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Judicial Review in the Americas: Comments on the United States and Mexico

Ken Gormley*

I would first like to thank Professor Robert Barker for inviting me to participate in this impressive forum, and all of our distinguished panelists for the honor of joining them in this important academic endeavor. Their credentials far outshine mine when it comes to international constitutional jurisprudence; I am still very much a student in this field. Yet, I do know a bit about American federalism and the notion of judicial review as it has evolved in the United States. I would like to begin by commenting on Judge Smith's excellent synopsis of the United States doctrine that dates back 203 years. I would next like to add some thoughts about Dr. Gamas's enlightening presentation concerning Mexico's still-evolving notion of amparo that teaches us something not only about Mexico's democracy, but about our own as well.

First, let me pick up on the history that Judge Smith so expertly wove together, concerning the origins of judicial review in this country. Let me ask you to close your eyes and try to answer this simple question: What would the system of laws look like in the United States today if Marbury v. Madison1 had been decided differently? To put it another way: What if Justice John Bannister Gibson of the Pennsylvania Supreme Court had prevailed in the views he expressed in his famous (or infamous) dissent in Eakin v. Raub2 decided in 1825? What would our constitutional world look like today?

Justice Gibson was considered one of the great intellectual leaders of that court in the early 1800s. He was not a kook or an iconoclast in the eyes of the leaders of the bench and bar of the day. He had served in the State Legislature and, according to his biography, had enjoyed a rather distinguished career.3

* Remarks by Professor Ken Gormley at the Symposium on “Judicial Review in the Americas . . . and Beyond” held at Duquesne University School of Law, November 10-11, 2006.
1. 5 U.S. 137 (1803).
2. 12 Serg. & Rawle 330 (Pa. 1825).
3. WILLIAM AUGUSTUS PORTER, AN ESSAY ON THE LIFE, CHARACTER AND WRITINGS OF
Yet, he took a stand in the *Eakin* case that would be viewed as almost foolhardy today. He spurned Chief Justice John Marshall's now-landmark decision in *Marbury v. Madison*, going out on a limb to attack it twenty-two years after *Marbury* was decided. It is worth noting that the political fireworks sparked by *Marbury* had not completely subsided. The successful impeachment of federal judge John Pickering of New Hampshire (for drunkenness and insanity) and the near-removal of Supreme Court Justice Samuel Chase (whose impeachment succeeded in the House but failed in the Senate) kept the debate about judicial review very much alive.4

*Eakin v. Raub* was an ejectment case, relating to property in Northampton County — nothing earth-shattering. More important than the merits of the case was the side-squabble among the Justices about the power of the court to even review acts of the Legislature. Chief Justice Tilghman wrote for the majority that: “When a judge is convinced, beyond doubt, that an act has been passed in violation of the constitution, he is bound to declare it void, by his oath, by his duty to the party who has brought the cause before him, and (by his duty to) the people . . . .”5

This holding provoked a vitriolic dissent by Justice Gibson, who devoted most of his ink to the majority's dictum concerning the doctrine of judicial review. Justice Gibson picked apart the logic of Chief Justice Marshall in *Marbury v. Madison* and found it to be bunk. He wrote: “It is the business of the judiciary to interpret the laws, not scan the authority of the lawgiver . . . .”6 Granted, part of the job of the judiciary, wrote Gibson, was “to ascertain and pronounce what the law is; and . . . this necessarily involves a consideration of the constitution.” Then Gibson added, as a warning: “[B]ut how far? If the judiciary will inquire into anything beside the form of enactment, where shall it stop?”7

Justice Gibson admitted that judges take an oath to defend the Constitution. But, so do legislators and all other public officers. Judges do not have a monopoly on wisdom or sound judgment: “Repugnance to the constitution is not always self-evident . . . .” he wrote, and differences of opinion and conflicts in interpretation

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6. *Id.* at 347.
7. *Id.* at 349.
"will be inevitable . . ." As a result, Justice Gibson concluded, "the legislature is entitled to all the deference that is due to the judiciary . . ." In other words, acts of the Legislature "are, in no case, to be treated as ipso facto void, except where they would produce a revolution in the government."

Justice Gibson therefore believed strongly that the Legislature itself was required to decide the constitutionality of its own acts. If it made an error and exceeded its power under the Constitution, that was not the judicial branch's fault. The judge's job was simply to faithfully interpret the laws. The ultimate check on the Legislature came from another source. "I am of opinion," Gibson concluded, "that it rests with the people, in whom full and absolute sovereign power resides, to correct abuses in legislation, by instructing their representatives to repeal the obnoxious act."

Thus, the people were perfectly positioned to check legislative abuses and mistakes, by exerting political pressure on their elected law-makers and by voting them out of office.

Justice Gibson became well-known in England and in some circles of American legal jurisprudence for his bold dissent in Eakin. Soon enough, however, with the gradual solidification of the doctrine of judicial review in the United States, his dissent became a relic. In fact, John Bannister Gibson himself eventually repudiated his own dissent, largely (according to folklore) because he was passed over for a seat on the United States Supreme Court after dissing Marbury v. Madison.

What would our country — and our system of laws — look like if Justice Gibson's logic had won the day? It would look quite a bit different. Nor would that picture be overly attractive to most of us today, as we sit here paying tribute to the virtues of judicial review in the Americas.

Archibald Cox, one of the great constitutional lawyers and scholars of the twentieth century, whose biography I was privileged to write, loved teaching and writing about Marbury v. Madison. It was part of a broader concept, as he called it, of "Judicial Supremacy" in American Government. For Cox, there were really two components of judicial review as it came to evolve

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8. Id. at 350.
9. Id. (emphasis added).
10. Id.
11. Eakin, 12 Serg. & Rawle at 343.
13. COX, supra note 4, at 44.
in the United States. Both of these are quite contra-majoritarian, as Judge Smith has aptly described. First, our United States Supreme Court has the last word with respect to the constitutionality of congressional legislation. This is anti-majoritarian because it allows the judicial branch to second-guess the will of the people, as expressed through their elected members of Congress. As Cox wrote in his book *The Court and the Constitution*, the irony of this facet of judicial review is that it rests on an assumption that there is something inherently unworkable about a system in which there is no formal check on acts of Congress.\textsuperscript{14} That is not necessarily true. In Great Britain, there was generally no check on the legislative power of Parliament. Rather, members of Parliament were careful to observe British constitutional traditions in drafting bills, and historically showed great reverence to the British Constitution even though it was (and remains) unwritten.\textsuperscript{15} It is doubly ironic because under our system as it evolved after *Marbury*, there is no limitation on the judicial branch other than a similar sort of self-restraint, a respect for the Constitution, and a moral sense of duty that hopefully guides judges. So, some branch has to have the final say, and there is no magic to picking the judicial branch over the legislative.

The second aspect of judicial review in the United States, equally anti-majoritarian, is that it established dominance over the decisions of state courts and state legislatures.\textsuperscript{16} This was the pronouncement of Justice Joseph Story in *Martin v. Hunter's Lessee*,\textsuperscript{17} later extended in *Cohens v. Virginia*.\textsuperscript{18} This facet of judicial review was important in the early stages of our country’s history. Most personal and property rights were governed by state law. Sweeping states within the ambit of the United States Supreme Court’s power of review was a dramatic move that in a very real sense caused the states (and the citizens thereof) to surrender a piece of their authority to the federal branch (especially the federal courts), as part of the price of joining the Union.

For Archibald Cox, the wisdom of this two-part judicial review doctrine in the United States lay not in the raw logic of Chief Justice Marshall’s opinion in *Marbury*. That, frankly, was far from iron-clad. Nor did it lay in the fallacy of arguments articulated by

\textsuperscript{14} *Id.* at 58-59.
\textsuperscript{15} *Id.* at 59.
\textsuperscript{16} *Id.* at 62-63.
\textsuperscript{17} 14 U.S. 304 (1816).
\textsuperscript{18} 19 U.S. 264 (1821).
Comments on the U.S. and Mexico jurists like Justice Gibson in Eakin v. Raub. The truth be told, these were perfectly plausible at a time when our nation was still in its infancy. For Cox, the wisdom of Marbury v. Madison was only evident once examined through the light of practical experience. What is clear in hindsight is that the judicial branch was the correct place to repose this final constitutional authority, at least for our unique brand of American Democracy.

Why? Because our country is rooted in the common law. We are driven by a body of judge-made law that has evolved over centuries. We are a country in which adhering to legal precedent is central to our system of government. Why does this make a difference? For one, because federal judges — unlike legislators — are divorced from politics and the scramble for power; they are appointed for life with irreducible salaries, making them independent of pressures from interest groups, political groups, and (to a large extent) from self-interest in career-building. Also, given the nature of our system, in which someone must regularly interpret broad, imprecise language in the Constitution and statutes, why not have individuals trained and learned in the law interpret these documents?

Even more importantly, in our system, judges are constrained by their precedents. This is a fact that we often fail to appreciate. In our system, unlike many others, judges are bound by the decisions of those who sat on the bench before them. They are steeped in a 200-year-plus tradition of common law and stare decisis. They are quite literally bound by those law books on the shelves surrounding them. Here is the part we often overlook: The beauty is that, over time, precedent actually limits the zone of potential discretion that judges may exercise. As issues come before the courts one by one, Supreme Court precedent builds up like sand on a shore, narrowing the field of navigation, so that citizens have clear markers of settled expectations when it comes to predicting the law. This is one of the great hallmarks of our system.

Legislatures, on the other hand, are not bound by precedent. They can draft one bill today based on political considerations and pressures from interest groups, and they can draft a completely different bill tomorrow. They can bargain, horse trade, cut deals, and switch positions overnight. This is not necessarily bad. Indeed, many legislators would consider that to be an essential component of their jobs: Legislators are like weathervanes that spin

19. COX, supra note 4, at 58.
around with gusts of wind, trying to catch the prevailing popular sentiment, which may be gone in an instant.

That may be a good recipe for accountability to the public and for getting reelected. However, it is not a recipe for producing a reliable body of constitutional jurisprudence. What judicial review has given us, as Archibald Cox so eloquently put it, is a "majestic sense of continuity."²⁰ It has given us a concept of "rule of law" in the United States that is far more enduring than any one jurist bedecked in robes.

That is the essence of American Democracy. It quickly unravels without the linchpin of judicial review in place.

Let me provide you with several concrete examples so that we can visualize what our country might look like if Marbury v. Madison had withered up and Justice Gibson's dissenting logic in Eakin v. Raub had won the day. Judge Smith mentioned a few examples, including recent acts of the Legislature that have sought to engage in jurisdiction stripping. Let me mention another one.

Last February, I had the privilege of testifying in the United States Senate on the issue of the secret warrantless wiretap program initiated by the Bush Administration, aimed at persons within the United States.²¹ Although the full expanse of that program was — and is still — not fully known, we have learned that in the aftermath of the September 11 attacks, President Bush authorized the National Security Agency (NSA) to monitor and intercept communications between Americans and individuals abroad, presumably to pierce the al-Qaeda terror network. This fairly extensive program of NSA wiretaps and intercepting of emails to and from American persons bypassed the 1978 Foreign Intelligence Surveillance Act (FISA), by which Congress had set up a special court to handle precisely these sorts of emergency requests from the executive branch. Attorney General Alberto Gonzales told the Senate Judiciary Committee that this secret, warrantless program was justified by the exigencies of wartime and that the President as Commander-in-Chief possessed the power to fight "our enemies" wherever — and however — he saw fit.²²

²⁰. Id. at 70.
²¹. Senate Judiciary Committee Concerning Bush Administration Wiretaps and Scope of Presidential Power (February 28, 2006) (statement of Ken Gormley, Professor of Law, Duquesne University School of Law) [hereinafter Senate Judiciary Testimony].
²². Id. See also, Ken Gormley, Secret Wiretaps: The Need for Legislative Reforms, JURIST, March 20, 2006.
The Senate hearings in which I participated in many ways resembled a law school debate over the doctrine of separation of powers and the proper roles of the courts and Congress and the President in our constitutional system. In discussing a host of possible options by which Congress might enact a law to clean up the NSA program and validate it after the fact — in order to give the President the tools he needs to fight the war on terror — Senators quickly clustered around two dramatically different types of proposals. One approach was simply to authorize the Bush Administration's program as-is, with the caveat that the executive branch would be required to consult with Congress (specifically its Joint Intelligence Committee) to ensure that any secret programs of searches and seizures were carried out in a constitutional manner. The other approach, which myself and many other constitutional scholars strongly favored, would require the FISA court to become involved. Ultimately, the Supreme Court would have the power to review the issue, even if some special mechanism had to be created to hear certain matters in secret in order to protect national security.  

Congress continues to grapple with this issue. Even before the recent dramatic mid-term elections, however, there were starting to emerge more and more bipartisan bills (like the Specter-Feinstein bill) that would ensure that the courts would be included in the process.

Why is that so important? Because it constitutes an integral part of the American system of democracy. All roads must lead to the Supreme Court. We do not have a system in which the President, or even Congress, can unilaterally decide which searches and seizures violate the Fourth Amendment and which do not. If Justice Gibson’s position in *Eakin v. Raub* had defined our jurisprudence, that might be the case. But Justice Gibson lost; his biography does not even mention the *Eakin* case. In the American system created by *Marbury v. Madison*, the final arbiter with respect to the scope and interpretation of the Bill of Rights must be the Supreme Court. The very definition of “probable cause” and “unreasonable” as those words are used in the Bill of Rights presuppose a determination by a neutral and detached magistrate. It also presupposes that the Supreme Court will have the power to make the final ruling as to a search’s constitutionality. If *Mar-

23. Senate Judiciary Testimony, supra note 21, at 22.

bury v. Madison had not won the day in 1803, perhaps today it would be permissible for Congress to give its blessing to certain secret wiretaps — without the court ever having the chance to review them. Perhaps Congress could say “we are satisfied that the Fourth Amendment has been satisfied here.” But my prediction is that Congress will eventually enact a law that preserves the role of the FISA court and the United States Supreme Court in this process. That is part of the essence of our American system of the rule of law, in which judicial review plays an indispensable role.

Another slightly different example appeared in the newspapers recently. In South Dakota, an initiative called the “Judicial Accountability Initiative Law,” or “JAIL,” was placed on the ballot for the voters’ consideration. The citizen-sponsors wished to amend the state constitution to make judges in South Dakota “more accountable,” in a rather heavy-handed way. They wanted to allow convicted felons to sue the judges who convicted them; to create a special grand jury so that judges could go to jail for misbehavior; and to create a “citizens’ oversight committee” with the authority to hear complaints against judges and allegations of judicial misconduct and to censure offending jurists.

This state constitutional initiative failed, by a wide 90-10 margin. That is good news, in my view, for our brand of American democracy. We do not have a system in which the judicial branch’s decisions are checked by a Council of Censures — as was the case under some of the early, failed state constitutions prior to Marbury v. Madison. We do not send judges to jail if we dislike like their decisions — nor do we take away their pay. Judicial independence is an essential ingredient of judicial review.

If we hold a gun to the head of the judicial branch and dictate how judges must interpret our statutes and our constitutional provisions, that is no different than allowing the public to have the “final say” on each ruling, which is precisely what Marbury disallowed. We do not have a system in which USA Today polls govern or in which the citizens gather in the acropolis and give thumbs up or thumbs down to a particular interpretation of the Constitution. That is not our system of governance. Indeed, we know from the Federalist Papers that one of the very reasons the American Constitution was structured in its current form, with

26. Id.
various anti-majoritarian features, was to protect us citizens from ourselves. Making judges walk the gang-plank with a pistol pointed at their heads as they render constitutional decisions — as this group of citizen-activists tried to accomplish in South Dakota — would disrupt the proper functioning of judicial review in this nation.

When it comes to the second aspect of judicial review — i.e., the power of the United States Supreme Court to review judicial decisions and legislative actions of the states — our world would look much different if Justice Gibson had won on this front. There would be no *Baker v. Carr*\(^\text{27}\) or *Reynolds v. Sims*,\(^\text{28}\) allowing the federal courts to review state reapportionment schemes and establishing the principle of "one person, one vote" in our country. The federal courts would be required to keep their hands off state political matters, no matter how corrupt or constitutionally dysfunctional. In a world without *Marbury*, the Supreme Court would have been incapable of deciding *Brown v. Board of Education*\(^\text{29}\) or of abolishing the doctrine of "separate but equal." Those matters would have been left to the states, and most likely would have remained intact. The Supreme Court would have been powerless to invalidate the "equal application" theory that forbade inter-racial marriage in many states, or to throw out the "doctrine of interposition" — a device that allowed states to justify all sorts of racial segregation schemes. These relics of our constitutional system would still be alive and flourishing in an American system of laws stripped of the doctrine of judicial review. States would be the final arbiters of their own constitutional limits.

Like Jimmy Stewart in *It's a Wonderful Life*, we can begin to appreciate how fortunate we are in the United States that decisions like *Marbury v. Madison* and *Martin v. Hunter's Lessee* were rendered by Chief Justice Marshall and other jurists early in our history when they reached those pivotal crossroads. Without those decisions, we would look quite different as a nation today.

This is not to deny that there is a certain amount of tension in our governmental system as a result of placing this awesome power in the hands of the judiciary. As Judge Smith correctly pointed out, a certain tug-of-war between Congress and the federal courts becomes inevitable. It is a constitutional see-saw that can easily swing too far in the direction of judicial arbitrariness.

\(^{27}\) 369 U.S. 186 (1962).
\(^{28}\) 377 U.S. 533 (1964).
\(^{29}\) 347 U.S. 483 (1954).
and non-accountability if we, as scholars and citizens and judges and legislators, do not carefully scrutinize the work of the courts and ensure that they do not cross the invisible line into the legislator's or the states' domains.

How do we accomplish that? The same way our society has accomplished it for 203 years, ever since Marbury. We do it through thoughtful academic and public discourse; through the appointment and election of judges who are apolitical and deeply committed to the rule of law; and through an unwavering commitment, as a democratic republic, to a rule of law based on precedent and stare decisis. As Archibald Cox so eloquently put it, precedent and stare decisis limit the sphere of judicial discretion in an incremental fashion over time, like waves of the ocean washing in and out, giving us "a majestic sense of continuity."30

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I have reserved less time to discuss the fascinating history of judicial review — or its equivalent — in Mexico, only because Dr. Gamas has done such a thorough job of that. I'm particularly wary because Dr. Gamas has written a book on the Mexican Constitution — the leading treatise on that subject, heavily footnoted, in Spanish.31 If you look at it in comparison to the book I have written on the Pennsylvania Constitution, it is at least twice as thick.32 I do not wish to press my luck. Still, I do want to raise a few of the most fascinating aspects of the Mexican system in our discussion today.

The starting point for this discussion — for those neophytes like me who are not well-versed in international constitutional jurisprudence — is the fact that Mexico traces its roots to a civil law history. It is not a country with common law traditions like the United States and Great Britain. This makes a significant difference. Mexico's civil law history originates from several sources: from its Spanish domination for three centuries; from the heavy influence of the French Revolution that brought with it a certain disdain for the role of judges due to past abuses; and from the writ of habeas corpus that had become anchored in the Consti-

30. COX, supra note 4, at 70.
tution of the United States and supplied a model for Mexico in dealing with abuses of power by corrupt government officials.\textsuperscript{33}

As Dr. Gamas has explained, the original form of the writ of \textit{amparo} appeared in the Constitution of Yucatan in 1841,\textsuperscript{34} thirty-eight years after \textit{Marbury v. Madison} was decided. Let me stop for a minute before getting into a fuller discussion of \textit{amparo} by saying that translating \textit{any} device in a civil law country to our notion of judicial review in the United States is tricky business. It is like trying to apply the designated hitter rule in American baseball to sports in a country where the national sport is soccer or cricket. The first fact that is essential to confront here is that, in civil law countries, judicial \textit{precedent} is not the driving force of the legal system. The bread and butter of such a system is the law of the legislature, reduced to writing in the form of extensive codes.

Thus, the original Mexican \textit{amparo}, added in reforms to that country's Constitution in 1847 and then written into the Federal Constitution in 1857,\textsuperscript{35} was a unique creature without any precise counterpart in American law. It was a narrowly-constructed procedural device designed to protect citizens' rights in certain circumstances — \textit{amparo} comes from "\textit{amparar}" which means "to protect." Initially, it was used by judges to take action when a citizen was being illegally conscripted into the military, or improperly detained, or condemned to death by a firing squad due to an alleged political crime. Thus, \textit{amparo} empowered the Supreme Court of Mexico to step in and to remedy constitutional violations of a procedural nature in certain circumstances. Limited though it was, it gave great prestige to the previously under-appreciated judiciary in Mexico. It also brought prestige to the federal government generally. Suddenly, judges had the power to protect citizens from certain egregious rights violations. In some ways, one could compare this to the function of the writ of habeas corpus under the United States Constitution.\textsuperscript{36} Yet, it was a different creature, born of Mexico's unique history.

Gradually, the \textit{amparo} developed to protect citizens in many more ways. A plaintiff could bring a proceeding in the Supreme


\textsuperscript{34} Zamudio, \textit{supra} note 33, at 312.

\textsuperscript{35} \textit{Id.} at 313.

\textsuperscript{36} \textit{Id.} at 309, 317.
Court, and eventually the intermediate appellate courts, to protect constitutional rights; to test unconstitutional laws; and to challenge certain judicial decisions ("cassation amparo"), the most widely-used form of amparo.37

Even with this expansion of the writ, it did not turn into a sweeping authorization for the judiciary to review acts of the Legislature or acts of the states. It was very much a hybrid of two legal traditions. It did, undoubtedly, seek to graft some aspects of American common law and the tradition of Marbury v. Madison onto the Mexican constitutional structure. Thus, the "Otero formula,"38 named after the distinguished Mexican jurist and politician Mariano Otero, was a key development. It provided that the amparo judgment should make "no general declaration about the law or act" at issue.39 In other words, an amparo judgment holding a law unconstitutional had to limit itself to granting such protection in the specific case in litigation, and have no effect beyond the immediate party complainant.

This is not judicial review United States-style. This is not a system of government in which judicial precedent and stare decisis rule the day. Rather, each decision is made on a blank slate. As a legal matter, no case bears precedential value (although that may not be true as a practical matter). One consequence is that the government may be found to violate a constitutional right in a particular amparo case. Even if the government continues to violate the same right, each case has to be brought and decided, one by one.

One fascinating development over time that truly blends the United States system with the civil law system is the notion of jurisprudencia, or what I will call the “five-case” rule. Under the five-case rule of Mexican jurisprudence, binding precedent is — indeed — created from judicial decisions. This is not, as in the United States system, a matter of stare decisis or some notion that courts are constitutionally bound to follow past precedent. Rather, it is a rule of convenience and efficiency. If the Supreme Court or an amparo court reaches the same decision by a 2/3 majority in five consecutive judgments or "theses," that decision is reduced to writing. It is then made binding on other courts and judges.40 This is based on the notion that judges should not waste

37. Id. at 323-24.  
38. Id. at 319.  
40. Id. at 346-47.
precious time and resources writing opinions in case after case (opinion writing is an essential component of the civil law tradi-
tion) if the same ruling is going to be repeated.

In this fashion, the courts are in effect codifying their own laws, like a great judicial Restatement, creating a form of precedent that becomes binding only after judges do the same dance five times in a row.

As Dr. Gamas has noted, United States precedent (including the law regarding habeas corpus) has played a role in this evolution, as Mexico has constructed its own democratic system. However, the most fascinating piece of this story is that Mexico has managed to invent its own creative brand of judicial review, true to its own Mexican history and to its own heritage as a civil law juris-
diction.

There are a few lessons that we in the United States can learn from the story of the Mexican amparo, which has taken root throughout much of Latin America, as we will hear throughout this conference.

At bottom, the now-complex legal creature known as amparo is designed to serve as a potent force to protect rights of citizens un-
der the Mexican Constitution. At the same time, it incorporates a healthy measure of restraint so that the courts do not slip over the line into legislative territory, an especially crucial check in a civil law system. As Judge Smith has explained, even in a system like that in the United States built upon a generous notion of judicial review that began with Marbury, we must be vigilant that the delicate balance between legislative acts and judge-made law re-

I am not suggesting that the Third Circuit Court of Appeals or the United States Supreme Court should adopt the five-case rule of jurisprudencia that has evolved in Mexico. However, it serves as an innovative reminder that gradualism has its virtues, especially when courts are treading close to territory that may belong to Congress or to the states. There may be ways for federal judges in the United States to borrow from this experience. For instance, they could do this by using plurality opinions and concur-
rences/dissents to move the law forward more slowly in certain instances. In this country, we tend to think of plurality decisions (that do not technically have the weight of precedent) and decisions that are split due to concurrences and dissents, as a sign of indecision and weakness. Yet, in considering the virtues of the five-case rule in the law of amparo, one can discern that these de-
ices can also constitute a prudent means of gradually establish-
ing a track record over time. This can be especially important before taking the plunge in an area that may be close to the line and subject a court to criticism that it has usurped another branch’s power in exercising judicial review.

For example, the United States Supreme Court’s plurality opinion in the recent case of Vieth v. Jubelirer, dealing with the controversial issue of “political gerrymandering,” was a disappointment to many constitutional scholars. Rather than telling us directly whether Davis v. Bandemer was overruled and whether political gerrymandering could ever trigger a valid claim under the Equal Protection Clause, the Court appeared to be splintered in five directions. When one considers the decision from a broader perspective, however, perhaps that inconclusive result was not so bad. Indeed, it may have been intentional on the part of the Court. It allows room for a gradual accretion of the law on a topic that has the potential to usurp a portion of the sovereignty of the states in a highly politically-charged area.

Likewise, the Supreme Court’s decision in United States v. Lopez, dealing with the Commerce Clause, was a disappointment to some jurists and scholars, particularly those who favored a more conservative approach that would roll back the Court’s precedent with respect to the authority of Congress under the Commerce Clause. Lopez stopped short of that dramatic change. It set forth a three-part test that still leaves many questions unanswered. Perhaps that, too, is not so bad. The concurrence of Justices O’Connor and Kennedy, which was crucial to the majority garnering five votes, served the function of putting the brakes on any radical departure from precedent. Those justices sent the message: “Time out! We’re talking about the scope of Congress’ power, here, and the extent to which judicial review can be used to supplant Congress’ own determination of how far it is permitted to go under the Commerce Clause. Maybe we should slow down and assess this over a series of cases.” That is not necessarily evidence of weakness or indecision. Perhaps it is a sign of maturity in a federal system. Like the five-case rule that has developed under the Mexican amparo, courts in the United States at times may benefit from taking advantage of those devices — plurality opinions, concurrences/dissents, and the infrequently-used “political question” doctrine — to move slowly and develop a track record, in

42. 478 U.S. 109 (1986).
order to maintain the delicate balance among the three branches of government.

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Finally, there is room for both Mexican and American lawyers and judges to learn a great deal from each other when it comes to the fascinating subject of “New Judicial Federalism.” This term refers to the increased reliance by state courts on state constitutions in the process of protecting individual rights. Dr. Gamas and I had a great chat at dinner last night, in which I learned that five of the thirty-plus states in Mexico have some form of amparo under their state constitutions. States are bound by the federal Constitution and Bill of Rights in Mexico; yet they are free to grant their citizens more rights, and some are becoming empowered using their own state constitutions to do just that. Dr. Gamas explained that the progress on this front has been very recent. It has been accomplished through tiny, incremental steps. Yet, it is an important new development.

That is the same story in the United States. Since the late 1970s, states have dusted off their own constitutions as a source of independent rights, and the law that has emerged is truly a constitutional revolution of sorts. In a number of states, including Pennsylvania, courts have not only encouraged but almost mandated that lawyers and judges raise separate state constitutional claims to develop this rich body of jurisprudence. As a result, there is now a parallel body of law that has evolved in most of the fifty states. Thus, a notion of judicial review is equally alive in the state courts.

What is clear from studying the rich history of the Mexican amparo, both at the federal and state level, and comparing it to the doctrine of judicial review in the United States, is that our procedures in the two countries may be different, but the substance of the rights being protected is the same. The goal of the courts, in both instances, is to give potency to those rights, for all citizens, while at the same time protecting the institutions of government that must endure longer than any particular litigant or judge involved in any particular case.

To the extent that this conference will bring us a step closer to accomplishing that noble endeavor in all of our nations in the Americas, it will have been as worthwhile as it has been enjoyable.

44. See Gormley et al., supra note 32, at 17-24.
joining this gathering, sharing time with such a wonderful group of scholars and friends.