spain. Instruments for such form of constitutional control have existed since 1951 in Germany (*Verfassungsbeschwerde*) and 1958 in Spain (*recurso de amparo*.) In both countries, individual instruments are designed to protect constitutional liberties and rights. Thus, the basic aim of individual complaints is the same as in Latin America. Similarly, individuals cannot file complaints against other individuals. The claimant always files a suit against an act by an authority. Although important similarities exist between Spain and Germany and Latin America, the differences are telling. Whereas Latin American systems are "mixed," both Germany and Spain have centralized systems of constitutional adjudication. That is, only the respective constitutional organ has the authority to hear constitutional cases. In both countries, the individual complaint is thought as a subsidiary

Table 6
Individual Instruments of Constitutional Control in Latin America

	Individual Instrument		Authority Hearing the Case[a]		Effects of Decision[b]	
	Yes	No	Centralized (constitutional organ)	Decentralized (any court)	Erga Omnes	Inter Partes
Argentina	X			X		X
Bolivia	X		X		X	
Brazil	X			X		X
Chile	X		X	X	X	X
Colombia	X			X		X
Costa Rica	X			X		X
Ecuador	X			X		X
El Salvador	X			X		X
Guatemala	X			X		X
Honduras	X			X		X
Mexico	X			X		X
Nicaragua	X			X		X
Panama	X			X		X
Paraguay	X			X		X
Peru	X			X		X
Uruguay	X			X		X
Venezuela	X			X		X

a. All or some individual complaints can reach the constitutional tribunal through appeals. Here, we focus on where individual complaints may be originally filed.
b. In some countries, individual complaints may have erga omnes effects whenever these complaints meet certain requirements. Here, we focus on the most common effects of decisions throughout Latin America.

instrument. For that reason, individual complaints are filed once judicial remedies have been exhausted. Only then can individuals go directly to constitutional judges (Stone Sweet, 2000, p. 46).

Consequently, the decisions of the German Federal Constitutional Court regarding cases of *Verfassungsbeschwerde* have erga omnes effects (Kommers, 1997). In Spain, the decisions on *amparos* have inter partes effects in most cases, but when *amparos* are decided by the Constitutional Tribunal *en banc* (generally because the decision of the chamber that originally heard the case contradicts jurisprudence by the Constitutional Tribunal) the decision has erga omnes effects (Rubio Llorente, 1988).

In sum, the institutional design of Latin American systems of constitutional adjudication does affect the nature and the scope of the decisions taken when issues of constitutionality are at stake. In particular, individual complaints in Latin America generally produce only inter partes effects, whereas individual complaints in countries such as Spain or Germany produce erga omnes effects. As our analysis of the institutional features of Latin American systems shows, this difference may result from the mixed nature of those systems because individual instruments often fall originally within the realm of lower courts instead of that of the constitutional organ.[15]

CONCLUSION

We have sought to map the rich and diverse approaches to constitutional adjudication in Latin America today. We classify those systems by type (concrete or abstract), timing (a priori or a posteriori), and jurisdiction (centralized or decentralized). As democratic consolidation and institution building further strengthen the judiciary and fosters constitutional adjudication across the region, new challenges emerge for Latin American constitutional adjudication bodies to be effective tools in facilitating the process. Many of these challenges are unique to each country because of the particular form of constitutional adjudication that all Latin American countries have developed. Because Latin American countries have been very creative in the way their constitutional adjudication systems have evolved, researchers must avoid gross generalizations when they study the advantages, constraints, and challenges faced by Latin American constitutional adjudication systems.

15. The German and Spanish constitutional organs have created a filter mechanism that allows them to hear only the most important cases. They rule only in those cases, and thus only erga omnes decisions are produced. In contrast, not every decision made in every *amparo* case has erga omnes effects. In many Latin American countries, *amparos* that originate in lower courts do not always reach the constitutional organ. In some cases, such rulings on *amparos* may have

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