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Federalism in the Americas in Comparative Perspective

Keith S. Rosenn

University of Miami School of Law, krosenn@law.miami.edu

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ARTICLE

FEDERALISM IN THE AMERICAS IN COMPARATIVE PERSPECTIVE

KEITH S. ROSENN*

I. INTRODUCTION	3
A. <i>The Essential Features of Federalism</i>	4
B. <i>The Advantages of Federalism</i>	6
C. <i>The Disadvantages of Federalism</i>	7
II. CONSTITUTIONAL ALLOCATION OF POWERS	10
A. <i>United States</i>	10
B. <i>Canada</i>	11
C. <i>Argentina</i>	13
D. <i>Brazil</i>	14
E. <i>Venezuela</i>	15
F. <i>Mexico</i>	16

* Professor of Law, University of Miami.

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<i>G. The Vagaries of Allocative Formulas</i>	16
III. JUDICIAL UMPIRING OF THE FEDERALIST SYSTEM	21
<i>A. The Need for Judicial Review</i>	22
<i>B. Which Courts Are the Final Arbiters of State Law?</i>	24
1. United States	25
2. Canada	26
3. Mexico	26
4. Brazil	27
5. Argentina	28
6. Venezuela	29
<i>C. Economic Regulation</i>	29
1. United States	29
2. Canada	35
3. Latin America	37
<i>D. Protection of Individual Rights</i>	39
1. United States	39
2. Argentina	41
3. Mexico	41
4. Brazil	42
5. Canada	42
6. Venezuela	43
IV. THE CENTRALIZATION OF FEDERALISM IN LATIN AMERICA	43
<i>A. Argentina</i>	44

B. <i>Brazil</i>	45
C. <i>Mexico</i>	45
D. <i>Venezuela</i>	46
V. THE LESSONS OF THESE SIX EXPERIENCES IN FEDERALISM	47

I. INTRODUCTION

This article compares federalist institutions and experiences in the six countries in the Western Hemisphere that have formally adopted federal systems of government. While other American countries or groups of countries, such as Chile (1826-1827), Honduras (1824-1831), the United Provinces of Central America (1829-1838), and Colombia (1853-1886), had short-lived experiences with federalism, only six countries in the Americas have lengthy federalist traditions: Argentina, Brazil, Canada, Mexico, the United States ("U.S."), and Venezuela.¹ It is not coincidental that five of these six countries are also the largest in the Western Hemisphere.² Because federalism grants regional units significant political and economic autonomy, it has been an extremely useful system for governing large land masses with diverse regions and populations.

1. Characterization of Venezuela as a nation with a long federalist tradition requires qualification. Since 1811, Venezuelan constitutions have adopted a formal federalist structure, but the expansion of federal powers has left the states with such limited powers that some commentators have characterized Venezuela as a pseudo-federalist nation. *E.g.*, JACQUES LAMBERT, *LATIN AMERICA: SOCIAL STRUCTURE AND POLITICAL INSTITUTIONS* 300 (1967); WIENAZYSTAW J. WAGNER, *THE FEDERAL STATES AND THEIR JUDICIARY: A COMPARATIVE STUDY IN CONSTITUTIONAL LAW AND ORGANIZATION OF COURTS OF FEDERAL STATES* 46-47 (1959); Harry Kantor, *Latin American Federalism: Aspiration and Futility, in FEDERALISM: INFINITE VARIETY IN THEORY AND PRACTICE* 185, 202-203 (Valerie Earle ed., 1968). Reforms enacted in 1989, particularly those permitting direct election of state governors instead of presidential appointment, have made Venezuela more genuinely federalist. See Steve Ellner, *Deepening of Democracy in a Crisis Setting: Political Reforms and the Electoral Process in Venezuela*, 35 *J. INTER-AM. STUD. & WORLD AFF.* 1, 16-22 (No. 4, 1993-94).

2. Canada has an area of 9,922,300 square kilometers; the U.S., 9,371,781 sq. kms.; Brazil, 8,511,965 sq. kms.; Argentina, 2,766,889 sq. kms.; and Mexico, 1,972,547 sq. kms. On the other hand, Venezuela, with an area of 912,050 sq. kms., is smaller than three Western Hemisphere countries: Peru (1,285,216 sq. kms.), Colombia (1,138,914 sq. kms.), and Bolivia (1,098,581 sq. kms.). NATIONAL GEOGRAPHIC, *ATLAS OF THE WORLD* 68, 100, 113, 120-121 (5th ed. 1981).

The federalist traditions of Canada and the U.S., although they differ in various important respects, are quite distinct from those of Latin America. Canada and the U.S. were colonized by Great Britain, which allowed its colonies substantial freedom in governing themselves.³ In both countries, federalism was perceived as a useful technique for integrating substantially autonomous colonies into a single nation. Latin America, on the other hand, was colonized by Spain and Portugal, whose heavily centralized regimes permitted their colonies little freedom to govern their own affairs. In Latin America, federalism was perceived as a means to decentralize governments that had been heavily concentrated. Both the U.S. and Canada, with the exception of Quebec, were products of colonizations that synthesized Protestantism, Locke's social compact theory, and the natural rights of Englishmen.⁴ This North American inheritance of theology and political theory was far more conducive to the structured dispersal of power among many regional centers than Latin America's inheritance of the centralized, hierarchical organization of Roman Catholicism and Bourbon absolutism. It should not be surprising, therefore, that power in all the Latin American federal nations is far more centralized than in Canada or the U.S.

A. *The Essential Features of Federalism*

Despite the vast literature on the subject, federalism's essential nature remains elusive.⁵ Since the framers of the U.S.

3. Keith S. Rosenn, *The Success of Constitutionalism in the United States and Its Failure in Latin America: An Explanation*, 22 U. MIAMI INTER-AM. L. REV. 1, 9-10 (1990); W.R. Lederman, *The Extension of Governmental Institutions and Legal Systems to British North America in the Colonial Period*, in CONTINUING CANADIAN CONSTITUTIONAL DILEMMAS: ESSAYS ON THE CONSTITUTIONAL HISTORY, PUBLIC LAW AND FEDERAL SYSTEM OF CANADA 63, 64-77 (W.R. Lederman ed. 1981).

4. For the importance of the Protestant, particularly Calvinist, theological underpinnings for the development of federal democracy in the U.S. colonies, see Daniel J. Elazar & Ilan Greilsammer, *Federal Democracy: The U.S.A. and Europe Compared A Political Science Perspective*, in INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE 71, 77-79 (Mauro Cappelletti, Monica Seccombe & Joseph Weiler eds., 1986) [hereinafter INTEGRATION THROUGH LAW]. See also Bernard J.S. Hoetjes, *The European Tradition of Federalism: The Protestant Dimension*, in COMPARATIVE FEDERALISM AND FEDERATION: COMPETING TRADITIONS AND FUTURE DIRECTIONS 117 (Michael Burgess & Alain-G. Gagnon eds., 1993).

5. L.J. BOULLE, CONSTITUTIONAL REFORM AND THE APARTHEID STATE: LEGITIMACY, CONSOCIATIONALISM AND CONTROL IN SOUTH AFRICA 51 (1984); Richard P.

Constitution of 1787 invented modern federalism, theorists have tended to regard the basic federalist features of the U.S. Constitution as the essence of federalism.⁶ There are, however, several types of federalist systems,⁷ many of which differ from the U.S. model in important ways. Nevertheless, the essential characteristics of federalism can be reduced to two: (1) constitutional division of powers between the central and regional levels of government, and (2) entrenched regional representation in the central government.⁸ Federalism is a form of government in which sovereign powers are constitutionally divided between a central government and geographically defined, semi-autonomous levels of government. Generally, federalist constitutions allocate powers to large geographically defined units, such as states, provinces, cantons or *länder*, but a few also allocate governmental powers to smaller subdivisions such as federal districts, counties or municipalities. Typically, some powers are exercised exclusively by the central government, some are exercised exclusively by the states or counties, and some are exercised concurrently. Nothing in the concept of federalism, however, other than a vague notion that national government should

Nathan, *Defining Modern Federalism*, in NORTH AMERICAN COMPARATIVE FEDERALISM: ESSAYS FOR THE 1990S 89, 90 (Harry N. Scheiber ed., 1992) [hereinafter COMPARATIVE FEDERALISM].

6. See, e.g., Arend Lijphart, *Non-Majoritarian Democracy: A Comparison of Federal and Consociational Theories*, 15 PUBLIUS: THE JOURNAL OF FEDERALISM 3, 4-5 (Spring 1985) (identifying the following five secondary characteristics of federalism: (1) a written constitution dividing powers between the central and regional governments, (2) a bicameral legislature with one chamber representing the people and the other chamber the regional units, (3) over-representation of smaller regional units in the upper house, (4) regional units having the rights to be involved in amending the federal constitution and to change their own constitutions unilaterally, and (5) a decentralized government with the regional governments' having a share of power that is relatively large compared with regional governments in unitary states).

7. As of 1987, there were 19 federalist nations, with 40 percent of the world's population; 58 nations had some form of institutional arrangements based upon federal principles. DANIEL J. ELAZAR, EXPLORING FEDERALISM 42 (1987).

8. Some political scientists contend that a third essential characteristic of federalism is that states or provinces are prohibited from seceding from the federal union. Elazar & Greilsammer, *supra* note 4, at 101; Carl J. Friedrich, *Admission of New States, Territorial Adjustments, and Secession*, in STUDIES IN FEDERALISM 753, 770 (Robert R. Bowie & Carl J. Friedrich eds., 1954). The indissolubility of the union is a fundamental principle of U.S. constitutional law. *Texas v. White*, 74 U.S. (7 Wall.) 700, 724-725 (1868), *overruled on other grounds by Morgan v. United States*, 113 U.S. 476, 496 (1885). Yet it would not have this status had the South won the Civil War. If Quebec were eventually successful in carrying out its threat to declare independence, Canada would not necessarily cease to be a federal nation.

be empowered to deal with national affairs and the state governments with local affairs, indicates how these powers should be divided. Hence, federal systems divide governmental powers differently. Even within the same country and under the same constitution, divisions of powers shift and evolve.

The second basic characteristic of federalism is that the states or provinces have entrenched representation within the national government.⁹ Federal states are almost invariably bicameral. Representation in the lower house is usually apportioned on the basis of population, but many guarantee each state or province equal representation in the upper house. Argentina and Brazil go one step further; the city of Buenos Aires and Brazil's Federal District are each entitled to elect three senators, the same representation as a province or state.¹⁰ Others, such as Canada or Germany, grant some provinces or *Länder* more delegates in the upper house than others.¹¹ Generally, federal constitutions may not be amended without the consent of a majority or extraordinary majority of the states or provinces.¹² The U.S. Constitution goes further, categorically prohibiting any constitutional amendment from depriving any state without its consent of equal suffrage in the Senate.¹³

B. The Advantages of Federalism

Federalism has a number of advantages as a form of political organization. The most obvious reason for sovereign entities to form a federal nation is mutual protection against outside forces. Federalism facilitates the common defense. Second, it promotes economic growth through free internal trade, a single currency, freedom of travel, and reciprocal promises to enforce

9. PRESTON KING, *FEDERALISM AND FEDERATION* 142-43 (1982).

10. ARG. CONST. art. 54 (as amended 1994); BRAZ. CONST. art. 46 (1).

11. CAN. CONST. ACT, art. 22 (1867); GERMAN BASIC LAW (GRUNDGESETZ) art. 51.

12. Brazil and Argentina are exceptions. The Brazilian Constitution can be amended by three-fifths majorities in both houses of the Congress in two rounds of voting. Amendments may be proposed by a majority of the state legislatures, but their consent is not required to approve an amendment. BRAZ. CONST. art. 60. The Argentine Constitution can be amended by a two-thirds vote of Congress, followed by approval in a Constitutional Convention. Consent of the provinces is not required. ARG. CONST. art. 30 (as amended 1994).

13. U.S. CONST. art. V.

the laws and judicial decisions of the component units. Third, it helps safeguard against tyranny by preventing concentration of governmental power and providing countervailing centers of power.¹⁴ Fourth, it encourages participation in government at local levels, promoting greater citizen involvement with the tasks of governance. Fifth, it leads to development of new and imaginative solutions to societal problems because local units are more free to act as laboratories for experimentation.¹⁵ Sixth, it simplifies the process of dealing with linguistic, ethnic, religious, or cultural diversity, facilitating governance of large regions and pluralistic societies. Seventh, it promotes administrative efficiency by utilizing national uniform regulations, taxation and expenditures for national concerns, while allowing local legislatures to tailor regulations, taxation and expenditures to regional and local concerns.

C. *The Disadvantages of Federalism*

Federalism also has several disadvantages. First, it is an anachronistic form of government that makes it increasingly difficult for modern governments to cope with issues that were deemed local in another age but today transcend state or even national boundaries. Second, it impedes economic efficiency by subjecting businesses to a bewilderingly complex structure of overlapping and inconsistent legal regulation, thereby increasing the costs of doing business in more than one state. Third, states often vie with each other to attract businesses, capital and population, by enacting legislation that will be the least restrictive or burdensome, resulting in less than optimal levels of regulation.¹⁶ Fourth, states often seek to impose external costs, like pollution or taxes, on residents of other states.¹⁷ Fifth, federal-

14. Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism after García*, 1985 SUP. CT. REV. 341, 380-389.

15. In *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932), Justice Brandeis' dissent observed that it "is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." This widely cited dictum is generally believed to be true, but whether it is in fact accurate is unclear. See Rapaczynski, *supra* note 14, at 408.

16. This creates the so-called "race to the bottom." Martin Shapiro, *Federalism, Free Movement, and Regulation-Averse Entrepreneur*, in *COMPARATIVE FEDERALISM*, *supra* note 5, at 47, 48.

17. Susan Rose-Ackerman, *Cooperative Federalism and Co-optation*, 92 YALE L.

ism creates redundancy, making the costs of governance more expensive by adding numerous layers of bureaucracy. For example, the U.S. has more than 83,000 governments.¹⁸ Sixth, state or provincial governments are more likely to threaten the individual rights and guarantees of minorities than national governments because local constituencies are more homogeneous and cohesive than national ones.¹⁹ Seventh, federalism tends to be unstable, sometimes fragmenting into several nations or requiring military force to preserve the union.

Federalist systems have constant debates about the proper boundaries between national and regional powers. Few are satisfied with the existing scheme, and political forces are continually being marshalled to promote greater centralization or greater decentralization.²⁰ The most difficult challenge confronting any federal system is to achieve and to maintain the appropriate balance between the resources and responsibilities of the central government and the resources and responsibilities of the constituent state and local governments.

In the past decade, political decentralization has become an important component of efforts to consolidate democracy in many Latin American countries. During this period, Brazil, Chile, Colombia, El Salvador, Mexico, Nicaragua, Peru, and Venezuela have instituted important political reforms aimed at

J. 1344, 1345 (1983).

18. Laurence J. O'Toole, *American Intergovernmental Relations: An Overview*, in AMERICAN INTERGOVERNMENTAL RELATIONS 1, 2 (Laurence J. O'Toole ed., 2d ed. 1993). These include one federal government, 50 state governments, some 3,000 counties, 19,000 municipalities, 17,000 townships, 15,000 school districts, and nearly 29,532 special districts.

19. Rapaczynski, *supra* note 14, at 385-386.

20. The debate over the "centralized-decentralized" nature of Canadian federalism is unending. "Many have likened it to a national sport, suggesting that whatever solution is found to this conflict will not be the final solution because a substantial component of the Canadian population will never support it." Gregory S. Mahler, *Canada: Two Nations, One State?*, in POLITICAL CULTURE AND CONSTITUTIONALISM: A COMPARATIVE APPROACH 56, 67 (Daniel P. Franklin & Michael J. Baun eds., 1994). The debate about the role and extent of states' rights versus national power is a continual one in the U.S.. Compare JESSE CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980) with Nagel, *Federalism as a Fundamental Value: National League of Cities in Perspective*, 1981 SUP. CT. REV. 81. See also Martha A. Field, *The Supreme Court, 1984 Term: Comment: Garcia v. San Antonio Metropolitan Transit Authority: The Demise of a Misguided Doctrine*, 99 HARV. L. REV. 84 (1985). For recent reforms and debates about reallocation of governmental powers in Latin American countries, see *infra* note 21, and accompanying text.

transferring power and resources from the national government to local governmental units.²¹ These reforms were motivated by a desire to strengthen democratic institutions by dispersing political power more widely and increasing popular access to democratic decision-making. They were also motivated by a belief that local application and disbursement of governmental resources would lead to greater economic efficiency than centralized control.

Significant decentralization has also been taking place in the U.S. in the past fifteen years. High on the priorities of Ronald Reagan's presidency was revitalization of federalism by turning over responsibility for administering a number of federal programs and revenue sources to the states and eliminating much of the bureaucratic red tape surrounding federal programs.²² President Reagan, and his successor, George Bush, also sought to revitalize federalism by appointing to the federal judiciary a group of judges believed to be more sensitive to states' rights.²³ In 1995, the Republican-led Congress enacted

21. DECENTRALIZATION IN LATIN AMERICA: AN EVALUATION (Arthur Morris & Stella Lowder eds., 1992); DESCENTRALIZACIÓN POLÍTICA Y CONSOLIDACIÓN DEMOCRÁTICA (Dieter Nohlen ed., 1991). Argentine constitutional reforms adopted on August 22, 1994, were also intended in part to strengthen federalism. These reforms reduce the powers of the Argentine president to rule by decree in matters involving criminal justice, taxation, elections, and political parties; presidential decrees in other areas are subject to ratification by Congress. This measure should reduce federal intervention in the provinces by making clear that the power to declare federal intervention belongs to Congress and may not be delegated to the Executive. Only when Congress is not in session may the president intervene on his own. The reforms also permit the city of Buenos Aires to elect its own mayor and constitutionalize preexisting revenue-sharing schemes. On the other hand, the Federal Senate, which is currently elected by the provincial legislatures, is likely to become less responsive to provincial concerns after the year 2001, when senators will be directly elected. This occurred in the U.S. following adoption of the 17th Amendment, which instituted an identical reform. Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 857-868 (1979). But the reduction in senatorial mandates from 9 to 6 years and the addition of a third senator from each province and the federal capital (assured to the party receiving the second highest number of votes) may make the Senate somewhat more responsive to provincial needs.

22. O'Toole, *supra* note 18, at 21-25; Daniel J. Elazar, *Opening the Third Century of American Federalism: Issues and Prospects*, in AMERICAN FEDERALISM: THE THIRD CENTURY 11, 15-16 (John Kincaid ed., 509 Annals Am. Acad. Pol. & Soc. Sci. May 1990).

23. See Sheldon Goldman, *Reagan's Judicial Legacy: Completing the Puzzle and Summing Up*, 72 JUDICATURE 318 (1989); Sheldon Goldman, *The Bush Imprint on the Judiciary: Carrying on a Tradition*, 74 JUDICATURE 294 (1991).

legislation restricting the power of the federal government to mandate activities by the state and local governments without transferring federal funds to pay for these mandates.²⁴ The results of these actions are both complex and multidirectional, but the net result has been an important shift towards decentralization.

II. CONSTITUTIONAL ALLOCATION OF POWERS

Modern federalism began in the U.S. more than 200 years ago, in large part as a practical solution to the problem of unifying thirteen autonomous former British colonies into a government that would permit development of a common market, while also allowing the states to retain many of their sovereign powers.²⁵ Federalism also complemented the doctrine of separation of powers as an additional technique for dispersal of power, which the Framers of the U.S. Constitution considered an important bulwark against tyranny by the majority.²⁶

A. *United States*

Initially, some Framers of the U.S. Constitution suggested that the proper formula for allocating power between the states and the national government was simply to grant to the national government "[l]egislative power in all cases to which the State Legislatures were individually incompetent."²⁷ Eventually, the Framers decided that it would be wiser to promulgate a complex tripartite division of powers. One part contains a specific enumeration of the powers of the federal government. These eighteen specifically delegated powers include the powers to tax and spend, to borrow money, to regulate interstate and foreign commerce, to coin money, to protect patents and copyrights, to de-

24. John H. Cushman, Jr., "Congress Clears Limits on Rules Costly to States," N.Y. TIMES, Feb. 2, 1995, at A1.

25. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987).

26. This is much less true for Canada, whose Founding Fathers subscribed to the doctrine of parliamentary supremacy. Roger Gibbons, *The Impact of the American Constitution on Contemporary Canadian Politics*, in THE CANADIAN AND AMERICAN CONSTITUTIONS IN COMPARATIVE PERSPECTIVE 131, 132 n.5 (Marian C. McKenna ed., 1993).

27. Madison's Notes on the Proceedings in the Federal Convention, May 31, 1787, 1 FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787 (1911), at 53.

clare war and raise an army, to establish uniform rules on naturalization and bankruptcy, and to make all laws "necessary and proper" to carrying out the delegated powers.²⁸ The second part contains a list of powers denied to the states, either absolutely or conditioned upon obtaining permission from Congress.²⁹ The third part is the residual scheme. The powers of state and local governments are not enumerated; all powers not delegated to the federal government are reserved to the states or to the people.³⁰

The actual functioning of this tripartite division is complex. It is a fundamental principle of U.S. constitutional law that the federal government is one of limited powers, possessing only those powers specifically delegated to it. Yet additional powers can reasonably be implied from these delegated powers.³¹ There is, however, no provision stating whether these specifically enumerated powers of the federal government are exclusive. Except for those powers denied to the states either by the Constitution or by federal preemption, the courts are free to infer a substantial area of concurrent powers and have in fact done so. In the U.S. the great bulk of civil, commercial, procedural, and criminal law is state law, and the overwhelming majority of cases are litigated in the state courts.

B. Canada

The constitutional allocation of powers in Canada is quite different from in the U.S. Determined to correct what they deemed a major flaw in U.S. Federalism, the weakness of the federal government, the Framers of the Canadian Constitution granted the national government more extensive powers than the U.S. counterpart. Canada's national government has the power to legislate concerning thirty-one (originally twenty-nine) specified subjects. These include not only legislative powers

28. U.S. CONST. art. I, § 8.

29. See *e.g.* art. 1, sec. 10, flatly prohibiting the states from issuing paper money, entering into treaties or alliances, or making anything but gold or silver coin legal tender; or prohibiting the states without the consent of Congress from levying export or import duties, or keeping troops or warships during peacetime.

30. U.S. CONST. amend. X. See Kathryn Abrams, *On Reading and Using the Tenth Amendment*, 93 YALE L.J. 723 (1984).

31. *McCulloch v. Maryland*, 17 U.S. (94 Wheat.) 316, 4 L. Ed. 579 (1819).

similar to those granted to the federal government by the U.S. Constitution,³² but also the power to regulate areas traditionally regarded as reserved to the U.S. states, such as criminal law, marriage and divorce, interest, and negotiable instruments.³³ The Canadian Constitution grants the provinces the exclusive power to legislate in sixteen specified areas, including the power to govern "property and civil rights."³⁴ Residual powers are conferred upon both the national and the provincial governments. The national government's residual powers include an emergency power and the power to legislate for the "Peace, Order, and good Government of Canada" in all matters not assigned exclusively to the provinces;³⁵ the provincial governments' residual power is to regulate "Generally all Matters of a merely local or private Nature in the Province."³⁶ As in the U.S., the bulk of private law is provincial rather than federal law.

The Canadian Constitution also contains certain extraordinary provisions giving the federal government significant powers to control the provinces, even in areas allocated exclusively to the provinces. Thus, the federal government appoints each province's chief executive officer, the lieutenant governor. The lieutenant governor, either subject to orders from the governor general or on his own discretion, has a temporary veto power called "reservation," which permits him to refuse to consent to any provincial bill, thereby preventing it from becoming law for one year. The federal government also has an unqualified veto power called "disallowance," which permits it to reject any provincial statute within one year of its enactment, even if approved by the lieutenant governor. The federal government can declare any local undertaking for the general advantage of Canada, thereby subjecting the work to federal control. Moreover, the federal government appoints the upper levels of the provincial judiciary.³⁷

32. These include the powers to legislate with respect to bankruptcy, patents, copyright, trade and commerce, unemployment insurance, taxation, armed forces, navigation, currency, and naturalization.

33. CAN. CONST. ACT art. 91 (1867).

34. *Id.* at art. 92.

35. *Id.* at art. 91 (opening paragraph).

36. *Id.* at art. 92(16).

37. Daniel A. Soberman, *The Canadian Federal Experience—Selected Issues, in* INTEGRATION THROUGH LAW, *supra* note 4, at 513, 515; Frank R. Scott, *The Special*

If all these extraordinary powers were actually used by the federal government, Canada would be far more centralized. However, the federal powers of reservation and disallowance, which were used frequently in Canada's early history, were last used in 1942, and it is unlikely that they will be used again. The approach of the past fifty years has been to leave questions about whether provincial governments have exceeded their constitutional powers to the courts.³⁸ Moreover, the national government has refrained from using its appointment power to pack the provincial judiciaries and the national Supreme Court with staunch supporters of greater national powers.³⁹

C. Argentina

The Argentine Constitution follows the allocative formula of the U.S. Constitution, specifically delegating a long list of powers to the federal government.⁴⁰ Article 121 tracks the language of the U.S. Tenth Amendment, reserving to the provinces all powers not delegated to the federal government, as well as all powers expressly reserved in special pacts made at the time of their incorporation into the federal system.⁴¹ Argentina's Constitution, however, departs radically from the U.S. model by expressly granting the federal government broad general powers to promote the economic prosperity of the nation and the conduct of human development,⁴² as well as the power to enact civil, commercial, penal, mining, and labor codes.⁴³ Once the Argentine

Nature of Canadian Federalism, in *ESSAYS ON THE CONSTITUTION* 175, 179 (Frank R. Scott ed., 1977).

38. Soberman, *supra* note 37, at 516.

39. See BRYAN SCHWARTZ, *FATHOMING MEECH LAKE* 93-94 (1987).

40. ARG. CONST. art. 75 (as amended 1994). This article contains 32 subsections, each setting out at least one, and sometimes several, powers of the federal government.

41. An example of such a pact is that of San José de Flores of Nov. 11, 1859, described in NESTOR P. SAGÜÉS, 1 *ELEMENTOS DE DERECHO CONSTITUCIONAL* 226 (1993).

42. ARG. CONST. art. 75(18) and (19) (as amended 1994). Prior to 1994, art. 67(16) authorized the federal government to legislate to promote the "prosperity of the country, the movement and well-being of all the provinces . . ." The wording of this clause was modified in the 1994 reform to grant the federal government the power to legislate "to promote human development, economic progress with social justice, the productivity of the national economy, the generation of jobs . . ." *Id.* at art. 75(19).

43. *Id.* at art. 75(12) (as amended 1994). The Federal Congress also has the

Congress enacts these codes, the provinces can no longer regulate any matter covered by them.⁴⁴ On the other hand, the Argentine provinces do have the power to enact codes of civil and criminal procedure, which generally follow the codes for the federal capital.

D. Brazil

Brazil's 1988 Constitution partly follows the allocative formula of the U.S. Constitution, but it delineates the distribution of governmental powers in much greater detail and includes the Federal District and the counties in the allocational scheme.⁴⁵ Brazil also borrows from the German Basic Law in permitting delegation of exclusive powers and in specifically providing for concurrent powers.⁴⁶ Article 21 of the Constitution specifically delegates to the federal government a broad array of powers that, even though not denominated "exclusive," are plainly meant to be. These include the powers to maintain international relations; to declare war and states of siege and to make peace; to provide for defense; to regulate currency, exchange rates, and mineral prospecting; and to operate or to regulate radio and television broadcasting, the post office, and the federal police.⁴⁷ Article 22 grants the federal government another broad array of powers specifically labelled "exclusive," although some of these powers overlap or repeat powers delegated in Article 21.⁴⁸ Brazil's basic codes, including those on criminal and civil procedure, are federal laws. Nonetheless, with respect to Article 22 powers, Congress may adopt complementary laws (requiring approval by an absolute majority), authorizing the states to

specific power to promulgate labor and social security codes. *Id.*

44. *Id.* at art. 126.

45. For a detailed explanation of this formula, see FERNANDO DIAS MENEZES DE ALMEIDA, *COMPETENCIAS NA CONSTITUIÇÃO DE 1988* (1991). The Federal District is treated virtually as another state. It elects its own governor and legislature, and is represented in the federal legislature under the same allocational formula as the states.

46. GERMAN BASIC LAW, arts. 70-74.

47. BRAZ. CONST. art 21.

48. These include the powers to legislate on civil, commercial, penal, procedural, electoral, agrarian, maritime, aeronautical, space and labor law; to regulate foreign and interstate commerce, the postal service, foreign exchange, expropriation, mining, informatics, national transportation policy, naturalization, social security, and commercial advertising.

legislate on specific matters in these areas of exclusive federal competence.⁴⁹

The Brazilian Constitution contains twelve areas where the federal government, states, federal district, and counties (*municípios*) have joint powers,⁵⁰ and sixteen areas where the federal government, states, and the federal district have concurrent legislative authority.⁵¹ In the area of concurrent authority, the federal government's power is limited to establishing general rules.⁵² In the absence of federal legislation, the states may freely regulate; however, where federal legislation exists, the states may adopt only supplementary legislation. The residual clause reserves to the states the powers not forbidden to them by the Constitution.⁵³ Counties are assured political, legislative, administrative, and financial autonomy.⁵⁴ They also have the power to legislate about subjects of local interest and to supplement federal and state legislation.⁵⁵

E. Venezuela

Venezuela's 1961 Constitution grants to the national government a broad array of powers covering virtually all aspects of a modern state, such as foreign affairs, defense, naturalization, currency, taxation, armed forces, mineral resources, expropriation, navigation, transportation, communications, banking, and agrarian reform.⁵⁶ Like Brazil's, Venezuela's Constitution also grants the national government the power to enact civil, commercial, criminal, and procedural codes.⁵⁷ In addition to a broad specific grant of powers to the federal government, the Venezuelan Constitution also gives the federal government power over "All other matters that this Constitution attributes to the National Power or which corresponds to it by its type or nature."⁵⁸ The counties (*municipios*) are granted the power to regulate

49. BRAZ. CONST. art. 22 (I).

50. *Id.* at art. 23.

51. *Id.* at art. 24.

52. *Id.* at art. 24 (XVI) § 1°.

53. *Id.* at art. 25 § 1°.

54. *Id.* at arts. 18, 29, 30, 31, and 34(VII)c.

55. *Id.* at art. 30(I) & (II).

56. VENEZ. CONST. art. 136.

57. *Id.* at art. 136(24°).

58. *Id.* at art. 136 (25°).

local concerns, such as urban growth, traffic, culture, health, social assistance, and popular credit institutions.⁵⁹ On the other hand, the states are granted virtually no significant powers other than organizing their own governments. Although the states have the residual powers,⁶⁰ the powers granted to the federal government are so broad that little is left to the states.⁶¹ To counterbalance this centralist tilt, the federal legislature, by two-thirds vote, may grant powers to the states in the interest of decentralization.⁶²

F. Mexico

Mexico's 1917 Constitution contains a broad grant of powers to the federal government, including the power to legislate with respect to hydrocarbons, mining, commerce, money, banking and credit, communications, nuclear and electrical energy, foreign investment, technology, and labor.⁶³ Powers not expressly granted to the federal government are reserved to the states.⁶⁴ Unlike the other Latin American countries, Mexico permits the states to enact their own basic codes, with the exception of commercial and labor codes. Nonetheless, the states' civil, criminal, criminal procedure, and civil procedure codes are virtually carbon copies of the codes for the federal district.

G. The Vagaries of Allocative Formulas

There is little agreement as to how federal systems should divide powers. The guiding principle — that the national government should exercise powers dealing with national affairs, and the states should exercise powers dealing with local affairs — provides little guidance. Similarly unhelpful are modern refinements, such as:

59. *Id.* at art. 30.

60. *Id.* at art. 17 (7°).

61. ALLAN R. BREWER-CARIAS, *LA CONSTITUCIÓN Y SUS ENMIENDAS 28* (1991); Allan R. Brewer-Carías, *El Sistema Constitucional Venezolano*, in *LOS SISTEMAS CONSTITUCIONALES IBEROAMERICANOS 771, 778* (Domingo García Belaunde, Francisco Fernández Segado & Rubén Hernández Valle eds., 1992) [hereinafter *SISTEMAS CONSTITUCIONALES*].

62. VENEZ. CONST. arts. 17, 137.

63. MEX. CONST. art. 73.

64. *Id.* at art. 124.

Policies and programs that affect the entire society more or less equally are appropriately assigned to the central government: national defense is the preeminent example. Policies and programs that affect only one subdivision of society are appropriately assigned to local governments⁶⁵

Other than assigning national defense to the federal government, there is no uniformity in the constitutional formulas by which federal systems of the Americas divide powers between national and state governments. Even the treaty-making power and the power to issue money, which functionally and logically seem quintessential national powers, have not been assigned solely to federal governments. Argentina grants the provinces, with the consent of Congress, concurrent powers to enter into partial treaties on various subjects.⁶⁶ Treaties are not necessarily the supreme law of the land in Canada; the treaty-making power has been interpreted so narrowly that the federal government cannot adopt legislation necessary to implement a treaty if the substantive area of the treaty deals with matters constitutionally allocated to provincial regulation.⁶⁷

The U.S. Constitution is omissive in allocating power to control issuance of currency. While it specifically prohibits the states from issuing bills of credit (what paper money was then called) and from making anything but gold or silver coin legal tender, a provision authorizing the federal Congress to issue bills of credit was stricken from the draft Constitution. Instead Congress was given the power to coin money and to regulate its value. Not until 1862, after great debate, did Congress issue paper money in order to finance the Civil War. For a substantial period in U.S. history, the circulating notes issued by state banks constituted the bulk of the U.S. money supply.⁶⁸ Not until 1865 did Congress pre-empt control over monetary policy from the states by the device of levying a 10 percent excise tax

65. PAUL E. PETERSON, BARRY G. RABE & KENNETH K. WONG, *WHEN FEDERALISM WORKS* 11 (1986).

66. ARG. CONST. art. 125 (as amended 1994).

67. A.G. Can. v. A.G. Ont. (Labour Conventions) [1937] A.C. 326; R. St. J. Macdonald, *International Treaty Law and the Domestic Law of Canada*, 2 DALHOUSIE L. J. 307, 314-316 (1975). Moreover, Quebec has claimed the power to enter into its own treaties. A. JACOMY-MILLETTE, *TREATY LAW IN CANADA* 78-91 (1975).

68. JAMES WILLARD HURST, *A LEGAL HISTORY OF MONEY IN THE UNITED STATES, 1774-1970*, 142 (1973).

on the amount of any state bank notes paid out after July 1, 1886.⁶⁹

Nor are the textual formulas reliable indicators of how powers are actually divided. For example, the constitutions of these six American Republics allocate the power to regulate criminal and family law quite differently. The Constitutions of Argentina, Brazil, Canada, and Venezuela confer the powers to regulate criminal and family law on the federal government; in Mexico and the U.S., these powers belong to the states under the residual clauses. These allocations, however, are not in practice mutually exclusive divisions of power. The federal governments of the U.S. and Mexico invade both these areas of state preserves. Similarly, the Argentine and Canadian provinces and the Brazilian states invade the federal domain of criminal law.

In the U.S., the federal government has enacted a large number of federal criminal statutes. Initially, Congress criminalized only activity that interfered with fairly obvious federal interests, such as treason; piracy; counterfeiting; forging government documents; murder, manslaughter, or maiming on U.S. property; larceny on U.S. property or on the high seas; perjury; bribery of a judge; robbing a mail carrier; and stealing from the U.S. mail.⁷⁰ During the twentieth century, however, there has been a huge expansion of federal crimes with jurisdictional hooks providing an ostensible linkage to the commerce or taxing powers, such as crossing state lines, using an instrumentality of interstate commerce, or possessing drugs or gambling without paying a tax.⁷¹

Even though each Mexican state has its own criminal code, these state codes are modeled upon the Penal Code for the Federal District. Moreover, the interpretation and application of these state codes is federalized through the *amparo* jurisdiction of the federal courts, which are the ultimate arbiters of the meaning of state law.⁷² The Penal Code for the Federal District

69. *Id.* at 180. The constitutionality of this tax was sustained by the Supreme Court in *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533 (1869).

70. DWIGHT F. HENDERSON, CONGRESS, COURTS, AND CRIMINALS: THE DEVELOPMENT OF FEDERAL CRIMINAL LAW, 1801-1829, 7-10 (1985).

71. See generally JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 165-166 (4th ed. 1991); Robert L. Stern, *The Commerce Clause Revisited—The Federalization of Interstate Crime*, 15 ARIZ. L. REV. 271 (1973).

72. See notes 110-112 *infra* and accompanying text.

contains certain provisions involving crimes against the nation that apply nationally rather than just to the Federal District. The determination of whether a provision applies nationally or only in the federal district is left open to "constitutional judgment."⁷³ In addition, the federal government has enacted numerous criminal statutes that apply nationally.⁷⁴ Attempts by Mexican states to challenge such federal criminal legislation as invading their sovereign powers have been unsuccessful.⁷⁵

Argentina and Brazil have federal criminal codes that apply throughout the nation. Nevertheless, the great bulk of the federal crimes are prosecuted by state prosecutors in the state courts.⁷⁶ Canada also has a federal criminal code that applies to the entire nation, but all federal offenses are prosecuted in the provincial courts by federal prosecutors.⁷⁷ The Canadian Supreme Court has occasionally invalidated federal criminal legislation on the dubious ground that the federal statute invaded powers reserved to the states.⁷⁸ The federal government's monopoly on the criminal law is incomplete because the provinces are permitted to enforce provincial laws by imposing fines and prison terms.⁷⁹ While provincial penal legislation was initially

73. HELEN L. CLAGETT & DAVID M. VALDERRAMA, *A REVISED GUIDE TO THE LAW & LEGAL LITERATURE OF MEXICO* 178 (1973).

74. These statutes are collected in FILBERTO CARDENAS V., *LEGISLACIÓN PENAL Y JURISPRUDENCIA 1917-1991* (1992).

75. See JOSÉ A. G. QUINTANILLA, *DERECHO PENAL MEXICANO* 162 (1991).

76. In Argentina, crimes are tried in federal courts only when the federal government has a particular stake in the matter, such as embezzlement of federal funds or the crime is committed on federal territory. Otherwise crimes are prosecuted in the state courts. ALEJANDRO D. CARRIÓ, *CRIMINAL JUSTICE IN ARGENTINA* 21 (1989). The same kind of division of jurisdiction occurs in Brazil. Weber Martins Batista, *An Overview of Brazilian Criminal Procedure*, in *A PANORAMA OF BRAZILIAN LAW* 207, 208 (Jacob Dolinger & Keith S. Rosenn eds., 1992).

77. Federal crimes are prosecuted by Crown Attorneys, who are agents of the federal Attorney General, but trials and appeals are conducted within the provincial courts. A final appeal to the federal Supreme Court is possible in certain cases. KENNETH L. CLARKE, RICHARD BARNHORST & SHERRIE BARNHORST, *CRIMINAL LAW AND THE CANADIAN CRIMINAL CODE 10-18* (1977)[hereinafter *CANADIAN CRIMINAL LAW*].

78. *E.g.*, *Re The Board of Commerce Act, 1919, and The Combines and Fair Prices Act*, [1922] 1 A.C. 191 (P.C.); *Reference Re Section 5(a) of the Dairy Industry Act*, [1949] 1 D.L.R. 433 (S.C.C.); *aff'd* [1951] A.C. 179 (P.C.); *Dominion Stores Ltd. v. The Queen*, [1979] 50 C.C.C. (2d) 277 (S.C.C.); *Labatt Breweries of Can. Ltd. v. A.G. Can.*, [1979] 52 C.C.C. (2d) 433 (S.C.C.).

79. Prison sentences can be substantial. For example, an Ontario law provides for imprisonment of "two years less a day." *CANADIAN CRIMINAL LAW*, *supra* note 77, at 12.

curtailed by exercise (or threat) of the federal power of disallowance, in modern times provincial criminal legislation has proliferated, often overlapping with federal legislation. The modern tendency of the Canadian courts is to permit concurrent jurisdiction in the criminal law area.⁸⁰ Moreover, the province of Quebec, through interpretation and translation, has managed to place its own distinctive gloss on the federal criminal code.⁸¹

Family law does not escape federal interference in either the U.S. or Mexico. For example, in 1980, the U.S. Congress enacted the Parental Kidnapping Prevention Act to try to deter interstate abductions and inconsistent state court awards of child custody.⁸² An important source of child support in the U.S. is a cooperative federal-state program called Aid to Families with Dependent Children, funded largely by the federal government and administered by the states. In 1971, after several Mexican states' "divorce mills" had become an international embarrassment, the federal government of Mexico effectively prohibited the Mexican states from divorcing non-resident aliens.⁸³ In addition, federal labor law, health law, social security, and social assistance all regulate diverse aspects of family law in Mexico.⁸⁴

The nature of federal-state relations has changed significantly from the 18th and 19th centuries, when jurists operated with the dual federalist theory that constitutional grants of power were mutually exclusive. Regardless of the constitutional allocation, crime and family law, like most subject matters allocated by federal constitutions, are matters of both national and local concern. Consequently, any formula that allocates subjects like these to either the federal government or to state govern-

80. MARTIN L. FRIEDLAND, *A CENTURY OF CRIMINAL JUSTICE: PERSPECTIVES ON THE DEVELOPMENT OF CANADIAN LAW* 54-57 (1984).

81. Nicholas Kasirer, *The Annotated Criminal Code en version québécoise: Signs of Territoriality in Canadian Criminal Law*, 13 DALHOUSIE L.J. 520 (1990).

82. 28 U.S.C. § 1738A (1994).

83. This was accomplished by amending the Law on Nationality and Nationalization to prohibit the state court from granting any divorce involving foreigners without a certificate issued by the Secretariat of the Federal Government showing legal residence in Mexico, and to prohibit jurisdiction in such cases from being based upon voluntary submission to Mexican courts. Decree of Feb. 3, 1971, published in the *Diario Oficial* of Feb. 20, 1971.

84. Manuel F. Chávez Asencio, *La Familia en la Legislación Mexicana*, 23 JURÍDICA (UNIV. IBEROAMERICANA) 381, 394-408 (1994).

ments, will in practice become an allocation of concurrent powers. Today the more appropriate metaphor for constitutional allocations of most powers is not a layer cake but a marble cake.⁸⁵

III. JUDICIAL UMPIRING OF THE FEDERALIST SYSTEM

Constitutions often fail to address crucial issues of federalism. When disputes arise, who decides how the balance of power should be allocated is critical. Granting the power to decide to the president or national congress tilts the balance in favor of the federal government. Leaving the decision to state governors or legislatures produces the opposite tilt. As the least political branch, the courts provide the most logical forum for developing appropriate principles to decide these disputes objectively.⁸⁶

One of the most notable differences between the Anglo-American and Latin American nations is that the former inherited the common law tradition, while the latter inherited the civil law tradition.⁸⁷ In the civil law tradition, the bulk of private law is set out in basic codes. With the exception of Mexico, the power to enact the basic codes in the Latin American countries lies with the federal government rather than with the states or provinces. Moreover, the civil law judge has far less power than his common law counterpart, who has traditionally invented much of the law in the process of finding it. Both constitutionalism and the courts have traditionally been much weaker in Latin America.⁸⁸ As a result, its judiciary has usually not served as the ultimate arbiter of the balance of power between the states and the national government. That role has

85. Morton Grodzins, *Centralization and Decentralization in the American Federal System*, in *A NATION OF STATES 1* (Robert A. Goldwin ed., 1963).

86. This too produces a problem, for federal systems usually have dual court structures. Placing the decision with the federal courts tends to increase federal power at the expense of state and local power, while giving the decision to the state courts tends to produce an increase in state power.

87. See Keith S. Rosenn, *A Comparison of Latin American and North American Legal Traditions*, in *MULTINATIONAL MANAGERS AND HOST GOVERNMENT INTERACTIONS 127-152* (Lee Tavis ed., 1988). The statement in the text requires minor qualification for Quebec, Louisiana, and Puerto Rico, which are mixed civil and common law jurisdictions.

88. Rosenn, *supra* note 3, at 27; Keith S. Rosenn, *The Protection of Judicial Independence in Latin America*, 19 *U. MIAMI INTER-AM. L. REV.* 1, 23-35 (1987).

normally been assumed by the executive or the legislature. In Canada and the U.S., however, the ultimate arbiter of the balance of power between federal and state interests has usually been the federal Supreme Court.⁸⁹

A. *The Need for Judicial Review*

One of the most celebrated Justices of the U.S. Supreme Court, Oliver Wendell Holmes, observed:

I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think that the Union would be imperiled if we could not make that declaration as to the laws of the several States.⁹⁰

Holmes recognized that every federal system must have some mechanism to allow the supremacy of the federal constitution and laws to prevail over inconsistent provisions of state constitutions and laws; otherwise, it will splinter. The successful constitutional experience of Switzerland, where the Federal Tribunal (*Bundesgericht*) has the power to declare cantonal (state) legislation unconstitutional, but cannot invalidate acts of the Federal Assembly, provides substantial support for the truth of Holmes' observation.⁹¹

The American federalist systems adhere to the principle of the supremacy of the federal constitution and federal law over conflicting state norms. The U.S. Constitution curiously expresses the Supremacy Clause as a command to state judges:

This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Con-

89. Calvin R. Massey, *The Locus of Sovereignty: Judicial Review, Legislative Supremacy, and Federalism in the Constitutional Traditions of Canada and the United States*, 1990 DUKE L. J. 1229, 1259.

90. "Law and the Court," speech at the Harvard Law Association, New York, Feb. 15, 1913, reprinted in *THE MIND AND FAITH OF JUSTICE HOLMES* 387, 390 (Max Lerner ed., 1943).

91. Koen Lenaerts, *Constitutionalism and the Many Faces of Federalism*, 38 AM. J. COMP. L. 205, 254 (1990).

stitution or laws of any State to the contrary notwithstanding.⁹²

U.S. courts regularly invalidate state legislation not only for conflicts with the Constitution, but also for explicit or implicit conflicts with federal legislation.⁹³

Argentina and Mexico have constitutional provisions directly modeled on the U.S. Supremacy Clause.⁹⁴ Brazil has a similar provision.⁹⁵ Venezuela achieves the same result by denying to the states the power to do anything that does not conform to the Constitution and requiring that all exercise of public power conform to the Constitution.⁹⁶ The Canadian Constitution Act of 1982 explicitly states that the Constitution is the supreme law of the land and that any inconsistent statute is without effect.⁹⁷ All these countries have developed complex systems of judicial review. Even though nothing in the constitutions of the U.S. or Canada explicitly authorizes the federal courts to declare statutes unconstitutional, both countries have developed decentralized systems of judicial review in which all levels of the federal and state judiciaries routinely determine the constitutionality of both federal and state legislation. From 1887 to 1994, the Argentine Supreme Court, also without explicit constitutional authorization, developed a decentralized system of judicial review in which all levels of both the federal and state judiciaries routinely determine the constitutionality of both federal and provincial legislation.⁹⁸ Argentina's 1994 constitutional reform now explicitly authorizes judicial review.⁹⁹ Brazil has a decentralized system of judicial review, but it is based on specific constitutional authorization that originated in the 1891 Con-

92. U.S. CONST. art. VI, § 2.

93. See RONALD D. ROTUNDA, JOHN E. NOWAK & J. NELSON YOUNG, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* §§ 12.1-12.7 (1986).

94. ARG. CONST. art. 31; MEX. CONST. art. 41.

95. BRAZ. CONST. art. 24 § 4^o.

96. VENEZ. CONST. arts. 17(7^o) and 177.

97. CAN. CONST. (Constitution Act, 1982), art. 52(1).

98. Argentina has much stronger historical evidence than does the U.S. that the authors of its Constitution intended that the courts exercise the power of judicial review. SANTOS P. AMADEO, *ARGENTINE CONSTITUTIONAL LAW* 73 (1943).

99. Article 116, a new provision inserted into the Argentine Constitution by the partial reform of Law 24.309 of 1994, specifically authorizes all Argentine courts to hear all cases involving constitutional issues.

stitution,¹⁰⁰ which first adopted federalism. The 1988 Brazilian Constitution contains an extraordinarily elaborate set of procedures for judicial review, including an abstract action of unconstitutionality that must be brought directly before the Supreme Court.¹⁰¹ The Mexican Constitution confers the power of judicial review only upon the federal courts.¹⁰² The Venezuelan Constitution confers the power of judicial review only upon the Supreme Court,¹⁰³ but Article 20 of the Code of Civil Procedure permits all federal courts to declare state acts unconstitutional.¹⁰⁴

Prior to 1982, judicial review in Canada did not involve claims of violations of the rights of individuals. In 1982, however, Canada adopted the Charter of Rights and Freedoms, which set out for the first time a constitutional list of rights and freedoms. Article 24(1) of this Charter grants anyone whose rights have been infringed the right to seek judicial relief from a court of competent jurisdiction. Since then, the Canadian courts have exercised the power of judicial review to protect individual rights. Curiously, the Canadian Supreme Court does not have the final word in invalidating either federal or provincial statutes for violation of most of the rights protected in the Charter. Maintaining the British tradition of parliamentary supremacy, Article 33 of the Charter permits the federal or provincial legislatures expressly to override certain fundamental rights protected by the Charter for a five-year period, renewable for another five years.

B. Which Courts Are the Final Arbiters of State Law?

The federal supreme courts of the American republics have developed quite different approaches to determining the meaning of state or provincial law. In some countries the ultimate power to interpret state or provincial law lies with the highest federal court. In others, the ultimate power lies with the highest

100. BRAZ. CONST. art. 59 (II) § 1º (1891).

101. Keith S. Rosenn, *A Comparison of the Protection of Individual Rights in the New Constitutions of Colombia and Brazil*, 23 U. MIAMI INTER-AM. L. REV. 659, 680-688 (1992).

102. MEX. CONST. arts. 103(I) and 107(VIII).

103. VENEZ. CONST. art. 215.

104. ALLAN BREWER-CARÍAS, *JUDICIAL REVIEW IN COMPARATIVE LAW* 276 (1989).

state or provincial court.

1. United States

In the U.S., federal courts often apply state law, particularly in cases of diversity jurisdiction. In 1842, in the case of *Swift v. Tyson*,¹⁰⁵ the U.S. Supreme Court held that federal courts should decide diversity cases by fashioning a federal common law unless the case were governed by a state constitutional or statutory provision, or particular local interest. *Swift v. Tyson* was primarily motivated by the Supreme Court's desire to create a federal common law that would facilitate commercial transactions. The Supreme Court had hoped that the states would follow the decisions of the federal courts, and that the creation of a uniform set of legal rules for commercial transactions would encourage the development of a national economy. This was not what happened. While the federal courts developed an elaborate body of federal common law for torts, contracts, and commercial transactions, the state courts continued to follow their own common law precedents. The resulting diversity simply aggravated the legal uncertainties of U.S. federalism. Which set of rules governed a transaction depended upon the vagaries of the citizenship of the parties. Finally, in the celebrated decision of *Erie v. Tompkins*,¹⁰⁶ the Supreme Court overruled *Swift v. Tyson*, holding that the lower federal courts should abandon the attempt to create a federal common law in diversity cases; instead they should apply state law just as if they were courts of the state in which they are sitting.

The state supreme courts, rather than the U.S. Supreme Court, are the final arbiters of the meaning of state law. Even though the Constitution does not so require, the U.S. Supreme Court has long taken the position that the state courts make the ultimate decisions about the meaning of their own constitutions and laws, and their interpretations are binding upon the federal courts.¹⁰⁷ The U.S. Supreme Court also has long taken the position that it cannot even review a decision of a state court that

105. 41 U.S. (16 Pet.) 1 (1842).

106. 304 U.S. 64 (1938). See generally John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974).

107. *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1875).

arguably violates the U.S. Constitution, a treaty, or federal law if the decision also rests upon an independent and adequate state ground. If, however, it is unclear or ambiguous whether the state court's opinion rests upon state or federal grounds, the Supreme Court will assume that the state court decided the case upon federal rather than state grounds.¹⁰⁸

2. Canada

The Canadian courts differ significantly in their approach to this issue. The provincial courts are the primary courts in Canada. When reviewing their decisions, however, the Supreme Court of Canada is the ultimate arbiter of the meaning of both the common law and provincial statutes.¹⁰⁹ Although the Canadian Constitution grants the provinces a larger exclusive law-making sphere than does the U.S. Constitution, Canada's federal courts exercise considerably more centralized control over provincial lawmaking than do the federal courts in the U.S.

3. Mexico

In Mexico, federal judicial control over state court decisions and state law is even more centralized. A clause in Article 14 of the Mexican Constitution provides: "In civil cases the final judgment shall be according to the letter of the law or the juridical interpretation of the law; in the absence of the latter, it shall be based upon general principles of law."¹¹⁰ Read literally, this clause would appear to establish a constitutional right to have all decisions made correctly, and that is precisely the interpretation that the Mexican Supreme Court has given to it. Consequently, the Mexican federal courts routinely review state court decisions in which the only federal question is whether the state court correctly interpreted or applied state law. Article 14 has become a way of appealing, by way of direct *amparo*,¹¹¹ from

108. *Michigan v. Long*, 463 U.S. 1032 (1983).

109. Martha A. Field, *The Differing Federalisms of Canada and the United States*, 55 L. & CONT. PROB. 107, 113 (1992).

110. MEX. CONST. art. 14, cl. 4.

111. *Amparo* is a summary procedure for judicial protection of constitutional rights. See generally RICHARD BAKER, *JUDICIAL REVIEW IN MEXICO: A STUDY OF THE AMPARO SUIT* (1971); IGNACIO BURGOA, *EL JUICIO DE AMPARO* (28th ed. 1991);

the state courts to the federal courts in virtually every case. This kind of *amparo* is called the *amparo de la legalidad* or the *amparo-casación*. The Supreme Court leaves the interpretation of the facts to the state courts, but every question of the meaning of state law can be converted into a federal constitutional question. This has resulted in a deluge of cases filed in the federal courts of appeals from state court decisions, involving really only state law issues.¹¹² This system hardly seems compatible with a real federalist judicial system.

4. Brazil

In Brazil, the final arbiter of the meaning of state law can be either a state or federal tribunal, depending upon the parties or type of case. Both state and federal courts have concurrent jurisdiction over claims based upon either federal or state law. The basic codes are federal, but whether litigants bring a case in

HÉCTOR FIX ZAMUDIO, *EL JUICIO DE AMPARO* (1964).

112. The Mexican Supreme Court has long struggled with a huge backlog, which exceeded 12,000 cases by 1923. In 1928, the number of judges was increased from 11 to 16 and the Court was divided into three chambers. The number of judges was increased to 21 and a fourth Chamber was added in 1934. In 1951, Collegiate Circuit Courts were created, and part of the of Court's backlog was transferred to them in nonappealable form. By 1967, when the backlog exceeded 20,000 cases, for the first time the Supreme Court, albeit only the Second Chamber (Administrative), was granted discretion to hear only those cases of national interest. KENNETH L. KARST & KEITH S. ROSENN, *LAW AND DEVELOPMENT IN LATIN AMERICA* 130-132 (1975). In 1986, this discretionary power to refuse to hear appeals that lacked transcendent social importance was extended to the Penal, Civil, and Labor Chambers, as well as the Court sitting *en banc*. A constitutional amendment that took effect in January 1988 converted the Mexican Supreme Court essentially into a constitutional court; unless the case law is in conflict, appeals involving only issues of legality are left with the Circuit Courts. Jorge Carpizo & Jorge Madrazo, *El Sistema Constitucional Mexicano, in SISTEMAS CONSTITUCIONALES*, *supra* note 61, at 594-95. On December 31, 1994, President Zedillo promulgated a constitutional amendment that removed the entire Supreme Court, reduced the size of the Court from 26 to 11, and fixed the term of service at 15 years. This amendment also modifies Article 105 of the Constitution in two important ways. One, it makes decisions of the Mexican Supreme Court effective *erga omnes* when they declare federal, state or municipal laws unconstitutional for invading the powers reserved to another federative entity, provided the decision is approved by at least eight of the eleven ministers. Two, it permits abstract review of legislation by the Supreme Court within thirty days of a law's promulgation, but standing to challenge the law is limited to the federal Procurator General or one-third of the members of a legislative body enacting the law. At least eight votes are required to invalidate a law in the abstract. Joseph J. Aragones, "Reshaping the Mexican Judiciary," 2 *INTER-AM. TRADE & INVEST. L.*, No. 21, Apr. 7, 1995, at 280, and No. 22, Apr. 14, 1995, at 284.

state or federal courts usually does not depend upon the law involved. Rather, it depends upon whether the federal government has an interest in the litigation, and whether there is a federal judge in the judicial district. If the federal government or one of its agencies has an interest in the outcome, the case is normally brought in the federal courts. But if no federal judge exists in the district, such cases will be tried before a state judge,¹¹³ and an appeal can then be taken to the appropriate Federal Regional Tribunal. Other cases are normally brought in the state courts, and an appeal can be taken to the State Tribunal of Justice or Tribunal of Alçada, depending upon the subject matter or amount involved. If the decision contravenes a treaty or federal law, upholds a state or municipal law challenged as contrary to federal law, or interprets federal law differently from some other tribunal, the decision can be reviewed on special appeal by the recently created Superior Tribunal of Justice. If the decision conflicts with a provision of the federal Constitution, declares a treaty or federal law unconstitutional, or upholds the constitutionality of a state or local act, an extraordinary appeal to the Supreme Federal Tribunal may be taken.¹¹⁴

5. Argentina

In Argentina, the procedure for federal review of provincial court decisions resembles that of the U.S.¹¹⁵ In 1863, Argentina enacted a procedural law adopting the writ of error from the U.S. Judiciary Act of 1789. Decisions of provincial courts involving issues of federal or provincial law normally terminate in the provincial courts. Final decisions of the superior provincial courts may be appealed to the Argentine Supreme Court only where: (1) the validity of a treaty, federal statute, or authority exercised in the name of the nation has been drawn in question, and the decision is against its validity; (2) the validity of a law, decree or authority of a province has been drawn in question as repugnant to the Constitution, a treaty, or a federal statute, and the decision is in favor of its validity; or (3) the meaning of some

113. BRAZ. CONST. art. 109.

114. *Id.* at arts. 102-108.

115. See GERMAN J. BIDART CAMPOS, 2 TRATADO ELEMENTAL DE DERECHO CONSTITUCIONAL ARGENTINO 351-353 (1989); NÉSTOR P. SAGÜÉS, 1 RECURSO EXTRAORDINARIO 199-255 (1984).

clause of the Constitution, a treaty, a federal statute or a commission exercised in the name of the national government has been drawn in question, and its validity denied, provided that a right, title, privilege or exemption based upon such clause is material to the litigation.¹¹⁶ The Argentine Supreme Court will not review decisions of the provincial courts interpreting provincial constitutions and statutes so long as they do not conflict with the federal constitution or statutes.¹¹⁷ Nor will it review judgments of provincial courts allegedly misapplying or misinterpreting general codes enacted by the national Congress.¹¹⁸ Argentina has also adopted from the U.S. a variant on the adequate state ground rule. If the federal question is not independent of provincial law or general code provisions (*i.e.*, the federal civil, commercial, criminal, mining and labor codes), the Supreme Court will decline to review the decision below.¹¹⁹

6. Venezuela

This problem does not arise in Venezuela, which has only a federal court system. Venezuela abolished the state courts in 1945.¹²⁰

C. Economic Regulation

One of the thorniest problems of federalism in the U.S. and Canada has been division of the powers of economic regulation. These powers go to the heart of federalism and are critical to the ability to establish and to maintain a common market.

1. United States

The U.S. Supreme Court determined early on that the enumerated powers granted to the federal government also included

116. Law 48 of Sept. 14, 1863, art. 14.

117. *Sociedad Anónima Frigorífico Anglo v. Fisco de la Provincia de Buenos Aires*, 172 Fallos 149 (1934).

118. AMADEO, *supra* note 98, at 74; LINO E. PALACIO, *EL RECURSO EXTRAORDINARIO FEDERAL: TEORÍA Y TÉCNICA* 148-51 (1992).

119. *O. Bemberg y Compañía v. Julio A. Rocha*, 133 Fallos 298, 303-304 (1921).

120. Allan R. Brewer-Carías, *El Sistema Constitucional Venezolano*, in *SISTEMAS CONSTITUCIONALES*, *supra* note 61, at 771, 796.

powers that could reasonably be implied therefrom and permitted broad discretion in the choice of means to implement these powers.¹²¹ Nevertheless, between 1895 and 1937, the Supreme Court narrowly confined the scope of federal powers to deal with national economic problems. By 1937, this crabbed construction of federal powers resulted in the invalidation of a significant number of federal statutes deemed essential to the Roosevelt Administration's attempts to produce an economic recovery from the Great Depression. President Roosevelt responded by announcing his controversial "court packing plan," which would have increased the number of justices from 9 to 15. The plan was defeated, partly because the Court formed a new majority that began to uphold federal economic measures that would have previously been declared unconstitutional, and partly because many in the country decried the threat to judicial independence. During the next four years, President Roosevelt had the opportunity to nominate seven new justices, creating a majority that was favorable to his New Deal program. This new majority overturned the cases that narrowly construed the federal government's powers to regulate the economy and broadened those powers extensively.¹²² Between 1937 and 1995, the Supreme Court interpreted the interstate commerce clause broadly to permit the Congress to regulate any economic activity or proscribe any criminal activity that Congress wished.¹²³ Sophisticated commentators observed that the real constraints upon Congress' commerce power were political rather than judicial.¹²⁴

Nevertheless, in April 1995, for the first time in nearly 60 years, the Supreme Court held that the commerce power was not broad enough to sustain a federal statute. By a 5-4 vote, the Court struck down the Gun-Free School Zones Act of 1990,

121. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (implying the power of the federal government to create a bank from the powers to lay and collect taxes, to borrow money, to regulate commerce, raise armies, and to conduct war).

122. The story of this revolution is told authoritatively in Robert L. Stern, *The Commerce Clause and the National Economy*, 59 HARV. L. REV. 645 (1946).

123. See generally Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 (1987).

124. See JESSE CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980); Francis G. Jacobs & Kenneth L. Karst, *The "Federal" Legal Order: The U.S.A. and Europe Compared, A Juridical Perspective*, in *INTEGRATION THROUGH LAW*, *supra* note 4, at 169, 200-201.

which made it a federal offense for anyone to possess a firearm in a school zone. The statute contained no requirement that the possession in any way be connected with interstate commerce, nor did it contain any legislative findings indicating how possession of a firearm in a school zone affected interstate commerce. Acknowledging that prior case law was unclear as to whether an intrastate activity must simply "affect" or "substantially affect" interstate commerce in order for Congress to be able to regulate it, the majority held that the regulated activity must substantially affect interstate commerce and possession of guns in schools had no such effect.¹²⁵ The dissent, relying on facts in reports and published literature, took the position that Congress had a rational basis for concluding that guns in school zones had a deleterious commercial effect on primary and secondary schools, which spent \$230 billion in 1990. Whether this decision will seriously curtail Congressional ability to regulate crimes and other activity that is not obviously economic, or is merely a warning to Congress to make specific findings of how an activity actually affects commerce, is unclear.

In *United States v. Robertson*,¹²⁶ a case decided the following week, the Supreme Court ruled unanimously that it did not have to decide the question that it had granted certiorari to decide: Whether the federal Racketeer Influenced and Corrupt Organizations Act (RICO) can be constitutionally applied to a local business (an Alaskan gold mine) that does not serve the interstate market and has only an incidental effect on interstate commerce. The Ninth Circuit Court of Appeals had overturned the racketeering conviction of a former federal prosecutor, who opened the mine with money from narcotics dealing, on the ground that there was no evidence to show that activities of the mine or its proceeds affected interstate commerce. Instead, the Court recharacterized the facts and found the mine was directly, rather than incidentally, engaged in interstate commerce because it had hired seven out-of-state employees and had purchased supplies from another state.¹²⁷

125. *United States v. Lopez*, 63 U.S.L.W. 4343, 4346 (U.S. Apr. 26, 1995). The dissenters contended that the Constitution requires that the regulated activity have only a "significant effect" on interstate commerce. *Id.* at 4362.

126. ___ S.Ct. ___, 63 U.S.L.W. 4386, 1995 WL 247479 (U.S.).

127. No. 94-251, see Linda Greenhouse, "Justices Decline to Expand Commerce-Clause Ruling," NY TIMES (National), May 2, 1995, at A12.

The Supreme Court has permitted the federal government to purchase state compliance with federal guidelines by upholding a broad array of conditions attached to federal funding. In *South Dakota v. Dole*,¹²⁸ the Court upheld a federal statute that secured a national minimum drinking age by withholding 5 per cent of all federal highway funds from states that failed to prohibit people under the age of 21 from drinking alcohol. While dicta indicated that such a conditional spending measure might be invalid under any of four circumstances,¹²⁹ since 1936 the Supreme Court has not invalidated any federal spending measures on federalism grounds, despite conditions routinely attached to federal grants that intrude substantially into state autonomy.¹³⁰

The U.S. Supreme Court regularly invalidates state laws for violation of the so-called "dormant" interstate commerce clause. The Supreme Court interprets the interstate commerce clause to prohibit state legislation that discriminates against interstate commerce, even when Congress has not exercised its commerce clause power. It also invalidates certain non-discriminatory state legislation. In 1851, the Court established the so-called "Cooley Rule," which permits states to regulate matters of commerce only if the nature of the subject matter does not require a uniform national rule.¹³¹ Since 1945, the Court has usually engaged in a more sophisticated balancing test in which it weighs the burdens on interstate commerce against the purported benefits of the state statute. Given the substantial inertia of Congress, the U.S. Supreme Court has seen its role as the protector of free trade and a common market, and has been particularly vigilant in combatting state protectionism.¹³² In the area of the

128. 483 U.S. 203 (1987).

129. These circumstances are: (1) if the conditional spending measure is not for the general welfare, (2) if the condition is ambiguous, (3) if the condition is unrelated to the federal interest in the particular program, or (4) if the condition coerces the states.

130. Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1162 (1987).

131. *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851).

132. See Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986). See also Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, contending that the values of Federalism would be better served if the courts left oversight of the commerce clause solely to Congress.

dormant commerce clause, however, the U.S. Supreme Court is not the ultimate umpire of the federal system. Congress may consent to state legislation that would otherwise violate the dormant Commerce Clause¹³³ or override the Court's decisions by validating unconstitutional state statutes.¹³⁴

Some members of the U.S. Supreme Court have been searching for a way to impose limits upon exercise of the federal commerce power to invade what they deem essential functions of the state governments. Prior to 1976, the Supreme Court uniformly upheld application of federal regulatory statutes to state activities. In *National League of Cities v. Usery*,¹³⁵ however, the Supreme Court reversed a 1968 precedent¹³⁶ and held that federal minimum wage requirements could not be applied to state employees performing traditional state functions. It is not clear whether Justice Rehnquist's plurality opinion was based upon the Tenth Amendment or a concept of state sovereignty inherent in the structure of the Constitution, but the decision established the principle that the federal government could not use its commerce power "to directly displace the State's freedom to structure integral operations in areas of traditional governmental functions."¹³⁷ Nine years later, the Supreme Court reversed this decision, announcing in *Garcia v. San Antonio Metropolitan Transit Authority*,¹³⁸ that the distinction made in *National League of Cities* between traditional state functions and nontraditional state functions was unworkable.¹³⁹ Instead of replacing this distinction with a new test, the Court abandoned the task of protecting state sovereignty from the federal government. Justice Blackmun's opinion announced that "the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself." Each state has two Senators and the President is chosen

133. *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946).

134. William Cohen, *Congressional Power to Validate Unconstitutional State Laws: A Forgotten Solution to an Old Enigma*, 35 STAN. L. REV. 387 (1983).

135. 426 U.S. 833 (1976).

136. *Maryland v. Wirtz*, 392 U.S. 183 (1968) (upholding application of federal minimum wage and maximum hours legislation to most state and local government employees).

137. *Id.* at 852.

138. 469 U.S. 528 (1985).

139. See generally Martha A. Field, *Garcia v. San Antonio Metropolitan Transit Authority: The Demise of a Misguided Doctrine*, 99 HARV. L. REV. 84 (1985).

by the states through the electoral college. The states have indirect influence over the election of their representatives, and therefore, the political processes should be the real check on overreaching by the federal government, not the courts.

In 1992, the Supreme Court once again returned to this problem. In *New York v. United States*,¹⁴⁰ the Supreme Court invalidated a provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985,¹⁴¹ a statute that ironically was an exercise in cooperative federalism. The states had been bickering for years about the unfairness of some states sending their nuclear wastes to others for disposal. Had Congress directly regulated the area, such a statute would have been plainly constitutional. Instead, Congress tried to confine the federal role to policing a solution agreed to by the states themselves. The federal statute made each state, either by itself or in co-operation with other states, responsible for providing for disposal of low-level nuclear wastes generated within the state. The federal government enforced the state-created disposal plans by setting deadlines for their implementation, offering monetary incentives for compliance and imposing surcharges for non-compliance. If by January 1, 1996, a state still had not provided its own disposal site or entered into a compact with other states to dispose of its wastes, the statute forced the non-complying state to take title to the radioactive wastes generated within its borders. The Supreme Court declared only the "take title"¹⁴² provision of the statute unconstitutional. The financial incentive provisions were deemed constitutional because the states had genuine choices whether to comply or not. The take title requirement, however, was deemed unconstitutional because "Congress lacks the power directly to compel *the States* to require or prohibit" activity that Congress itself could have required or prohibited directly. It is doubtful that this attempt to impose a non-textual federalist limitation upon the exercise of federal power will prove any more viable than the prior attempts.

The latest chapter has just been written by the U.S. Congress, whose new Republican majority pushed through legislation severely limiting the ability of the federal government to

140. 112 S. Ct. 2408 (1992).

141. 42 U.S.C. §§ 2021(b)-(o) (1994).

142. 112 S. Ct. at 2428-2429.

enact legislation that imposes unfunded regulatory costs upon the states. The new legislation requires Congress to study the costs of new regulations and to find ways to pay for these costs; however, Congress can specifically waive the reimbursement requirement by separate vote.¹⁴³ This measure should sharply reduce some of the complaints of state and local governments about the impact of federal regulations.

2. Canada

In Canada, the role of the British Privy Council and its successor, the Canadian Supreme Court, has been much the opposite of the U.S. Supreme Court. Although the broad grant of power to the federal government to regulate trade and commerce in the Constitution Act of 1867 indicated that the national government ought to play the dominant role in economic regulation, the courts limited the role of Canada's national government to enacting economic regulation that was either international or interprovincial. By the end of the 19th century, the Privy Council had construed the broad residual powers granted by Section 91 of the 1867 Constitution Act narrowly, limiting the federal government's residual powers to matters of national concern.¹⁴⁴

In 1916, the Privy Council overturned the Federal Insurance Act of 1910, which provided for federal licensing of all insurers except those engaged only in intra-provincial insurance, holding that the federal parliament lacked any residual power to regulate the insurance business.¹⁴⁵ In 1925, the Privy Council struck down federal labor legislation on the grounds that labor relations were matters of "property or civil rights," assigned exclusively to the provinces. The federal government's residual power could not be used to justify labor legislation unless there was some extraordinary peril to the national life of Canada as a

143. The Congressional Budget Office estimated that between 1983 and 1990, federal regulations forced state and local governments to assume between 8.9 to 12.7 billion dollars in unreimbursed costs. John H. Cushman Jr., "Congress Limits Federal Orders Costly to States," N.Y. TIMES, Feb. 2, 1995, at 1.

144. Attorney-General for Ont. v. Attorney-General for Can. [1896] 11 APP. CAS. 222 (The Local Prohibition Case).

145. Attorney-General for Can. v. Attorney-General of Alta. and B.C., [1916] 26 D.L.R. 288.

whole.¹⁴⁶

In contradistinction to the U.S. Supreme Court, the Privy Council invalidated much of the Canadian federal legislation designed to deal with the Great Depression. The Council invalidated minimum wage and maximum hour laws as an attempt to regulate labor relations, an area deemed reserved to the provinces.¹⁴⁷ The Privy Council invalidated unemployment insurance on the theory that it invaded the powers exclusively granted to the provinces under the Property and Civil Rights Clause.¹⁴⁸ The Council reached this result by generously construing the provinces' power to legislate with respect to "property and civil rights," a power that was originally intended simply to protect Quebec's civil law system. Indeed, the Canadian courts have construed the Property and Civil Rights Clause to permit the provinces to regulate virtually all labor law, consumer product standards, securities, insurance, and much financial activity.¹⁴⁹ Consequently, Canada has been less successful than the U.S. in creating an internal common market. "Provincial legislation favoring local business interests and discriminating against goods produced in other provinces has begun seriously to 'balkanize' the Canadian economy."¹⁵⁰

The federal government of Canada has also utilized its spending power to augment its powers by conditioning grants to the provinces on their enactment of appropriate legislation, but this practice has been much more problematic in Canada than in the U.S. Quebec has refused to participate in certain social programs that were funded by conditional grants from the federal government. Instead, Quebec has directed its own social programs and has obtained unconditional grants of funds from the federal government. Provincial resentment against conditional federal spending led to a 1987 constitutional amendment limit-

146. *Toronto Electric Commissioners v. Snider*, [1925] 2 D.L.R. 5.

147. *Attorney-General for Can. v. Attorney-General for Ont. (Labor Conventions)*, [1937] 1 D.L.R. 673.

148. *Attorney-General for Can. v. Attorney-General for Ont. (unemployment insurance)*, [1937] 1 D.L.R. 684. This decision was reversed by a 1940 constitutional amendment, which granted the federal government the power to deal with unemployment insurance. *Constitution Act of 1867*, § 91, cl. 2A.

149. Katherine Swinton, *Federalism under Fire: The Role of the Supreme Court of Canada*, 55 L. & CONTEMP. PROBS. 121, 123 (1992).

150. Donald P. Kommers, *Federalism and European Integration: A Commentary*, in *INTEGRATION THROUGH LAW*, *supra* note 4, at 603, 605.

ing the spending power of the federal government whenever this power establishes a national cost-sharing program in an area where the provinces have exclusive jurisdiction. Such funding programs must allow any province to opt out and to receive unconditional funding from the federal government "if the province carries a program or initiative that is compatible with the national objectives."¹⁵¹

Ironically, the process of judicial interpretation has resulted in the evolution of Canadian federalism in a manner that resembles the division of powers originally designed for the U.S., while U.S. federalism has evolved in a manner that resembles the division of powers originally intended for Canada. The intent of the drafters of the Canadian Constitution Act of 1867 was to create a quasi-unitary state controlled by a national parliament, but judicial interpretation has given the provinces a much stronger role in governance of the country. In the U.S., the constitutional plan contemplated a much more limited role for national government and a more dominant role for the state governments, but judicial interpretation has permitted an enormous growth in the powers of the national government.

3. Latin America

Argentina, Brazil, Mexico, and Venezuela have not had similar court battles about federalist constraints upon the powers of the federal government to regulate the economy.¹⁵² This is partly because they are civil law countries whose legal systems are predicated upon basic codes, and the constitutions of all these countries have conferred the power to enact the commercial codes upon the federal government. It is also partly because frequent periods of political instability have led to domination of the states and provinces by the central government through military intervention and frequent changes in constitutional texts.

151. Constitution Amendment, § 106A (1987). See *Lenaerts*, *supra* note 91, at 246.

152. Argentina has had a number of cases involving the power of the states to tax instrumentalities of interstate commerce. See *AMADEO*, *supra* note 98, at 119-25. It has not, however, had the fierce battles concerning the extent of federal power to enact economic legislation that have occurred in the U.S. or Canada.

The more serious federalist concern in the economic area has been the enormous growth in the power of the central governments over the states and provinces through the federal taxing and spending powers.¹⁵³ In each of these four Latin American countries, the states or provinces are far more heavily dependent upon federal subsidies, which inevitably come with federal controls, than their U.S. or Canadian counterparts. The federal governments of Canada and the U.S. respectively collect 40 and 51 percent of total tax revenues. The federal governments of Argentina, Brazil, Mexico, and Venezuela, on the other hand, respectively collect 84.8, 70.3, 84, and 97.4 percent of the total tax revenues.¹⁵⁴ The Argentine federal government transfers to the provincial and municipal governments 26 and 6.1 percent of its total tax revenues, providing for 68 percent of provincial tax receipts and 45 percent of municipal tax receipts.¹⁵⁵ In Mexico, the federal government distributes to the states and municipalities only 19 percent and 1 percent respectively of the federal tax revenues, keeping 80 percent for itself. As in Argentina, the Mexican states are heavily dependent upon federal grants, which provide most states with more than 80 percent (and some more than 90 percent) of their total revenues.¹⁵⁶ In Venezuela, the states have virtually no independent taxing authority and are dependent upon constitutionally mandated transfer payments from the federal government (the *Situado Constitucional*). Prior to 1990, the *Situado Constitucional* was fixed at 15 percent of the federal budget. This percentage has been elevated by one percent a year, beginning with the 1990 budget, and will continue to rise until it reaches 20 percent. The states are required to transfer to their municipalities a percentage of the *Situado Constitucional*, set at 10 percent for 1990 and

153. See Segundo V. Linares Quintana, *Régimen Constitucional de las Relaciones Económicas entre la Nación y las Provincias*, [1992-A] L.L. 717, 723 (1992).

154. The percentages for Argentina, Brazil, and Venezuela are taken from IMF financial data in Rafael de la Cruz, *Finanzas Públicas y Decentralización: La Teoría Inacabada del Federalismo Fiscal*, in *FEDERALISMO FISCAL: EL COSTO DE LA DECENTRALIZACIÓN EN VENEZUELA* 199, 228 (Rafael de la Cruz & Armando Barrios eds. 1994). The percentage for Mexico is taken from IMF financial data in John Bailey, *Centralism and Political Change in Mexico: The Case of National Solidarity*, in *TRANSFORMING STATE-SOCIETY RELATIONS IN MEXICO* 97, 105 (Wayne A. Cornelius, Ann L. Craig & Jonathan Fox eds. 1994).

155. Calculated from data in de la Cruz, *supra* note 154, at 228.

156. "The Financial Problems of State Governments," Mexico & NAFTA Report 3 (Apr. 20, 1995).

rising one percent a year until it reaches 20 percent.¹⁵⁷ On the other hand, in Brazil, because of the extremely generous transfer payments mandated in the 1988 Constitution, the federal government controls only 36.5 percent of the tax revenues and has 43.4 percent of the expenditure burden; the states receive 40.7 percent of the total revenues and have 43 percent of the expenditure burden; and the municipalities have a free ride, receiving 22.8 percent of total revenues, with an expenditure burden of only 13.6 percent.¹⁵⁸ This fiscal imbalance has been one of the principal causes of the huge federal deficit, which has fueled extremely high levels of inflation. In order to launch the present stabilization plan, the *Plano Real*, Congress amended the Constitution in 1994 to create an Emergency Social Fund that changes the revenue sharing rules in the 1988 Constitution for fiscal years 1994-1995. The result of this change is to transfer an estimated nine billion dollars from state and local governments to the federal government, which has helped to make the plan thus far a huge success.¹⁵⁹ Making this change permanent is one of the top priorities of President Fernando Henrique Cardoso's constitutional reform package, which is presently pending in the Brazilian Congress.

D. Protection of Individual Rights

1. United States

In the U.S., basic individual rights, which were set forth in the first Ten Amendments (the Bill of Rights) to the Federal Constitution, originally were guaranteed only against actions of the federal government.¹⁶⁰ By a process called "selective incor-

157. Ley Orgánica de descentralización, delimitación y transferencia de competencias del Poder Público, arts. 13 and 14 (G.O. No. 4.153 Extraordinary of Dec. 28, 1989).

158. Anwar Shah, *The New Fiscal Federalism in Brazil* 18 (World Bank Discussion Paper No. 124, 1991).

159. Keith S. Rosenn, *Federative Republic of Brazil Supplement*, CONSTITUTIONS OF THE WORLD (Gilbert H. Flanz ed., Release 95-1, Jan. 1995), which contains the Portuguese and English translation of Constitutional Amendment of Revision No. 1 of Mar. 1, 1994.

160. *Barron v. Mayor and City Council of Baltimore*, 32 U.S. (7 Pet.) 242 (1833). *But see* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991); *see also* Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992).

poration," the U.S. Supreme Court, on a case-by-case basis, gradually has read most, but not all, of these guarantees into the Due Process Clause of the Fourteenth Amendment, making them equally applicable to the states.¹⁶¹ With the exception of the 13th Amendment guarantee against involuntary servitude, the constitutional guarantees of individual rights are deemed applicable only against governmental actions and not against private actions.¹⁶²

"States rights" has been a rallying cry for supporters of maintenance of racial apartheid, as well as opponents of reform of state criminal justice systems to ensure compliance with federal constitutional standards. It has also been a rallying cry of those opposed to judicially mandated redistricting of state and federal election districts to ensure compliance with the federal requirement of "one man, one vote," as well as federal voting rights legislation that interferes sharply with state autonomy with respect to changing political districts, voting tests, and methods of electing officials in states with prior histories of racial discrimination in voting.

Despite certain significant exceptions, the primary source of individual rights abuses has been state and local governments. For the past four decades, the federal government has exerted substantial pressure on states and municipalities to ensure greater respect for individual rights. In recent years, however, at least at the judicial level, the situation has been changing. As the federal judiciary has become more conservative, some of the state supreme courts have become more vigorous than the U.S. Supreme Court in protecting certain individual rights.¹⁶³

161. The following guarantees have been held to have been incorporated into the Fourteenth Amendment: (1) First Amendment guarantees of free speech, religion, and association; (2) the Fourth Amendment guarantees against unreasonable searches and seizures; (3) the Fifth Amendment guarantees against double jeopardy, self-incrimination, and taking of property without just compensation; (4) the Sixth Amendment guarantees of speedy trial, public trial, jury trial, notice of charges, confrontation of witnesses, compulsory process for obtaining witnesses and right to counsel; and (5) the Eighth Amendment guarantees against excessive fines and cruel and unusual punishment. The relevant case law is cited in WILLIAM COHEN & JONATHAN D. VARAT, *CONSTITUTIONAL LAW* § 3, 511-13 (9th ed. 1993).

162. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 18-1 10-7, 1688-1720 (2d ed. 1988). Nevertheless, there are cases in which the Supreme Court has deemed private action to be the functional equivalent of state action. *See id.* § 18-5, 1705-1711.

163. William J. Brennan, Jr., *State Constitutions and the Protection of Individual*

2. Argentina

Argentina departed from the U.S. model with respect to protection of individual rights. Argentina placed a bill of rights within the body of its 1853 Constitution. From the beginning, these rights have been regarded as guaranteed against both the federal and provincial governments. Attempts to argue on the basis of U.S. precedents that individual rights are protected only vis-à-vis the federal government and not the provincial governments have been rejected by the Argentine Supreme Court.¹⁶⁴ Since its creation by the Supreme Court in 1957, a summary constitutional remedy called *amparo* may be brought against acts or omissions of both public authorities and private parties that injure constitutionally protected rights.¹⁶⁵

3. Mexico

Since promulgation of the 1857 Constitution, Mexico's federal courts have been entrusted with the task of protecting individual rights against both federal and state authorities through the summary remedy of *amparo*.¹⁶⁶ The *amparo*, which functions as habeas corpus to protect physical liberty, also protects all other fundamental rights guaranteed by the first 29 articles of the Constitution. *Amparo* may be brought only against acts or omissions of a "responsible authority," defined by the Mexican Supreme Court as "every person who, *de jure* or *de facto*, exercises public power and is materially enabled thereby to operate as an individual who commits public acts . . ."¹⁶⁷ The Mexican Supreme Court has developed a theory of dual personality for gov-

Rights, 90 HARV. L. REV. 489, 495 (1977); Peter J. Galie, *State Supreme Courts, Judicial Federalism and other Constitutions*, 71 JUDICATURE 100, 101 (Aug./Sept. 1987).

164. *Hileret y Rodríguez v. Tucumán*, 98 Fallos 20 (1903); *Pereyra Iraola v. Buenos Aires*, 138 Fallos 161 (1923).

165. *Siri*, 239 Fallos 459 (1957); *Samuel Kot, S.R.L.*, 241 Fallos 291 (1958). The *amparo* has subsequently been codified by law 16.986 of October 18, 1966, and CÓD. PROC. CIV. Y COM., arts. 321, 498 (Arg.). See generally, NÉSTOR PEDRO SAGÜÉS, DERECHO PROCESAL CONSTITUCIONAL: ACCIÓN DE AMPARO (4th ed. 1995).

166. MEX. CONST. arts. 101 and 102 (1857), now MEX. CONST. arts. 103 and 107 (1917).

167. APÉNDICE DE JURISPRUDENCIA DE LA SUPREMA CORTE, TESIS 179, 360.

ernmental agencies. If the agency is legislating, judging, or executing laws, its acts are those of a responsible authority and may be checked by *amparo*. If, however, the governmental agency is exercising the government's patrimonial rights, it is acting as a private party. Paradoxically, in such cases, the complainant in an *amparo* suit can be a governmental agency and may bring *amparo* against certain decisions by authorities, such as expropriation awards or labor indemnities that must be paid out of the government's patrimony.¹⁶⁸

4. Brazil

In Brazil, both state and federal courts have responsibility for the protection of individual rights. Brazil has a variety of procedural devices to protect constitutional rights. Some kinds of actions may be brought only in the Federal Supreme Court; others may be brought in the state courts or federal courts, depending upon whether the rights are allegedly being deprived by federal or state authorities. The writ of security (*mandado de segurança*), a summary remedy used to protect constitutional rights unprotected by habeas corpus, may only be brought against public authorities or individuals with functions delegated by the government.¹⁶⁹

5. Canada

Canada adopted a Bill of Rights in 1960 as a statutory rather than a constitutional instrument. This statute provided that no federal statute could violate the human rights protected therein. Not until 1982 were individual rights constitutionalized in a document called the Charter of Rights and Freedoms.¹⁷⁰ The Charter guarantees individual rights against both the federal and provincial governments. Yet Canada has retained the doc-

168. *Id.*, TESIS 451, p. 875; *Id.*, TESIS 450, pp. 872-74; José Guidiño Pelayo, *Hacia una teoría del acto reclamado en materia del Juicio de Amparo*, 2 REV. JUR. JALISCIENSE 11, 14 (No. 2, Jan.-Apr. 1992).

169. See Rosenn, *supra* note 101.

170. See generally, CANADIAN CHARTER OF RIGHTS AND FREEDOMS COMMENTARY (Walter S. Tarnopolsky & Gérald-A. Beaudoin eds., 1982).

trine of parliamentary supremacy by permitting either the federal or provincial legislatures to override the fundamental rights secured in this Charter. The Charter contains a "notwithstanding" clause that allows either federal or provincial legislatures to override the individual constitutional rights.¹⁷¹ Nevertheless, the federal legislature has not used the overriding clause power to overturn Supreme Court decisions declaring statutes unconstitutional for violation of constitutionally secured human rights.¹⁷² The provinces, however, have on occasion used the override power to prevent provincial legislation from judicial invalidation under the Charter of Rights and Freedoms.

6. Venezuela

In Venezuela, individual rights are protected by the federal courts against both federal and state authorities. Procedurally, this protection usually takes the form of habeas corpus for physical liberty and *amparo* for other rights and guarantees. In addition, individual rights are protected by infringement from private individuals by ordinary judicial means.¹⁷³

IV. THE CENTRALIZATION OF FEDERALISM IN LATIN AMERICA

The text of the constitutions of Argentina, Brazil, Mexico, and Venezuela suggests that these countries have federal systems that resemble the U.S. and Canada. But the reality is quite different. Political power has been so heavily centralized in the national governments, particularly in the executive, that, with the exception of Brazil, the states or provinces have minimal autonomy. On the other hand, the power of the central governments has not always penetrated into the interior of these countries, which traditionally have been ruled by local large landholders or *caudillos*. "[A] strong *de facto* system of local rule emerged in Latin America, despite what the laws or constitutions proclaimed."¹⁷⁴

171. CAN. CONST. ACT art. 33 (1982).

172. Massey, *supra* note 89, at 1267.

173. BREWER-CARIAS, *supra* note 104, at 300-301; OTTO MARÍN GOMEZ, LA PROTECCIÓN PROCESAL DE LAS GUARANTÍAS CONSTITUCIONALES DE VENEZUELA. AMPARO Y HABEAS CORPUS 229-254 (1983).

174. Howard J. Wiarda & Harvey F. Kline, *Government Machinery and the Role*

A. Argentina

On paper, Argentine federalism closely resembles that of the U.S. This is not surprising, since about two-thirds of Argentina's Constitution was copied from that of the U.S. Political authority is divided between the national government and twenty-three semi-autonomous provinces. Each province has its own constitution, executive, legislature, and court system. In actual practice, however, this system differs dramatically from the theoretical conception. The national government almost totally dominates the provinces. Constitutional provisions designed to assure provincial autonomy have been easily brushed aside by federal intervention under Article 6, which authorizes the federal government to intervene in the territory of the provinces to guarantee a republican form of government. Article 6 has been used and abused, allowing the federal government *carte blanche* to assume total control over any province at any time. This provision, which was taken from the U.S. Constitution, has fallen into disuse in the U.S. In Argentina, on the other hand, it is used continually, usually by the Executive. According to one count, by 1962 Argentina had more than 220 federal interventions, more than 150 of which were ordered by the Executive.¹⁷⁵ In the first four years of his government, the current president, Carlos Menem, has used this power to place four of the twenty-three provinces under federal trusteeship.¹⁷⁶ Generally, mere threat of intervention suffices to secure provincial compliance with the wishes of the federal government. Moreover, the provinces lack fiscal autonomy, leaving them dependent upon the federal government for financial assistance. Even at the federal level power is heavily centralized in the presidency, which dominates both the Legislature and the Judiciary.

of the State, in LATIN AMERICAN POLITICS AND DEVELOPMENT 81, 90 (Howard J. Wiarda & Harvey F. Kline eds., 3d ed. 1990).

175. JORGE I. GARCÍA, EL FEDERALISMO ARGENTINO, cited in HUMBERTO QUIROGA LAVIE, DERECHO CONSTITUCIONAL LATINOAMERICANO 391 (1991).

176. Alejandro M. Garro, *Nine Years of Transition to Democracy in Argentina: Partial Failure or Qualified Success*, 31 COLUM. J. TRANSNAT'L L. 87-89 (1993).

B. Brazil

For the first 65 years of its existence, Brazil had a unitary system of government under a constitutional monarchy. The First Republic (1889-1930) adopted a constitution heavily influenced by the U.S. that changed the unitary state into a federation of 20 states with substantial autonomy. The 1891 Constitution worked badly and was characterized by widespread electoral fraud. Getúlio Vargas, who ruled the country as a dictator from 1930 to 1945, strongly centralized political power in the national executive. The return of democracy in the brief period from 1946 to 1964 permitted significantly more autonomy for state and local government, but military rule from 1964 to 1985 resulted in strong centralization of power at the expense of the states and counties. This was accomplished in large part by concentrating the bulk of the taxing power in the federal government.¹⁷⁷ In 1988, after the return of democracy, a new constitution was adopted that substantially restructured allocation of tax revenues from the federal government to the states and counties.¹⁷⁸ The new constitution has revitalized Brazilian federalism by transferring substantial power from the federal government to state and local governments. It also has substantially reallocated power from the Executive to the Legislature.¹⁷⁹ Congress is currently considering several proposed constitutional amendments, including one that provides for permanent reallocation of federal tax revenues in favor of the federal government.

C. Mexico

In theory, federalism has been the Mexican form of political organization since its first constitution in 1822, when there were twenty-two states. Article 40 of the Mexican Constitution characterizes the country as a "representative, democratic, and feder-

177. See LUIS ROBERTO BARROSO, *DIREITO CONSTITUCIONAL BRASILEIRO: O PROBLEMA DA FEDERAÇÃO* 32-107 (1982).

178. See *supra* note 158 and accompanying text.

179. See Keith S. Rosenn, *Brazil's New Constitution: An Exercise in Transient Constitutionalism for a Transitional Society*, 38 AM. J. COMP. L. 773 (1990); Wayne A. Selcher, *A New Start Toward a More Decentralized Federalism in Brazil*, 19 PUBLIUS: THE JOURNAL OF FEDERALISM 167 (Summer 1989).

al republic formed by free and sovereign states in all manners concerning their internal governments, but united in a stabilized federation" Article 124, modeled after the 10th Amendment to the U.S. Constitution, provides that the powers of the federal government are limited to those specifically delineated, the remainder being reserved for the states.¹⁸⁰ But Mexico, like Argentina, suffers from what the late Carlos Nino called "hyperpresidentialism." Virtually all real political power is concentrated in the federal government, and more precisely in the hands of the president and the PRI.¹⁸¹ Decentralization did increase somewhat in the six years under President Salinas,¹⁸² but what Jorge Carpizo wrote in 1973 is essentially true today: "A good part of the federated states' autonomy is under central will. In this fashion, what really exists in Mexico is a centralized government with some decentralized aspects."¹⁸³

D. Venezuela

Venezuelan constitutions, following the tradition begun in 1811 and reinforced in 1863, have established a federal state. Gradually, this federal state became more and more centralized. The 1961 Constitution, which is currently in effect, has been aptly termed "The Centralist Constitution with Federalist Fringes."¹⁸⁴ The breadth of the powers granted to the federal government have left the states with fairly minimal powers. Even the powers to tax and to operate their own judiciaries have been denied to them. Moreover, the states have had quite limited political autonomy. Until December 1989, the state governors were freely selected and removed by the President of the Republic.

This excessive centralism led to demands for political re-

180. For a discussion of the exceptions to this constitutional rule, see Laura Trigueros Gaisman, *El Federalismo en México Autonomía, Coordinación de las Entidades Federales*, in 1 DERECHO CONSTITUCIONAL COMPARADO MÉXICO-ESTADOS UNIDOS 217, 248-250 (James F. Smith ed., 1990).

181. Partido Revolucionario Institucional [Institutional Revolutionary Party].

182. See Kenneth M. Holland, *Federalism in a North American Context: The Contribution of the Supreme Courts of Canada, the United States and Mexico*, in THE CANADIAN & AMERICAN CONSTITUTIONS IN COMPARATIVE PERSPECTIVE 87, 99-100 (Marian C. McKenna ed., 1993).

183. JORGE CARPIZO, FEDERALISMO EN LATINOAMÉRICA 78 (1973).

184. Tulio Chiossone, *Constitución Centralista con Ribetes Federales*, in 1 ESTUDIOS SOBRE LA CONSTITUCIÓN: LIBRO HOMENAJE A RAFAEL CALDERA 207 (1979).

form. In 1989, the National Congress enacted an important law on decentralization that progressively transfers to the states concurrent powers over services that the federal government had assumed, such as planning, protection of the family, education, culture, sports, employment, health, promotion of agriculture, industry and commerce, protection of the environment, the ordering of territory, protection of the consumer, popular housing, and public works.¹⁸⁵ The initiative for these transfers must come from the state governors, who are to request transfer of personnel, budget, equipment, and services from the federal government for social and economic programs. Thus far, only six states have begun the process. No coherent plan has yet been formulated for these transfers, which are being negotiated piecemeal between federal ministries and various state governments.¹⁸⁶ These transfers have already resulted in a significant increase in state powers and a more meaningful federalism.¹⁸⁷

V. THE LESSONS OF THESE SIX EXPERIENCES IN FEDERALISM

Federalism is critical to international economic integration. Many of the same problems that these six countries have faced are precisely the problems that confront multinational pacts like the European Common Market, Caribbean Common Market, MERCOSUR,¹⁸⁸ and NAFTA.¹⁸⁹ Neither NAFTA, which includes the U.S., Canada, and Mexico, nor MERCOSUR, which includes Argentina, Brazil, Paraguay, and Uruguay, have yet set up the kind of transnational legislative, executive or judicial organs that have been created by the European Economic Community, but such organs eventually may become necessary. In any event, implementation of NAFTA and MERCOSUR, as well

185. Ley Orgánica de descentralización, delimitación y transferencia de competencias del Poder Público de 28 dec. 1989, *discussed in* ALLAN R. BREWER-CARIAS, *PRINCIPIOS DEL RÉGIMEN JURÍDICO DE LA ORGANIZACIÓN ADMINISTRATIVA VENEZOLANA* 72-74 (1991).

186. Allan Angell & Carol Graham, *Can Social Sector Reform Make Adjustment Sustainable and Equitable? Lessons from Chile and Venezuela*, 27 *J. LAT. AM. STUD.* 189, 214-215 (1995).

187. See Ellner, *supra* note 1; Isabel Boscán de Ruesta & Gustavo Urdaneta Troconis, *El Federalismo Venezolano y la Reciente Descentralización Territorial*, 47 *REV. DER. PUB.* 5 (1991); Roberto Delgado Salazar, *El nuevo régimen legal de los estados y municipios*, 43 *REV. FAC. DER. DE UNIV. CAT. ANDRÉS BELLO* 111 (1991).

188. Mercado Común del Cono Sur [Common Market of the Southern Cone].

189. North American Free Trade Agreement.

as the Uruguay Round of the General Agreement on Tariffs and Trade (GATT), are already redefining the nature of federalism for the next century by limiting the sovereignty of states and provinces to implement consumer, labor, land use, tax, alcoholic beverages, licensing fees, procurement policies, and environmental legislation deemed unnecessary obstacles to international trade and investment.¹⁹⁰

There is no magical formula for federalism. There are myriad ways to allocate powers within federal systems. One need only make sure that certain essential powers are given to the central government, such as common defense, foreign affairs, and the regulation of interstate and international commerce, and that both the federal and regional governments have concurrent or joint powers to tax and to spend. Whether the federal government or the states have the residual powers does not seem critical. Indeed, the experiences of all six countries suggest that their constitutional texts do little to explain the historical evolution of these federalist systems. Regardless of how powers are allocated, federal systems will experience tension between demands for greater state autonomy and demands for greater centralization.

Federalism can be a technique for centralizing or decentralizing governmental power. In the U.S. and Canada, federalism was utilized to integrate formerly autonomous colonies into a single nation. In Argentina, Brazil, Mexico and Venezuela federalism was utilized to decentralize former colonies that had been highly centralized. To this day, the U.S. and Canada have remained less centralized than the Latin American Republics. One consequence of the greater decentralization has been serious problems with threats of secession.

Federalism requires an independent judiciary to "umpire" the system. At a minimum, the judiciary needs to be able to declare state legislation invalid because of conflicts with the federal constitution or statutes. Despite the formal guarantees of

190. See Conrad Weiler, *Foreign-Trade Agreements: A New Federal Partner*, 24 *PUBLIUS: THE JOURNAL OF FEDERALISM* 113, 123-128 (Summer 1994); Pete du Pont, *Federalism in the Twenty-First Century: Will States Exist?*, 16 *Harv. J. L. & Pub. Pol'y* 137, 143-144 (1993); Campbell, *A Canadian Labor Perspective on a North American Free Trade Agreement*, in *THE NORTH AMERICAN FREE TRADE AGREEMENT: LABOR, INDUSTRY AND GOVERNMENT PERSPECTIVES* 62 (Bognanno & Ready eds. 1993).

judicial independence, Latin American judiciaries historically have been far too dependent upon the other branches of government to perform this function adequately. They also have had considerable difficulty in adequately protecting individual rights, in part because of the heavy centralization of power. Entrusting the umpiring function to the Federal Executive or Congress has led to a massive centralization of the powers of the central government at the expense of the states.

Federalism is not much of a bulwark against tyranny. Federalism has been an insignificant barrier to dictatorships in the Latin American federal republics. Moreover, the U.S. experience suggests that the federal government, not the state governments, has frequently been far more vigilant in protecting the rights of minorities.

Federalism involves an ongoing process of political conflict and compromise. Political checks as well as judicial checks need to be built into the system. States need to be adequately represented in the federal legislature so that the normal political processes will assure respect for the federal structure. The U.S. Senate, where each state has the same number of senators, has been better at fulfilling this function than the Canadian Senate, whose members are appointed for life by the federal government. Yet even in systems where each state is equally represented by elected representatives in the federal Senate, there is considerable skepticism as to whether the political constraints of federalism actually function.¹⁹¹

The evolution of federalism is not a unilinear process that inevitably leads to progressive centralization. While five of the six American federalist republics have evolved towards greater centralization, Canada has evolved in the other direction. Moreover, the evolutionary process has been cyclical rather than unilinear.

At present, the most critical problem of federalism is financial. Without sufficient financial independence, state autonomy quickly disappears. Effective federalism requires that both the federal and state governments have adequate and independent tax bases. Some aggrandizement of federal power through at-

191. See Martha Derthick, *The Structural Protections of American Federalism*, in *COMPARATIVE FEDERALISM*, *supra* note 4, at 9, 12-23.

taching conditions to federal grants to the states is inevitable, but limits on such conditional spending are necessary in a genuine federal system. In all six countries, the federal governments are attempting to cut back sharply on federal spending and to transfer responsibility for social programs to the states and provinces. Increasingly, the problems of federalism are becoming problems of how tax revenues are shared between the states and the federal government, and how the societal responsibilities that are transferred from federal governments to the states will be funded.

Federal systems "are most successful in societies with the human resources to fill many public offices competently and with material resources plentiful enough to allow a measure of economic waste in payment for the luxury of liberty."¹⁹² Without large cadres of relatively well-educated and well-paid civil servants to staff the multiple layers of bureaucracy, federalism is unlikely to function well.

Finally, form does not matter as much as substance. None of the federal systems of the Americas closely follows the allocation of powers laid down in its constitution. Federalism is no substitute for competent and honest political leadership. Alexander Pope's couplet makes the point succinctly:

For forms of government let fools contest; whate'er is best administered is best.¹⁹³

192. Daniel J. Elazar, *Federalism*, 5-6 INT'L ENCY. SOC. SCI. 353, 265 (David L. Sills ed., 1968).

193. AN ESSAY ON MAN, Ep. iii, 1.303 (1733), cited in THE OXFORD DICTIONARY OF QUOTATIONS 379 (3d. ed. 1980).