3. The geopolitics of constitutionalism in Latin America

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I. INTRODUCTION

An increasingly general belief ascribes the waning influence abroad of U.S. constitutionalism to cultural and political idiosyncrasies in the United States. The mythologies of exceptionalism and originalism do not translate well beyond its borders. At the same time, constitutionalism in the global South has exponentially grown in importance. The emergence of "constitutional law powerhouses" among them suggests the inexorable expansion of the field of comparative constitutional law.

In Latin America, this is a particularly pivotal development. The region embraced constitutionalism following independence in the early nineteenth century, and the U.S. constitution has until recently been its pre-eminent model. While standard comparative law accounts confirm the region's indebtedness to continental European private law, they equally emphasize the preponderant influence of the U.S. constitution. Many nineteenth-century Latin American charters closely tracked the 1787 U.S. text. Most Latin American courts did not follow the same example of U.S. constitutional jurisprudence however. With few exceptions, constitutional adjudication in the region did not hew to the same model of constitutional doctrine that is characteristic in the U.S. More recently, though, many constitutional courts in the region have adopted some similar interpretive practices. They have embraced constitutional reasoning techniques reminiscent of strict scrutiny and interest balancing tests, although not always described in these terms. They often cite Anglo-American constitutional theory. And, they appear bolder about relying on decisional precedents.

At the same time, new constitutional texts and reforms in the past 30 years in the region have diverged from the U.S. model. They include robust provisions on social, economic and cultural rights. They recognize much more forcefully the validity of legal pluralism. They include expanded procedural mechanisms for bringing constitutional actions. And, they

have expanded review powers for national supreme and constitutional courts. Despite the converging reasoning techniques, it may be said that the United States is simply no longer a good model for Latin American constitutional law. The content of constitutions and constitutional adjudication in the region has taken a different turn, recognizing a broader array of rights and accepting a more active position on the part of judges. This same observation may in fact apply to other countries in the global South that have developed a similarly active constitutional practice. The focus here though is on the Latin American example.

Conversely, from a U.S. perspective, the question has not been definitively settled that U.S. constitutional scholars and courts *should* pay attention to Latin American developments. That side of the debate presumes that a more global constitutional law – including all countries – is in fact desirable. And, there are many known objections to this stance. Some of these include objections to foreign cultural influences, a perceived liberal bias in comparative constitutional law in practice, and the defense of American exceptionalism. In parallel fashion, it may be that the globalization of national practices of constitutional law may not be the best course for newly empowered constitutional courts in Latin America. The reasons for this may be very different however than those typically raised in the United States. It is not simply that the texts of many Latin American constitutions are now too country-specific, or that U.S. constitutionalism is no longer the textual, or sole jurisprudential, model. It also has to do with the broader geopolitics of national constitutionalism.

Indeed, comparative constitutional scholars herald an increasingly global field. They identify phenomena as varied as increased foreign influence on national constitutional adjudication; supranational governing bodies with domestic constitutional effects; and even a transnational culture of constitutionalism.[1] A fuller appraisal of these developments cannot be adequately undertaken in this single chapter. Other contributions in the present volume and elsewhere do address some of these topics. The focus here, more narrowly, is on the potential negative

[1] See generally, Rudi Teitel (2003–04), Book Review: "Comparative constitutional law in a global age", *Harvard Law Review*, **117**, 2570; David S. Law and Mila Versteeg (2011), "The evolution and ideology of global constitutionalism", *California Law Review*, **99**, 1163; Anne Peters (2009), "The merits of global constitutionalism", *Indiana Journal of Global Legal Studies*, **16**, 397; Peer Zumbansen (2012), *Comparative, Global and Transnational Constitutionalism: The Emergence of a Transnational Legal-Pluralist Order, in Global Constitutionalism* (Cambridge: Cambridge University Press); and chapters in this volume.

effects of a globalization of national constitutional law on the democratic development of constitutional jurisprudence in countries of Latin America.

Taking a step back to consider the increasing doctrinal production of constitutional courts and scholars in the developing world, it stands to reason that the tide of constitutional influence would begin to change. It would be logical to think that U.S. courts and constitutional scholars – not simply *comparative* constitutional scholars – would be more greatly influenced by, or at least cite, developments in the global South. This has not yet occurred in any routine way, at least not in any way approximating the influence that Anglo-American scholars or the U.S. Supreme Court has had abroad. A marker of the unevenness of influence consists in the quite skewed citation practices of legal scholars in the global North.

Indeed, whether or not the globalization of national constitutionalism is ultimately advisable, it is worthwhile to examine the likely obstacles that stand in the way of its more plural and democratic construction. Some of these obstacles may count as the very reason why such a global constitutional practice might not be desirable in the first place. Within the existing geopolitics of national law, a globalized constitutionalism may unduly hegemonize certain constitutional law doctrines or "best practices". These particular positions portend to impede a more organically expressed evolution of constitutional consciousness within Latin American legal communities. And, this likely translates to less locally representative politics within the realm of constitutional law. Still, assuming global constitutionalism is inexorable despite these potential drawbacks, the discussion here attempts to identify the impediments to its wider representativeness. In doing so, it reveals how global constitutionalism may be a double-edged sword for Latin American courts. The wider debate about globalization is taken up only indirectly. The discussion instead is on the background reasons hindering greater input and influence from Latin America in particular. These reflect the historical and contemporary geopolitics of national constitutionalism.[2]

In short, one may ask why is it that Latin American constitutional precedents and theories carry diminished weight in the United States? There are surely many contributing factors. There would be the usual explanations

[2] Of course, there may be some specific projects by states and scholars to address and rectify these imbalances that are better than others. These would need to be assessed individually from this perspective and are beyond the scope of this chapter.

based on: variations in the text of the constitutions themselves; specific national histories; distinct local politics; diverse societies; different political economy; and the like. Rather than discuss these particular differences, this chapter addresses the dominant historical representations of Latin American courts and contemporary accounts of constitutional law, as depicted outside the region. The focus here is principally on comparative and other transnational legal literature produced mostly in the U.S. and other English-language texts. This approach extends and continues some of my past work on the hegemonic external representations of the region's law. It is my contention that these images contribute, in addition to other possible factors, to the skewed citation practices of courts and scholars in the global North.

By way of organization, section II of this chapter addresses historical perceptions in the global North of courts and justice in Latin America. Section III describes more contemporary, comparative constitutional law in the region. Finally, section IV considers the advisability of a globalized constitutional law in this context.

II. DENIAL OF JUSTICE

Latin American judiciaries have long been characterized as dysfunctional. In fact, this view helped justify diplomatic and military intervention in Latin America by the major powers in the nineteenth and early twentieth centuries. It supported "denial of justice" claims in international law. The rationale was a failure of the municipal courts to provide foreigners with judicial redress for alleged harms suffered in the host country. The foreigner's home state had the right to demand a remedy based on notions of state responsibility.[3] This action was pursued through diplomatic and military intervention, including reprisals on the offending state to reverse its decision or to grant compensation.[4] As noted about the era: "The old methods of reprisals were revived in the form of gunboat diplomacy and the continued tendency of the powerful to view the right of protection not as an entitlement to stand before an international tribunal, but as a warrant for the use of unilateral force. The diplomatic component of the

[3] Charles de Visscher (1935), "Le déni de justice en droit international", in *Collected Courses of the Hague Academy of International Law*, vol. 52 (Leiden/Boston: Brill/Nijhoff), pp. 9–11.

[4] Hans W. Spiegel (1938), "Origin and development of denial of justice", *American Journal of International Law*, **32**, 63, 78 ("In earlier times just cause of war and denial of justice were complementary terms.").

expression 'diplomatic protection' was, in such circumstances, an ironic but hardly subtle fiction."[5]

The doctrine of denial of justice also offers a particularly useful vantage point from which to observe the "geopolitics of national law". The latter refers to the hierarchical positioning of the world's national legal systems and the global politics surrounding questions of comity, legal transplants, and the harmonization of laws, among other topics. Along these same lines, the denial of justice doctrine explicitly opens national judicial systems to external scrutiny and stipulates compensation from the state when found lacking. Under its terms, state responsibility is engaged if foreign citizens are wronged in a host country's courts. According to one authority, in the interwar period, "the presumption of (the state's) conformity (with international law) collapses if it is shown, in effect, that because of the insufficiency of the laws, or the faults of those who apply them, foreigners do not receive the treatment that they are due. The denial of justice furnishes this demonstration and gives place to diplomatic protection."[6] As such, the exercise of this doctrine laid bare the relative international standing, and consequent liability, of particular national courts.

In this connection, the scope of such scrutiny-triggering wrongs was the subject of considerable debate. At a minimum, "denial of justice" included foreigners' lack of access to the courts, discriminatory access, or undue delay in proceedings. Beyond that, the claimed wrong could actually extend quite far, as discussed further below. The possibility of making such claims and obtaining redress through the intervention of one's home state placed the interests of foreign investors and foreign residents in relation – one could even say, in tension – with the transnational standing of Latin American legal systems. From the perspective of aggrieved foreigners, as a whole, there was a persistent incentive to serially condemn the operation of national courts. Such characterizations provided the justification for potential extra-national and extra-judicial relief.

Notably, in the latter part of the nineteenth and early twentieth centuries, there was a great influx of European immigration to Latin America. Many of these immigrants retained their original citizenship and allegiance to their home countries and sought their assistance when faced with local disputes, in some cases. More importantly, it was also a period of significant foreign investment from Europe in the region.[7] Disputes

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[5] Jan Paulsson (2005), *Denial of Justice in International Law* (Cambridge: Cambridge University Press), p. 15.

[6] Visscher (n 3), at 11.

[7] Frank Griffith Dawson (1990), *The First Latin American Debt Crisis* (New Haven: Yale University Press).

in the courts could quickly take on an international dimension depending on the nationalities of the parties. And diplomatic intervention, in legal cases rejected by the courts or decided adversely against the foreign party, depended on making the case that the municipal courts were unable, or unwilling, to judge according to law. Given that European powers and the United States did not much hesitate to intervene in Latin American domestic affairs, it is quite likely such a claim could in fact succeed. As such, the then prevailing geopolitics can be seen to have impacted quite significantly on the general economy of characterizations and standing of national law and courts in the region.

Indeed, this period provides a continuous record of diplomatic and military interventions in Latin America by European powers and the United States.[8] Such interventions were outwardly premised on varied transgressions real and alleged: such as, the non-payment of sovereign debt by Latin American governments; harm occurring within the national territory to citizens and property of a foreign power; and the denial of justice in Latin American courts.[9] According to one commentator in 1944:

> [T]here was no more deplorable page in the relations of Latin America with foreign powers, than that which records the history of diplomatic claims, branded by the Supreme Court of Brazil in one case, as the "terrorism of the indemnities," and by the Supreme Court of Peru, as an "unfortunate history," which shows "naught but the constant display of might over weakness." In this exhibition of international lawlessness, all of the great powers, and some of the small ones, too, joined; and the history of these claims constitutes a most sinister chapter in the relations of the strong toward the weak.[10]

State responsibility for denial of justice claims was a principal basis for these foreign interventions. As a result, Latin American diplomats and officials struggled to narrow its meaning, attempting to limit it to procedural requirements of free access to national courts by foreigners, on a par with the rights of its own citizens.[11]

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[8] Richard F. Grimmett (2001), *Instances of Use of United States Armed Forces, 1798 to 2001* (Washington, DC: U.S. Congressional Research Service); Ann Van Wynen Thomas and A.J. Thomas Jr (1956), *Non-Intervention: The Law and its Import in the Americas* (Texas: SMU Press); see generally, Jorge L. Esquirol (2012), "Latin America", in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press), pp. 566–70.

[9] Id.

[10] J. Irizarry and Y. Puente (1944), "The concept of 'denial of justice' in Latin America", *Michigan Law Review*, **43**, 383, 387.

[11] Spiegel (n 4), at 80 ("It [the definition of "denial of justice"] denotes, according to South American practice, the refusal of access to justice, and, according to the practice of others, every kind of international delict.").

In order to curb additional privileges to foreigners challenging final court decisions, this principle of equal access was raised to the level of constitutional doctrine: "The civil assimilation of the citizen and the alien has long since become current constitutional doctrine in Latin America."[12] Under this limitation, a potential claim by a foreigner could only arise upon a discriminatory bar to the courts or the complete closure of the courts.[13] Indeed, the eminent Argentine publicist Carlos Calvo sought to cabin the international law concept's applicability as part of his much acclaimed Calvo Doctrine.[14] The latter required foreigners to submit exclusively to host state jurisdiction; to submit their disputes with host governments and local individuals to the national courts; to exhaust all local remedies; to abide by the national court's decisions; and to forgo diplomatic recourse.[15] This doctrine came to be promulgated in constitutions, legislation, treaties, and public and private contracts with foreigners.[16] Some versions contained an exception for diplomatic recourse in cases of denial of justice: others attempted to foreclose that possibility all together.[17] In 1936, the U.S. publicist, Oliver Lissitzyn, informs us of treaty efforts to define denial of justice:

> The treaties in which the term "denial of justice" is used are not many, being confined mainly to those with Latin American States. In no treaty is a direct definition of the term to be found. In general, it seems to be used in a rather narrow sense, being frequently supplemented by references to delays of justice, non-execution of sentences, and even identified with negligence in the

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[12] Irizarry and Puente (n 10), at 387 (citing, J.M. Yepes (1934), "Les problèmes fondamentaux du droit des gens en Amérique", *Acad. de Dr. Int*., **47**, 91; Hormann Montt (1939), *Derecho Constitucional*, 2nd edn (Santiago: Sociedad Talleres Gráficos), p. 52 et seq.; I. Campillo (1928), *Tratado Elemental de Derecho Constitucional Mexicano* (Jalapa: La Económica), p. 278 et seq.; A. Aragon (1921), *Nociones de Derecho Público Interno*, Sección 153 (Popayán: Imprenta del Departamento), p. 195).

[13] See e.g. Rafael F. Seijas (1884), *El derecho internacional Hispano-americano (público y privado)* (Caracas: El Monitor), p. 518; Guillermo J. Sepúlveda Necoechea (1959), *La denegación de justicia en el derecho internacional: Coneptuación Moderna* (Universidad Nacional Autónoma de México, Escuela de Jurisprudencia (Tesis)), pp. 50–51.

[14] Carlos Calvo (1896), *Le Droit International Théorique et Pratique*, 5th edn (Paris: Arthur Rousseau), vol. 1 at pp. 264–355.

[15] Esquirol (n 8), at 566–70.

[16] M.R. Garcia-Mora (1949–50), "The Calvo clause in Latin American constitutions and international law", *Marquette Law Review*, **33**, 205.

[17] Frank Griffith Dawson, "International law, national tribunals, and the rights of aliens: The experience of Latin America", *Vanderbilt Law Review*, **21**, 712, at 720–25 (1968).

> administration of justice. It is not clear whether the contracting parties wish to distinguish these delinquencies, or merely to render the idea more definite and prevent possible misinterpretation. Nor is it clear whether or not these clauses merely refer to the exhaustion of local remedies as a condition of diplomatic interposition.[18]

The United States never recognized the Calvo Doctrine's validity, claiming the "denial of justice" rights presumably waived by private parties are not properly waivable by them but rather belong to the state.[19] As Frank Griffith Dawson notes, in 1968:

> [T]he Latin American conception of non-intervention also entails denial of diplomatic intervention on behalf of aliens, a broad definition not acceptable to the United States, which defines intervention more restrictively and does not consider itself obliged to avoid intervening on its citizens' behalf, especially where there has been a denial of justice . . . the United States maintains that Calvo Clauses will not prevent interposition otherwise permissible under generally recognized rules of international law.[20]

In general, publicists outside of Latin America cited a broader definition for the concept of denial of justice.[21] It was thought capable of extending to multiple aspects of alleged state failure in judicial actions instituted by foreigners, such as obstacles to making rights effective due to lack of access to the courts; non-existent or inadequate law governing the case; a refusal or delay by the courts to render judgment; a disregard of the law; misapplication of the law to the facts of the case; or a failure of the authorities to carry out the decisions or judgments of its courts. In its broadest acceptation, it could even extend to instances of gross judicial error, described in terms of "manifest" or "notorious" injustice.[22] Lissitzyn notes that in

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[18] Oliver J. Lissitzyn (1936), "The meaning of denial of justice in international law", *American Journal of International Law*, **30**, 632, at 635–36.

[19] American Law Institute (1987), *Restatement of the Law (Third) of the Foreign Relations of the United States*, Vol. 2 (New York: Thomson Reuters), s. 713, fn g.

[20] Griffith Dawson (n 17), at 721 and 723.

[21] Griffith Dawson (n 17).

[22] Francisco V. García-Amador (1957), "Responsabilidad del Estado por daños causados en su territorio a las personas o bienes de los extranjeros", *Anuario de la Comisión de Derecho Internacional*, **II**, 122 ("En las codificaciones que hemos citado anteriormente, la actuación de los organismos judiciales se califica, expresa o tácitamente, conforme a la 'norma internacional de justicia' (*international standard of justice*), en el sentido de que, aun cuando no se haya infringido el derecho interno, el Estado incurre en responsabilidad si el acto u omisión supone el desconocimiento de una 'norma' generalmente aceptada en

international adjudications, most of them dealing with Latin American states: "Many cases use 'denial of justice' to describe various acts, chiefly of judicial authorities, without attempting to specify its limits. In all these cases, however, its sense is broader than mere failure to grant access to courts, and includes unjust sentences."[23]

In an 1891 international arbitration between France and Venezuela, the arbitrators extended the meaning of judicial error not only to questions of law covered by the treaty between the two states but also to interpretations of Venezuelan law and general legal principles:

> D'un autre côté, la signification du mot "dénégation de justice" veut être précisée. Il convient d'entendre par là toute (sic) acte qui devra être envisagé comme une dénégation de justice, soit d'après les lois du Vénézuéla, soit d'après les principes généraux du droit de gens, soit d'après la convention du 26 novembre 1885, le compromis n'exigeant pas la concordance absolue de ces trois sources juridiques et des différences essentielles, ou même notables, n'existant d'ailleurs pas entre elles sur la matière.[24]

Thus, foreign interposition on the basis of "denial of justice" claims were played out on a broad spectrum from lack of procedural guarantees in the courts, on the one hand, to de facto appeals of alleged judicial errors, on the other. Some jurists of the era did draw a distinction between "denial of

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materia de organización judicial o del procedimiento. En las codificaciones interamericanas, en cambio, al menos en lo que se refiere a los casos de 'denegación de justicia' y de 'retardo anormal', la calificación del acto u omisión para los efectos de determinar la responsabilidad internacional, depende exclusivamente del derecho interno.") ("In the codifications that we have previously cited, the acts of judicial organs are assessed, expressly or tacitly, according to the 'international standard of justice', in the sense that, even when national law has not been infringed, the state incurs responsibility if the judicial act or omission entails non-compliance with a generally accepted 'norm' in the area of judicial organization and procedure. In the Inter-American codifications, however, at least in cases of 'denial of justice' and 'abnormal delay', the characterization of the act or omission, for the purposes of determining international responsibility, depends exclusively on national law.")

[23] Lissitzyn (n 18), at 642.

[24] ("Additionally, the meaning of the word 'denial of justice' needs to be specified. It is properly understood by that all acts which must be perceived as a denial of justice, either according to the laws of Venezuela, according to general principles of international law, or according to the treaty of 26 November 1885, the commitment not requiring the absolute concurrence of these three legal sources and essential, or even notable, differences among them not existing, in any case, on the matter.") President of the Swiss Confederation, Arbitrator under the Convention of 1891 between France and Venezuela, in the *Fabiani* case, Moore, *Arbitrations*, **5**, 4878, at 4893–97. Cited in Lissitzyn (n 18).

justice" and "manifest injustice" in the courts. The former, it was argued, required an independent international law wrong: the latter was considered wrongdoing by the courts themselves and therefore not the proper subject of a "denial of justice" claim.[25] Additionally, questions arose as to whether the denial of justice claim was limited to the actions of the judiciary or could include interference from the executive, legislative, or other agency of government.[26] In any case, the only situation which was clearly outside of the purview of the "denial of justice" doctrine was mere harmless error by the local courts. Something more was required, but it was not always clear how much more.

As a result, Latin American courts and commentators struggled to defend the baseline *res judicata* effects of their judicial decisions.[27] The international law doctrine in place and the *realpolitik* of the era undermined the very finality of court decisions throughout the region. In the words of the Venezuelan Supreme Court in 1918, in the matter of the *Claim of Martini & Company*:

> It would be unusual to think that such expressions ("denial of justice") authorize an interpretation which might justify diplomatic intervention every time that an objection of injustice is made against a judicial decision. Such allegation would be made each time an adverse judgment is given against an alien, the stability of decisions would disappear, and while the natives of the country would be bound by the definitive authority of the thing adjudged, the alien would enjoy the privilege of a final revision of the judgment before an international tribunal.[28]

No doubt, there existed clear cases of frustration of legitimate claims by foreigners in national courts.[29] It is also certain that there were egre-

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[25] Clyde Eagleton (1928), "Denial of justice in international law", *American Society of International Law*, **22**, 538, 551–54.

[26] Oscar Rabasa (1933), *Responsabilidad internacional del estado con referencia especial a la responsabilidad por denegación de justicia, Imprenta de la Secretaría de Relaciones Exteriores* (México: Imprenta de la Secretaria de Relaciones Exteriores), pp. 16–17 (noting the wide definition of "denial of justice" proposed at the Fourth Pan American Convention of 1910 in Buenos Aires, which included legislative and executive actions, and which was still rejected by the U.S. representative as too narrow).

[27] See e.g. the "Guerrero Report" to the League of Nations. Annexed to Questionnaire No. 4 as adopted in 1926 by the Committee of Experts for the Progressive Codification of International Law, established by the Assembly of the League of Nations in 1924, League of Nations Document C.196.M.70.1927.V.

[28] Venezuela-7 Revista de Derecho y Legislación I43 (Caracas, 1918).

[29] Consider Griffith Dawson (n 17), at 728 (citations omitted) ("Observers of the Latin American scene sometimes incorrectly presume that, due to political

gious instances of judicial corruption, executive and legislative interference in the courts, and the like in relation to specific cases. However, the doctrine of "denial of justice" incentivized the characterization, by the foreign losing party, of the entire national judicial system in question as dysfunctional, corrupt, or incompetent in interpreting its own law.[30]

By the second Pan American conference in 1902, the United States agreed to submit denial of justice claims that could not be resolved diplomatically to international arbitration, either under separate bilateral treaties or referral to the Permanent Court of Justice in the Hague.[31] Some cases were decided by mixed international claims commissions, with a lead arbitrator generally having the last word.[32] Less formally, appeals to the chancelleries and embassies of the relevant foreign power were, in effect, a *realpolitik*-enabled review of judicial decisions.[33] Whether the product of a unilateral major-power determination or the decision of a trusted arbitrator, the background discursive economy had no reason to change. If anything, less direct control by aggrieved states over decisions, now in the hands of arbitrators, could likely contribute to a heightened rhetoric of failed courts.

In any case, judiciaries in Latin America were particularly under scrutiny.[34] Describing several international arbitration cases, one commentator noted in 1959:

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climates unstable in relation to our own, Latin American courts and judges will be incompetent at best, and corrupt at worst. They fail to realize that typical Latin American disorders, except in the immediate contexts of social revolutions such as swept Mexico and Cuba, do not necessarily disrupt all institutions in a particular society. Thus, members of the judiciary normally remain in office untouched despite military coups.").

[30] Griffith Dawson (n 17), at 720 ("[I]t would seem, in retrospect, as if diplomatic insistence for redress of injuries often depended more on political, than on legal, considerations . . . assertion of international claims was considered to have been used to justify armed invasion and occupation, as in the French expeditions to Mexico in 1838 and 1861, the United States interventions in the Caribbean after 1900, and in the 1902–03 German, British and Italian threat to Venezuela.").

[31] Rabasa (n 26).

[32] Sepúlveda (n 13).

[33] Consider Griffith Dawson, (n 17), at 730–31 ("The manner in which Latin American court proceedings are generally conducted, and the procedural code provisions which govern the course of the proceedings, may seem unfamiliar to alien litigants accustomed to common law jurisdictions. Mere unfamiliarity, however, hardly justifies pleas for denial of justice . . .").

[34] Id.

> [T]he judgments of the supreme courts of the (Latin American) governments complained of were seen with disdain by the complainants; and the international tribunals that took them up rejected their conclusions.[35]

This practice of diplomatic recourse, upheld by the international law doctrines and the practices of the day, stimulated an interest and a textual practice of condemning Latin American courts and legal systems in their entirety. Indeed, assuming local remedies had been exhausted, "the allegation of denial of justice consists of a critique of the conduct of the supreme tribunal of the state".[36] It was to the benefit of an international investment community, and foreign residents in Latin America, to count on a generalized belief that lawlessness reigned throughout the region.[37] Any corroboration of irregularity in any one court proceeding could thus be easily added to this normalized perception of dysfunction and to more easily make out a case for "denial of justice".[38] This very image was generated and recycled by the very incentives created by the doctrine. Indeed, once set in place, it is not difficult to imagine the many financial and other incentives for its overstatement and generalization and, conversely, for the more limited ability to counteract its force with a more balanced counter-narrative.

Again, this is not to say that there were not specific cases of wrongdoing by the courts; periods and places of "lawlessness" in Latin American countries; and all sorts of reproachable situations. It does point to, however, the skewed incentives that would generate a constant and all-purpose narrative of legal failure and lawlessness in Latin America. With respect to the doctrine of denial of justice, this was a particularly active incentive during the nineteenth and early twentieth centuries. And, it goes some way in illuminating the generalized perception of legal breakdown

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[35] Sepúlveda (n 13), at 66.

[36] Constantin Th. Eustathiades (1936), "La responsabilité de l'état pour les actes des organes judiciaries et le problème du déni de justice en droit international" (Paris: A. Pedone), p. 311.

[37] See e.g. Henri C.R. Lisboa (1906), "Des Réclamations Diplomatiques", *Revue de Droit International et Législation Comparée*, **8**, 237 ("au moindre acte d'autorité du gouvernement vénézuélien, concernant des intérêts étrangers, sa mauvaise réputation suffit pour qu'on s'empresse d'approuver les mesures de répression préparées à la hâte, sans que l'opinion publique soit renseignée sur les motifs et les incidents du conflit et sur les raisons que le Venezuela invoque pour justifier sa conduite").

[38] See Procès-Verbaux of the Third Commission for the Codification of Public International Law, cited in Eustathiades (n 36), at 307 ("international responsibility is equally grave because it implies the failure of the state in its international duties, and that one can formulate such an accusation against the state").

in the region, beyond a more evenhanded assessment of what could reasonably be expected of national judiciaries in that period.

More contemporarily, the denial of justice doctrine has experienced a resurgence, especially in the context of international commercial arbitration. Corroborating its extensive historical existence, Jan Paulsson notes: "International law provides standards by which national systems can be judged from the outside."[39] While generally limited to violations of international law, and not national law, in reality the assertion of customary or treaty-based international standards of fairness (and justice) potentially covers any national court decision. Moreover, international remedies are no longer dependent on diplomatic or military intervention: in many cases, individuals and legal persons can pursue their remedies directly in international forums, especially with respect to foreign investor rights.[40]

Furthermore, several other legal doctrines and procedures operate functionally in similar ways, in that they require a judgment "from the outside" of national legal systems. For example, in the arena of U.S. judicial proceedings, *forum non conveniens* motions, political asylum cases, proceedings to enforce foreign judgments, all call for the submission of assessments and diagnostics of the operation of national legal systems. In light of the international legal relations history of Latin America, these procedures generate strong incentives to recycle quite instrumental narratives and reinforce certain types of comparative legal literature about the region. Surely, all of these constructions are subject to the same type of scrutiny suggested in this chapter. And, while the topic requires more specific empirical investigation, the preponderant discursive constructions seem heavily weighted nonetheless toward emphasizing Latin America's perpetual legal dysfunction, often independent of the merits of any particular case.

In sum, the historical perspective presented above supplements more contemporary analyses of Latin American "legal failure" that I have written about elsewhere and briefly examine below in the context of constitutional law. It suggests a hypothesis about the inattention of U.S. scholars and courts to substantive constitutional developments in Latin America during the nineteenth and early twentieth centuries, despite the fact that most Latin American countries shared the model of the U.S.

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[39] Paulsson (n 5), at 4.

[40] Laure-Marguerite Hong-Rocca (2012), "Le Déni de Justice Substantiel en Droit Public International", doctoral thesis, Université Panthéon-Assas (Paris II).

constitution. Jeremy Adelman, discussing the state of U.S.-centered Latin American studies in 2001 notes:

> Few subjects elicit more yawns than constitutional and legal history. Yet, with our neglect of the ways in which arrangements among classes, ethnic groups, and genders became encoded into a series of formal and informal rules, the appreciation of how these rules shaped subsequent bargains got lost . . . How, in effect, can we return to a historical study of rule making and institutional life (looking, thereby, at structures that shape the world) without presuming that such structures are immutable, inelastic constraints on agents?[41]

Adelman credits (1) a past over-reliance on structural theories positing Latin America's failures as owing to its wrong institutional legacy, and (2) the subsequent reaction to these overstatements of structure as the reason for the neglect (or rejection) in history studies of institutional topics like Latin American law and constitutions.[42]

Of course, there are additional reasons that could also account for this situation. It may simply be the case that "parent" jurisdictions rarely look to their "offspring" jurisdictions for legal authority or expertise.[43] A parallel could be drawn here to the similar lack of influence of Latin American private law in Europe, its "parent" jurisdiction. Additionally, the political and economic situation in Latin America in the nineteenth century was in many areas quite unstable. This would surely play a role in the perceived non-comparability of their constitutional law. No less, racial and cultural differences appeared quite prominent and pertinent in this era. Latin American states were not regarded as full members of the international community of civilized states until the early part of the twentieth century.[44]

In any case, the generalized negative perception of law and legality in Latin America, as I have been arguing, is also fueled by the geopolitics of national legal systems. In this regard, the financial and political incentives to reproduce "denial of justice" narratives no doubt played a role in

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[41] Jeremy Adelman (2001), "Institutions, property, and economic development in Latin America", in Miguel Angel Centeno and Fernando Lopez-Alves, *The Other Mirror: Grand Theory through the Lens of Latin America* (Princeton, NJ: Princeton University Press), p. 34.

[42] Adelman (n 41).

[43] See generally, Diego López Medina (2005), *La Teoría Impura del Derecho: La transformación de la cultura jurídica latinoamericana* (Legis Editores, Tercera Re-impresión).

[44] C. DeArmond Davis (1975), *The United States and the Second Hague Peace Conference: American Diplomacy and International Organization, 1899–1945* (Durham, NC: Duke University Press).

characterizing and positioning Latin American jurisdictions as, almost axiomatically, denying of justice. By extension, it is not surprising then that there would be little to no jurisprudential and academic exchange with the United States in the realm of constitutional law. The Latin American texts and courts were likely not perceived as credible sources of real law. The many accounts of denial of justice would have gone far in undermining the credibility of Latin American judicial reasoning and the statements of Latin American courts of their own constitutional and other law. Moreover, the reality that Latin American court judgments – at least in the case of aliens – were not really final and depended on the major foreign powers' chancelleries or diplomatic missions' perceptions would have also significantly de-legitimated their authority.

III. CONSTITUTIONAL FAILURE

Most of the contemporary comparative law scholarship in the United States on constitutional law in Latin America is, in many cases, also quite dismissive. It is noticeably marked by the "law-and-development" paradigm beginning in the 1960s. Indeed, this is the period in which most scholarly attention was paid in the United States to law in Latin America. It stemmed from development era efforts to align law with economic development. This literature is rather indelibly impressed with its original objective of diagnosing Latin American law's inability to produce greater economic growth and political democracy. In fact, this diagnostic approach always already presumes law's failure in the region: its starting point is the insufficiency of economic wealth and orderly democracy.[45] The only question for legal analysts is then: what is it about the law that contributes to making it so?

This framework for thinking about law in Latin America remains paramount in much comparative law on the region. In a nutshell, it is characterized by an idealized image of developed country law, such as U.S. law, contrasted to a hyper legal-realist account of the failings of liberal legalism *in Latin America*. Certainly, there are numerous legal operational failings, instances of clear corruption, incompetence, and a host of other shortcomings in Latin America – as in all societies to some degree. What

[45] See e.g. Adelman (n 41), at 27 ("For scholars of Latin America, their subject provided ample evidence of deviation from, and failure to live up to, a norm of change and progress. Latin America thus exemplifies the persistence of some obstacle or hindrance, the inability to adapt or modernize, or compulsive failure, especially when contrasted with other areas of the Atlantic world.").

is unhelpful however, as a clear-eyed comparative account, is juxtaposing the ideology of liberal legalism against the inescapable shortcomings of actual legal systems.[46] This is the case whether liberal myths are depicted in the abstract or projected as if they were the actual operation of developed country law. The picture becomes even more distorted when this idealization of developed country law is contrasted to the operation of actual legal systems *in developing countries*. This is so not only because the same liberal legal myths remain unattainable, but also because those societies generally have fewer resources to support the costly operation of liberal legal systems and, equally important, to sustain the wide-scale production of ideology and apology to legitimate that system, which jurists in resource rich countries are more easily able to do.

Below is a brief overview of the more prominent perspectives on constitutional law in Latin America, viewed from the United States. It is of course incomplete and incapable of capturing the fine nuances of their authors or disciplinary conventions. It is also not meant as an individual critique of the authors cited. Rather, the latter are highlighted as representative of some of the main genres of the field. Other authors and genres could certainly be added to the discussion.

A. Too Many Constitutions

Quite prominent, the law-and-development brand of Latin Americanist scholarship accepts the mythology of the U.S. legal system at face value and contrasts it to Latin America. A 1991 article quite succinctly states its conclusion in the title *The Success of Constitutionalism in the United States and its Failure in Latin America: An Explanation.*[47] In it, the author provides a historical account of the success of U.S. constitutionalism in a highly idealized way.[48] By contrast, he draws on Latin America's past

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[46] As just one example, supporting the extensive international funding for "adversarial" criminal procedure reform in Latin America, see David Alan Sklansky (2008–09), "Anti-inquisitorialism", *Harvard Law Review*, **122**, 1634, 1687 ("The problem with overblown rhetoric about the advantages of the adversary system is not just that it lumps together questions best considered separately. It can also mix together myth and reality, papering over the notorious gaps between an idealized version of the American adversary system and the system's actual, day-to-day operation.").

[47] Keith Rosenn (1990–91), "The success of constitutionalism in the United States and its failure in Latin America: An explanation", *University of Miami Inter-American Law Review*, **22**, 1.

[48] See generally, Miguel Schor (critiquing Rosenn); cf. Michael Schudson (1998), *The Good Citizen: A History of American Civic Life* (New York: Simon

political and economic difficulties to argue the region's failed constitutionalism. In the end, the point hinges on a comparison between the total numbers of constitutions and constitutional reforms enacted in Latin America versus the United States. The numbers are tabulated for each country. The results show that "since independence the twenty Latin American republics have promulgated some 253 constitutions, an average of 12.65 per country".[49] Thus, for the author, the fact of having two constitutions and twenty-seven amendments over a two-hundred year plus period in the United States marks constitutional success, while an average of thirteen over a similar period indicates failure in Latin America.

Of course, this framing does not count the extensive changes in constitutional law produced by constitutional adjudication in the courts, especially in the United States. It does not take into account the divergent opinions about the constitution not definitively resolved by the high courts. Nor does it take into account the numerous gaps, ambiguities, and contradictions within the U.S. constitution – or other constitutions for that matter – concerning executive powers, states' rights, international treaties, and other anomalies not usually highlighted in uncritical accounts of U.S. law. Moreover, the fact that constitutional change is mostly effectuated through new constitutions and constitutional reforms, instead of as modifications of constitutional precedents, is a distinction that may – or may not – pack much substantive difference. The fact that much constitutional change in Latin America has been implemented through textual revisions is also explainable – at least partially – by the limited role acknowledged to judicial interpretation, at least in the past, within the civilian legal tradition proper to the region.

Still, the political and economic history – and in some cases contemporary accounts – of Latin America seem to suggest the common-sense reality of these assertions of legal failure. Noted Latin Americanists Miguel Centeno and Fernando Lopez-Alves confirm that:

> When Latin America does appear in general discussions of contemporary history or grand theory, it is most often as the negative counterfactual . . . the Black Legend of Latin American failures to develop economic and political institutions is elaborate and deeply ingrained in our disciplinary heritage. Yet little effort is expended in explaining these breakdowns, malfunctions, and disappointments or even analyzing whether they were indeed failures. Why

& Schuster); Peter Charles Hoffer (1998), *Law and People in Colonial America* (Baltimore: Johns Hopkins University Press).

[49] Rosenn (n 47), at 6–7.

> not treat Latin America as simply an alternative development, with its own probabilities and variances?[50]

Indeed, if we were to examine more critically the elements sustaining a diagnosis of legal failure, then the Latin American experience cannot be so easily dismissed. Clearly, throughout the history of many countries in the region, there have been irregular transfers of power, military coups, dictatorships, extended periods of emergency rule, etc.[51] However, there is also a significant history of constitutional debate, constitution-making, constitutional adjudication, amendment and reform, and constitutional theory. Even in the context of extended emergency rule, for example, there is valuable, recent academic work on the political "flexibility" that these periods provided within, or in relation to, the constitution.

Indeed, in slightly more detail on this last example, declarations of emergency powers can be seen from a very realist perspective as more than simply power grabs by unscrupulous leaders or the unchecked authoritarianism of pathological rulers. They may also serve to introduce defensible public policies not seemingly implementable, at the time, through the ordinary constitutional order. In a fascinating, recent doctoral dissertation on this question, Jorge González Jácome explains the constitutionally questionable, and seemingly abusive, use of emergency powers within the 1886 Colombian constitution, during the period of emergency rule in the 1930s, as a mechanism through which comprehensive social policy was introduced.[52] According to González Jácome, this approach to emergency rule supports neither of the standard positions regarding emergency powers within liberal constitutions: whether viewed as the original sin which encourages their repeated use or, conversely, as insufficiently explicit emergency provisions which could, if more explicit, forcefully cabin their use. Rather, he positions this emergency constitutional mechanism as an inherent possibility, not so unlike – one could say – a *sua sponte* judicial determination of unconstitutionality, or a re-interpretation by the courts of the constitution. It raises a thought-provoking parallel between

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[50] Miguel Angel Centeno and Fernando Lopez-Alves (2001), "Introduction", in Centeno and Lopez-Alves (n 41), p. 10.

[51] Centeno and Lopez-Alves (n 41), at 8 ("between 1930 and 1990, the Latin American countries have had 139 extraconstitutional changes in government, an average of 6.95 per country").

[52] Jorge González Jácome, "States of exception and the debate over liberal-democracy in South America: Argentina, Chile and Colombia between 1930 and 1990", doctoral dissertation, Harvard Law School (May 2013) (on file with author).

emergency powers and the power of legal realist critique to chasten the courts into not invalidating popular social legislation in the same era in the United States. In any case, this more comprehensive analysis of what constitutes a "constitutional practice" suggests the need for a wider frame in which to analyze and compare Latin American constitutionalism, broader than mere adherence to the U.S. experience.

B. Constitutions Are Too Easy to Change

A somewhat different perspective on Latin American constitutionalism is provided in a 2006 article provocatively titled "Constitutionalism through the looking glass of Latin America".[53] It presents a thoughtful exploration of the failure of *U.S. constitutionalism* in Latin America. The author is careful to note that: "Law in Latin America did not take a failed path, but, as this Article argues, a different path . . .".[54] In the end, however, his argument "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".[55] In this particular piece, the diagnosis is that Latin American constitutions are too malleable and too centralized by design of the elites so that the latter can more easily maneuver once in power. And thus, the author argues, Latin American societies have understandably not committed to the practice of "constitutional politics", whereby constitutional conflict is resolved solely through the institutions and procedures delimited by the constitution itself. Instead, constitutional conflict is resolved through "ordinary politics" which too easily turns to amending or rewriting the constitution, and in some cases to ignoring it all together. According to the author, this realm of constitutional politics remains to be "socially constructed in Latin America", although the newest wave of constitutionalism and democratization bodes promise.[56]

The article's central argument is that Latin American constitutions are not sufficiently "socially moored". As such, these nineteenth and twentieth century charters are understood as merely elite political pacts. At the same time, the author argues, the realm of constitutional politics in Latin America is fused together with ordinary politics, leading to the treatment of constitutions like ordinary legislation. Constitutional politics, by contrast, according to the author, should be higher stakes, require

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[53] Miguel Schor (2006), "Constitutionalism through the looking glass of Latin America", *Texas International Law Journal*, **41**, 1.

[54] Schor (n 53), at 17.

[55] Schor (n 53), at 24.

[56] Schor (n 53), at 7.

greater social mobilization, demand more consensus, and confront hard-to-change constitutions. However, these two broad assertions may seem somewhat contradictory: advocating both more diffusion and internalization of the constitution socially versus a separate realm of constitutional politics harder to engage. In fact, the observed malleability of Latin American constitutions, and their commonplace role within ordinary politics, seems to suggest the opposite of a lack of social mooring. And, indeed, the author complains that constitutional politics are too much part of the common political process. Under this reasoning, its suggested reform to separate it from ordinary politics may actually lead to social *un*-mooring by limiting constitutional debates to only certain questions and to those who represent them. Conversely, greater social mooring in contexts of deep political conflict may lead to greater politicization of the constitution and to more routine constitutional volatility.

Regardless, the useful distinction identified between constitutional politics and ordinary politics is presumed to stand, however, on some uncontroversial basis. Under the analysis above, that basis is drawn from U.S. history. And, that experience – it is argued by the author – reflects a constitution that is very hard to change and a realm of "constitutional politics" constrained by the procedural and institutional self-restraint of a liberal society. That self-restraint is an extension to the constitutional sphere of pre-existing societal commitments, reinforced by the procedural difficulties in changing that status quo. Indeed, it is precisely this rigidity – the author maintains – which characterizes the U.S. constitution's success "in changing the status quo". While seemingly paradoxical, it is not *necessarily* a contradiction: commitment to constitutional ideology coupled with relatively few changes to the charter may more deeply internalize within society the changes that are actually made. However, relative to this same paradox, Latin American constitutionalism can be argued – if one were so inclined – to be equally successful at changing/maintaining the particular underlying status quo, if not necessarily through the same mechanisms. In the Latin American case, more textual revisions accompany political changes even though most do not change the basic status quo. Notably, that dynamic provides for a different proportion of change to status quo, and both change and status quo look different, than that generated by U.S. constitutional history.

What is more, the whole history of U.S. constitutional politics – while providing a useful account of constitutionalism in the United States – is not operationalizable in mechanical terms elsewhere. The line between constitutional and ordinary politics may not be drawn in the same place, and the elements of constitutional practices may also be different. Indeed, the U.S. model of constitutional politics – as described by the author above – may or may not make sense to political actors in Latin America

strategizing about their ultimate ends. While societal commitment to constitutional rule (whether we mean by that commitment to a certain text or to a broader set of practices) seems like a rather uncontroversial goal, not much else is necessarily evident. For example, it may be that more social mooring is desirable in a particular society. But, just as well, as an all-purpose prescription, it may exacerbate an already highly conflictual polity, an overpolitization of the constitution, and an excessive engagement in constitutional reform. Indeed, viewed more realistically, the constitutional politics that has "worked" in the United States is a series of opposing elements, held together by the ideological normalization of their paradoxical co-existence. Simply culling from the very observations in the article cited above, they would include: a broad social mooring of the constitution *and* a practice of constitutional politics separate from ordinary politics; a very hard to change constitution *and* a constitutionalism successful at changing the status quo; the existence of mobilized social movements *and* only social movements limited to goals within the constitution; a politics of constitutional positions *but* not for all political questions all the time; a recognition of the politics of constitutional law and practices *and* a belief in its non-political legal nature especially in terms of judicial reasoning; as well as possibly some other not immediately obvious combinations.

In short, my point here is that a simplified set of characteristics, reduced down from U.S. experience, stands little chance of serving as an effective prescription to entrench constitutionalism in Latin America. In fact, one could not be faulted for thinking that much of this literature has quite a circular feel. The proposed explanations and prescriptions slip back and forth: Latin American constitutions fail because they are too flexible – or too rigid; because the law is too little like society – or too much like it; because constitutions are too centralized – or too little centralized. Thus, without going into more extensive detail as I have elsewhere, these diagnoses appear more reflective of the particular political and economic orientations they serve than any uncontroversial agenda for constitutionalism, whether or not the ends they serve are foregrounded by – or conscious to – any particular diagnostician.

As a result, it may be easy to believe, as does the author above, that "constitutional law in Latin America has an almost surreal quality given that constitutions do not provide accurate maps to how power is distributed . . . 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 . . .".[57] Of course, this impression

[57] Schor (n 53), at 5–6.

could also describe the surreal and magical quality of seemingly contradictory combinations that characterize U.S. constitutionalism – even if the United States has had many fewer constitutional texts and its history is quite different from Latin America. Yet, marked by the characterization of exceptional contradiction, the seemingly topsy-turvy world of Latin America cannot possibly be taken at face value, much less engaged as sensible legal authority.

Furthermore, the common prescriptions advanced for obtaining the "rule of constitutions", and adduced from idealized or overly simplified versions of U.S. constitutionalism, simply appear to restate its definition, i.e. limiting social conflict to constitutionally contained politics, whose limits are deeply socially internalized but are also distinct from ordinary politics, and which is admittedly politics but also law at the same time. All of these terms and concepts, moreover, are drawn from the perspective of U.S. conceptual history and experience. This may be an overly narrow way to conceive of constitutionalism. And, even if it were universally agreed, the question would then become how to get that to happen in societies where it does not function that same way. Yet the answer – it seems abundantly clear – is not simply any one mechanical blueprint of procedural and institutional components.

C. Constitutional Law is Just Politics

A promising new vein of information about constitutional law in Latin America is the "judicialization of politics" literature.[58] This body of work explores the newest wave of democratization and constitutionalization in the region. It generally develops the thesis that politics in Latin America have become "judicialized". This is the case as new constitutions have introduced new rights and procedural mechanisms which bring political controversies into the courts. It has also accompanied the empowerment of constitutional courts and the expansion of constitutional powers in

[58] Linn A. Hammergren (1998), *The Politics of Justice and Justice Reform in Latin America: The Peruvian Case in Comparative Perspective* (Boulder: Westview Press); William C. Prillaman (2000), *The Judiciary and Democratic Decay in Latin America: Declining Confidence in the Rule of Law* (Westport: Praeger); Rachel Sieder, Line Schjolden and Alan Angell (eds) (2005), *The Judicialization of Politics in Latin America* (Basingstoke: Palgrave Macmillan); Javier Couso, Alexandra Huneeus and Rachel Siede (eds) (2010), *Cultures of Legality: Judicialization and Political Activism in Latin America* (Cambridge: Cambridge University Press); Gretchen Helmke and Julio Ríos-Figueroa (2011), *Courts in Latin America* (Cambridge: Cambridge University Press).

existing courts. In this context, the "tutela" and "amparo" proceedings granting individual rights of action to those claiming a violation of their constitutional rights have been an explosive source of constitutional adjudication in the region. Likewise, minimal standing requirements to challenge legislation on constitutional grounds have also opened the courts to substantial constitutional pronouncements. The judicialization of politics literature presents and explains these developments, principally to audiences in the global North.

Indeed, this literature seems to herald the advent in Latin America of the much recommended "constitutional politics" discussed in the section above. It provides for the procedural mechanisms around which social movements may mobilize to seek constitutional remedies and reforms. It also endows individuals in society with easy and direct access to the courts to vindicate their constitutional rights. Moreover, it follows the model recognized as central to U.S. democracy: the legal resolution of some of the most conflictual political questions in society. Thus, scholars of judicialization are quick to point out that questions previously addressed by the political process or other routes are now – and in the process of further becoming – decided by the courts. As such, there has been a renewed emphasis in the operation of courts, the behavior of judges, the structure of the judiciary, and the like.

The judicialization literature is rather heavily weighted to political science analysis. Even legal scholars participating in these studies typically adopt a social science perspective. As such, these studies are rich in analysis of the likely political motivations for certain court decisions; the personal political motivations that may animate certain judges or courts; the strategic behavior of institutional actors operating in a corporate body; and the like. Indeed, this literature is the successor to an earlier era of comparative politics on the independence of Latin American supreme courts. In that body of work, the question of judicial independence was paramount and measured by the number of cases decided by courts against other branches of government. Under this earlier framing, the courts are just one of several powerful political actors within government. The fact that their discretion is supposed to be constrained by legal texts and legal reasoning is considered quite secondary if not all together pre-textual, simply a way of covering over their preferences *post hoc*.

The more recent judicialization literature expands the scope of political and sociological analysis of courts and judges. It examines the multiple possible motivations for court decisions: not just the relationship to the executive and legislative and their related politics but also the micro-politics of the courthouse, long-term career goals, and so on. It significantly omits, however, any earnest consideration of the legal logic

that informs court decisions or the doctrines and arguments devised over time in particular courts. Even recent work that recognizes the need for examining the "discursive" dimension of courts in the global South has for the most part limited itself to applying social science models to the verbal utterances of courts.[59]

For example, the appearance of particular legal terms in judicial decisions is tested on a single variable cause-and-effect model, expecting the court's use of formalist interpretations and deference to government policy to coincide with times of economic crisis and, instead, of socially responsive interpretations in times of non-crisis.[60] This framework parallels the comparative politics exercise of testing judicial independence based on the number of court holdings against other branches of government. In this instance, the analysis does not track legal outcomes but rather legal terms. Or, rather, it tracks interpretations of legal terms in relation to an economic crisis variable. According to the author from which this example is taken, formalist interpretations demonstrate the court's submission to government interests while expansive interpretation reflects responsiveness to social interests (although, admittedly, social interests may conflict within society). In the cases examined, the expectations of formalist submission to government policy were, unexpectedly, not borne out by the author's analysis of the court's mode of interpretation.

While quite interesting in some ways, this type of analysis described above does not convey the meaning that the courts themselves are attempting to create in their own decision-making. It does not explain the sense that local lawyers and jurists may make out of these judicial elocutions. As such, this literature does not really engage the legal dimension, or the law-like quality that these judicial decisions may achieve. It may be that political scientists and legal sociologists are reflexively skeptical of all legal reasoning, if it is not immediately linked to political or personal motivations. And, this insight may very well be true. Indeed, it may very well be applicable to all legal confabulations. In the United States, it could equally turn quite a skeptical eye to assertions about the "original intent"

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[59] See Couso, Huneeus and Sieder (n 58), at 3–4 (citing Diego López Medina for authority, "Our volume explores this landscape of changing legal cultures. Starting with the assumption that formalism is no longer a useful concept for describing Latin American legal cultures – as was in any case always an oversimplification – we explore the repertoires of legal ideas and practices that accompany, cause, and are a consequence of the judicialization of politics.").

[60] See e.g. Pablo Rueda, *Legal Language and Social Change during Colombia's Economic Crisis, in Cultures of Legality* (Cambridge: Cambridge University Press), pp. 25–50.

of the founders as a means to apply the constitution. This same insight would also apply to assertions about any clear, underlying "legal policy" that would prescribe the correct answer when the legal texts are ambiguous or contradictory. It may also ring true for some when confronted with rationalizations about the "living constitution" as a means to decide constitutional cases. Indeed, a hyper-realist critique of all these modes of legal reasoning could immediately discredit any intellectual traction claimed by their proponents.

However, the liberal practice of law requires some faith in a realm of reasoning that is distinctly law-like.[61] From the perspective of its persistent critics, some suspension of disbelief is required to indulge in assertions about, for example, what the framers of the U.S. constitution could have possibly thought about some contemporary legal issue. No less, the living constitution approach may only make sense to those already sharing a particular political bent, and cases may only be convincingly rationalized that way, to a wider audience, in decisions hard for skeptics to openly oppose – such as *de jure* racial equality for example. In sum, the study of constitutionalism in the global South, and in Latin America in particular, tells us little about constitutional law if it does not engage the specific modes of legal meaning-making, reasoning, and conventions of local constitutional discourse in its own terms. Merely tracking the interests motivating particular judges and decisions neglects its most crucial dimensions. The judicialization literature, promisingly, stands poised to engage the other side of the equation as well, that is, constitutionalism's construction as law. Surely, it would be an unjustified presumption to continue to proceed as if no one in Latin America actually accepts any legal reasoning at all, and instead solely engages a political or personal calculus as the judicialization literature seems to suggest.

Total disbelief in legal reasoning across society at all times may possibly be the case, but this would seem like an exaggeration. Paradoxically, in the sphere of legal governance, the projection of law-ness as a convincing decisional discourse is a continually reiterative performance. It requires the continuing legitimation and acquiescence of a significant sector of society, persuaded to go along with some sorts of legal reasoning and conventions. Surely, most types of legal reasoning are easy enough to disbelieve, given our existing set of critical tools. For example, early twentieth-century legal realist critique is credited with thoroughly undermining purely formalist legal argument in the United States. Moreover, one could easily

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[61] Duncan Kennedy (1997), *A Critique of Adjudication* (New Haven: Harvard University Press), pp. 73–82.

disbelieve the necessary nature of assertions of "original intent" or the "living constitution" in contemporary U.S. constitutional adjudication, as noted above. But, the fact remains that these are debated and discussed on their own terms, as if they could actually deliver the correct constitutional answer.[62] Indeed, it is these debates that constitute the *legal* dimension of constitutionalism. In the absence of this feature, as Latin American law is typically portrayed in the global North, it is no wonder that there is little interest in constitutional law or any other law in the region. It appears that there is no such thing there: it is just politics and personal interest.

By contrast, a fantastic example of scholarly analysis of judicial reasoning in the Colombian context is Diego López Medina's path-breaking, *El derecho de los jueces*.[63] This treatise lays out the jurisprudence of the Colombian constitutional court over a number of doctrinal areas. It argues in favor of recognizing greater precedential value to these judicial constructions. López Medina's analysis has had enormous impact throughout Colombia, including on judges in Colombia's Constitutional Court itself. The reason it is noted here is because it actually does the work of analyzing the Court's and commentators' constructions of legal doctrine, reasoning, and conventions. Moreover, it has had considerable traction within the local epistemic community. Unfortunately, this invaluable contribution to Latin American constitutionalism has not yet been translated into English, and thus this dimension of law in Latin America is less well known in the global North. Regardless, it is a prime example of the legal aspects of constitutionalism that are most relevant locally.

IV. GLOBAL CONSTITUTIONAL AUTHORITY

The discussion above brings us back to the basic question of the desirability of global constitutional law in the first place. To the extent that this means a worldwide epistemic community engaged in common questions of constitutional reasoning, accepted doctrines, theoretical references, and general world view, the answer is not clear. Certainly, basic humanist propositions of intellectual sharing, dialogic intercourse across borders, the benefits of advances developed elsewhere, and other such points are of general value. However, in the arena of national legal systems, not all

[62] Hans Vaihinger (2009), *The Philosophy of "As if": A System of the Theoretical, Practical and Religious Fictions of Mankind* (Eastford, CT: Martino Publishing).

[63] Diego López Medina (2000), *El derecho de los Jueces: Obligatoriedad del precedente constitucional. Análisis de sentencias y líneas jurisprudenciales* (Bogotá: Legis).

are equal in the global sphere. There is a recognizable geopolitics of state law. And, these politics are organized around a hierarchical ordering. This hierarchy is likely to influence the dominant practices of a global constitutionalism, including its generally accepted forms, doctrines, and sources of authority. If the current state of geopolitics remains in place, this would no doubt work against the legitimacy of a distinct constitutionalism or constitutionalisms in the global South, or at a minimum significantly limit its role in the wider global order.

The geopolitics of national law noted here are surely related to the relative power of the states from which such legal systems derive. However, there is also a substantial discursive reproduction of hierarchy sustaining the perceived merit of the various national systems. These assessments are constructed in many different ways. They may seek to rank legal systems according to a preferred scale of development or economic policy; degrees of openness to foreign investors and observers; the co-relation between deep capital markets and legal tradition or origins; and the like. It would not be justified to dismiss all of these "indicators" out of hand as mal-intentioned reproducers of unmerited hierarchy: indeed, each of these would have to be analyzed separately. In the Latin American context, however, as I have examined here and in more detail elsewhere, there are long-standing practices of proclaiming the failure of national legal systems. These may be seen by some as simply honest assessments of the realities of the region. However, the structural incentives, say, for example, motivating "denial of justice" claims in the past or the mission to figure out a legal diagnosis for economic underdevelopment, have unduly impressed some of the dominant images and representations. Notably, in both of these particular paradigms just mentioned, the incentive has been to represent the local legal system as failed, either to circumvent it or to transform it. Taken together, such instrumentally produced perceptions, I would contend, contribute to the low standing of Latin America in the geopolitics of national law.

As such, the construction of a global constitutional discourse as a basis for the legitimation of Latin American constitutionalism must confront these *realpolitik* circumstances of influence and power. Engaging in a common mode of constitutional justification may thus be driven – and limited – by the more powerful and influential actors globally. That is, as a practice of legitimation of certain societal positions, the accepted conventions and common modes of reasoning in the global North may more easily predominate. Indeed, they may be the only modes which are generally found credible and convincing, as a matter of law. Thus an orthodoxy of constitutional thought, doctrines, and conventions could easily constrain the more particular meaning-making, constitutional practices, and scope of constitutional law in the

global South. It is not hard to imagine that only certain constitutional tests, doctrines, and the like would be seen as legitimate. This may limit the innovation and latitude needed by local courts to more effectively legitimate their constructions of constitutional law and practices.

A quick example of the above is the mandate within the 2009 Bolivian constitution to create a plurinational state, extending to the interpretation and application of the constitution. Operationally, it draws together constitutional court magistrates from both the European and indigenous traditions of the country's citizenry, with the mandate to construct a constitutional discourse that combines the different world views. This exercise of epistemic fusion will surely require a great deal of creativity and innovation in the overall construction of common sources of reference and legitimation. It is one which may be unduly hampered by the imposition of a global constitutional order, at least under its current geopolitics. Under such constraints, this particular project of constitutionalism runs the significant risk of being classified as a quite exceptional and marginal enterprise, never quite believable and endemically failing.

In this same vein, certain quite defensible actions taken by constitutional courts in the global South could be seen – by comparison to accepted conventions in the global North – as simply objectionable judicial activism; improper interference with the legislature or public administration; ultra vires acts of regulation; and other instances of "wrongdoing", inconsistent with a hegemonic constitutional order. Thus, the evolution of constitutional practices suited to local conditions – both material and inter-textual – could be stunted by an inordinate influence and power of a global constitutional field, given the current geopolitics of national law. Despite this, local courts might well continue operating in sync with the ambient legal consciousness of their immediate communities. Yet, a global constitutionalism could potentially undermine a range of options that may be substantially supported locally but rejected by global constitutional authorities. At a minimum, an overemphasis on global authority could simply work to reinforce the hand of particular local interests aligned with the dominant geopolitics. It would reinforce their hand not only as a matter of general international political support but also one of correct or "best practices" law.

Somewhat the same point has been made in different terms by post-colonial scholars. Applied to this setting, the insight suggests that simply advocating for more Latin American inclusion in existing global constitutionalist circuits may not necessarily make way for any distinctive Latin American grounding. A global constitutional order, under its current geopolitics, is near exclusively rooted in the conceptual history of the global North. Simply arguing to be let into this game, in more geographically diverse numbers, does nothing per se to change the existing hierarchy of

national law. Indeed, under these same conditions, greater Latin American participation could even more deeply entrench a global North vision of constitutionalism, by simply adding more native adherents to the existing hierarchy and paradigm. A more capacious understanding of constitutionalism would require not merely different geographically situated *interpretations* of a presumed global knowledge, but as Walter Mignolo puts it, different *perspectives* of knowledge.[64] Of course, this type of reasoning presumes one supports the possibility of constructing constitutional law in the global South in greater relation to local political and conceptual histories and not simply wanting to supplant them with some alternative order. As such, resisting an unreflective progression of global constitutionalism would seek alternative roles for national constitutional law, other than the direct transmission of a global hegemonic logic as the supreme law of the land.

Of course, these observations invite consideration of other possible forms that global constitutionalism could potentially take, which may possibly influence a quite different arrangement of geopolitics. In this regard, one could imagine and work toward a more cross-global-South constitutional discourse.[65] Additionally, there is the possibility of the emergence of new hegemonic constitutional powers, potentially arising from a different set of constitutional jurisdictions than simply the United States or Europe. And much new and interesting work is being developed in precisely these areas. Still, the concerns expressed here remain much the same. National constitutional law based on global authority is significantly impacted by the existing hierarchies of national law. This has the potential for further aligning both the form and the substance of the supreme law of different lands to predominant geopolitical interests. As such, in the context of existing legal hierarchies, it threatens to relegate significantly different constitutional practices, and possibly alternative interests they may represent in particular nations, to the status of non-law.

V. CONCLUSION

The relative influence and participation of Latin America within a more robust global community of national constitutional law is subject to the

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[64] Walter D. Mignolo (2005), *The Idea of Latin America*, Blackwell Manifestos (Oxford: Blackwell Publishing), pp. 8–14.

[65] See e.g. Gonzalo Aguilar Cavallo (2010), "¿Emergencia de un derecho constitucional común? El caso de los pueblos indígenas (Parte 1)", *Revista Derecho del Estado*, **25**, 41(arguing in favor of *a ius constitutionale comune* in Latin America in the area of indigenous rights).

recognizably existing hierarchy of national legal systems. This legal hierarchy is surely reflective of the disproportionate economic and military power of the world's quite different nations. In the ordering of national law, however, there is also a substantial textual production of assessments, ranks, indicators and the like that presume to sort and classify national law. In Latin America, these have been historically supplemented by international law doctrines, international assistance efforts, and economic development projects which have significantly contributed to the predominant images and perceptions of the national legal systems of the region. Each of these paradigms of assessment can be examined, and potentially criticized, in their own specificity. However, in the main, these transnational narratives have preponderantly worked to classify law in Latin America very marginally. Perceived in this way in the global North, not much interest or influence can be expected to welcome the latest constitutional decisions, doctrines, or theories emanating from the region. Indeed, given these conditions, global constitutionalism is quite likely to continue to minimize and undervalue Latin America's legal production.

Of course, this whole question of relative levels of influence and recognition presumes the advisability, or inevitability, of a worldwide constitutional law community. Such internationalization of constitutional law could mean both greater global legitimation and greater scrutiny of national constitutional practices. Legitimation of national constitutional law, one would presume, would then come to depend more on commonly shared sources of authority, including certain prestigious courts, renowned legal scholars, and ultimately the global society and economy. As a result, the range of acceptable constitutional practices may become more limited to references that are transnationally supported, specifically those endorsed by the dominant geopolitics of national law. In the end, this may unduly limit the alternatives for national constitutionalism and may limit the modes in which constitutionalists can convincingly construct their community's law.