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Emergency Powers and the Feeling of Backwardness in Latin American State Formation

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EMERGENCY POWERS AND THE FEELING OF BACKWARDNESS IN LATIN AMERICAN STATE FORMATION

JORGE GONZALEZ-JACOME*

INTRODUCTION	1073
I. REPUBLICAN RHETORIC.....	1077
A. BOLÍVAR’S CONSTITUTION	1078
B. ECHOES OF BOLÍVAR’S RHETORIC	1090
II. THE ECONOMIC PROGRESS RHETORIC	1095
A. EGAÑA AND BELLO IN CHILE	1095
B. ALBERDI AND HIS “BASES”	1100
CONCLUSIONS	1105

INTRODUCTION

Since the nineteenth century, Latin American constitutions have included provisions allowing presidents or legislatures to suspend the rule of law in times of crisis.¹ Throughout Latin American history, these emergency powers were used as ordinary tools not only by military dictatorships² but also by democratic governments.³ As a

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1. See BRIAN LOVEMAN, *THE CONSTITUTION OF TYRANNY: REGIMES OF EXCEPTION IN SPANISH AMERICA* 20 (1993) (explaining that emergency powers have been cloaked under various terms, such as “state of siege, state of internal war, state of emergency, or state of internal commotion”). Even though there are theoretical and practical differences in these notions, for the purpose of this article I use these terms interchangeably to refer to the generic expression of emergency powers.

2. See, e.g., JOSÉ LUIS ROMERO, *BREVE HISTORIA DE LA ARGENTINA [BRIEF HISTORY OF ARGENTINA]* 141-204 (1996) (describing the period between 1930 and

result, emergency powers have become a central topic in the constitutional debates of Latin American jurists and political elites. This article suggests that nineteenth century constitutional thinkers justified emergency powers using at least two different rhetorics, discourses, or sets of arguments—each of which stressed the idea of Latin American backwardness. The first rhetoric argued that Latin American people were vicious and thus the rule of law could not be applied until the population acquired necessary republican virtues. The second claimed that governments should establish strong executive powers in their Constitution in order to lead Latin American countries toward a path of economic prosperity. Both of these discourses imagined Latin America as a backward region where the application of law had to be delayed for an uncertain period of time, until either republican virtues or economic prosperity were achieved. However, “backwardness” is not only an objective description of a particular population or territory, but especially a condition from which nineteenth century Latin American constitutional thinkers derived the need for broad emergency powers. This paper does not empirically verify whether Latin American backwardness was “false,” but rather argues that the “backwardness argument” improperly skewed the interpretation of emergency powers in the region’s constitutional thought.

This historical reconstruction of nineteenth century constitutional thought has three different goals. First, this article highlights the centrality of emergency powers in constitutional design. The suspension of a constitution is not only a tool that one must understand to grasp how constitutional regimes deal with exceptional circumstances. Rather, one may claim that theoretical discourses around emergency powers can help identify the deep fears of liberal

1983 when military officers controlled Argentine politics and stymied political dissent).

3. See, e.g., Mauricio García-Villegas, *Constitucionalismo Perverso, Normalidad y Anormalidad Constitucional en Colombia: 1957-1997*, in BOAVENTURA DE SOUSA SANTOS & MAURICIO GARCÍA VILLEGAS, *El Kaleidoscopio de las Justicias en Colombia: Análisis Socio Jurídico* [The Kaleidoscope of Justices in Colombia: Socio-judicial Analysis] 317, 327 (Boaventura de Sousa Santos & Mauricio Garcia Villegas eds., 2001) (demonstrating through a timeline of presidential administrations that between 1958 and 1984 Colombians lived longer under emergency powers than under the ordinary rule of law, despite having a democratic government).

constitutionalism and the ways in which such fears are addressed.⁴ This article shows how Latin American jurists in the nineteenth century explicitly acknowledged the fundamental character of emergency powers in the building of their republics.

The second goal of this article is to intervene in a theoretical debate that has traditionally excluded the so-called “Third World,” leading jurists to inaccurately reconstruct historical processes. For example, Carl Schmitt argued that it was only after the 1848 French Revolution that the “state of siege”—a tool used to give absolute power to military authorities when a military post was surrounded by enemy troops—entailed the suspension of the constitution.⁵ If Schmitt’s dates are correct, France was not the first country to connect the state of siege and the suspension of the constitution; it was Chile fifteen years before, in the 1833 Constitution.⁶ Giorgio Agamben’s more recent effort in building a general theory about states of exception⁷ also ignores theoretical developments of the Third World. He relies exclusively on European and American sources for his general theory and historical reconstruction of states of exception.⁸ However, since the last decade of the nineteenth century, Argentine, Brazilian and Colombian legal and political elites have been particularly concerned with this topic.⁹ Latin American

4. See CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 7 (George Schwab trans., Univ. of Chi. Press 2005) (1922) (advocating that, from a liberal point of view, a constitution can dictate who may act, but not when it should be suspended); see also GIORGIO AGAMBEN, *STATE OF EXCEPTION* 1-32 (Kevin Attell trans., Univ. of Chi. Press 2005) (2003) (exploring the history of the “state of exception”).

5. See CARL SCHMITT, *LA DICTADURA: DESDE LOS COMIENZOS DEL PENSAMIENTO MODERNO DE LA SOBERANÍA HASTA LA LUCHA DE CLASES PROLETARIA* [THE DICTATORSHIP: FROM THE BEGINNINGS OF THE MODERN THOUGHT OF SOVEREIGNTY TO THE STRUGGLE OF THE PROLETARIAT CLASSES] 252 (Jose Diaz Garcia trans., 1999).

6. See CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 161 (allowing the suspension of the constitution during a state of siege).

7. See generally AGAMBEN, *supra* note 4.

8. See generally *id.* at 11-22.

9. *E.g.*, CARLOS PELÁEZ, *ESTADO DE DERECHO Y ESTADO DE SITIO: LA CRISIS DE LA CONSTITUCIÓN EN COLOMBIA* [RULE OF LAW AND STATE OF SIEGE: CONSTITUTIONAL CRISIS IN COLOMBIA] 141-42 (1955) (arguing that the frequent use of states of siege in Colombia altered the philosophical underpinnings of the Colombian constitutional regime); CARLOS SANCHEZ VIAMONTE, *LEY MARCIAL Y ESTADO DE SITIO EN EL DERECHO ARGENTINO* [MARTIAL LAW AND STATE OF SIEGE IN ARGENTINEAN LAW] 49-54 (1957) (critiquing the Argentine expansion of

constitutional thinkers have widely discussed emergency powers. This article gives voice to the silenced Third World jurists that have also shaped global law and legal institutions.

The third and final goal is related to comparative law scholarship. In the debate about legal transplants, some argue that legal texts should be transplanted only when the receiving country's social and economic context is similar to the one exporting the text. Accordingly, transplants fail because legal elites borrow institutions that do not fit the realities of the importing society. The context largely determines the correct legal institutions that should be adopted in different communities.¹⁰ This argument divides the legal text from the country's social, cultural, and economic context. The former is artificially constructed and borrowed by jurists, and the latter is a reality that can be described and verified empirically. The sets of arguments about emergency powers in Latin American constitutional theory show that even though contexts change, legal elites can maintain the same legal texts by building new interpretations of the relationship between the legal and the contextual. Therefore, although after independence from Spain the "context" of Latin American countries was quite different from that of the mid-nineteenth century, legal elites continued to justify the constitutional provisions of emergency powers in light of their mid-nineteenth century "reality." This article invites the reader to think about the relationship between text and context as something constructed by jurists to advance their normative projects. Hence, I reject the idea that there is a sort of logical and necessary derivation from context to the legal text.

The article is divided into three parts. Part I explains the republican rhetoric—its main representative being Simon Bolívar. This discourse maintained that the corrupt and vicious character of the population of Latin America made it impossible to establish republics. Bolívar thought that the northern part of South America needed authoritarian regimes that would keep anarchy in line. A full

emergency powers after the 1930 military coup).

10. See generally William Ewald, *Comparative Jurisprudence (I): What Was It Like to Try a Rat?*, 143 U. PA. L. REV. 1889 (1995) (describing the main debates of comparative law between textualist and contextualist and criticizing them for underestimating the importance of legal thought in studying a foreign legal system).

republican government was too perfect for the corrupt citizenry. Echoes of this discourse may be found from Juan Manuel de Rosas in Argentina and Diego Portales in Chile. Part II describes the economic prosperity discourse, which fostered the notion that Latin America's main problem was its poor economic performance and furthered suggested that political order was the key to improve such performance. Mariano Egaña and Andrés Bello in Chile were two of its initial representatives. However, it was Juan Bautista Alberdi in Argentina who more explicitly defined the characteristics of this second rhetoric of backwardness and justified the use of emergency powers as a necessary tool to achieve political stability and foster economic prosperity. Finally, in Part III, I offer some conclusions.

I. REPUBLICAN RHETORIC

According to republicanism, liberty is possible only in communities where citizens hold the civic virtues that allow them to participate in public government. These virtues are necessary to reject monarchy, tyranny, and any other form of non-free government. A lack of such virtues in the population leads republics to perish.¹¹ Simón Bolívar (1783-1830) believed that Latin American people did not have sufficient civic virtues that would enable them to establish free governments.¹² The backward nature of the population, therefore, justified the adoption of strong executive powers with wide emergency attributions. This rhetoric was also embraced by Diego Portales (1793-1837) in Chile and Juan Manuel de Rosas (1793-1877) in Argentina, who emphasized that the suspension of the Constitution was a necessary tool of government for vicious societies.¹³

11. MAURIZIO VIROLI, *REPUBLICANISM* 12-13 (Anthony Shugaar trans., Farrar, Straus & Giroux 2002) (1999).

12. *E.g.*, Simon Collier, *Simón Bolívar as Political Thinker*, in *SIMÓN BOLÍVAR: ESSAYS ON THE LIFE AND LEGACY OF THE LIBERATOR* 13, 16 (David Bushnell & Lester D. Langley eds., 2008) (stating Simón Bolívar's opinion that, unlike their Western European counterparts, the Venezuelan people lacked political virtues, making them incapable of exercising their political rights).

13. *See infra* Part I.B (arguing that Bolívar and Rosas used classical Western republican rhetoric as a pretext to justify continued use of emergency powers).

A. BOLÍVAR'S CONSTITUTION

Constitution-making in Latin America was a highly contested issue in the nineteenth century.¹⁴ Latin American jurists and statesmen experimented with conservative, liberal, and radical models in different countries of the region.¹⁵ In the years that followed independence from Spain, Simón Bolívar was one of the most influential figures in the constitutional design of countries that we know today as Bolivia, Colombia, Ecuador, Perú, and Venezuela. Bolívar experienced fierce opposition from different political antagonists and could not always impose his views about political organization, but his constitutional theories shaped political debates in the region even after his death.¹⁶ During his active political and military career he was especially concerned about two issues for the new nations: (1) the lack of political virtue of Colombians¹⁷ and (2) establishing the correct system of government considering the vicious character of the population. Bolívar thought that because Colombians (and Latin Americans in general) lacked political virtue, the otherwise perfect form of government (federation and a pure republic) was absolutely impracticable. He thus argued that Latin Americans needed governments with strong executive branches through which presidents could assume supra-constitutional powers in order to deal with their vicious populations.

As noted by historian Simon Collier, Bolívar's philosophy was full

14. See, e.g., HERNANDO VALENCIA-VILLA, CARTAS DE BATALLA: UNA CRÍTICA DEL CONSTITUCIONALISMO COLOMBIANO [BATTLE CARDS: A CRITIQUE OF COLOMBIAN CONSTITUTIONALISM] 149 (1987) (explaining that conflicts among legal and political elites in Colombia led to reform, which led to further conflicts).

15. See generally ROBERTO GARGARELLA, LOS FUNDAMENTOS LEGALES DE LA DESIGUALDAD: EL CONSTITUCIONALISMO EN AMÉRICA, 1776-1860 [THE LEGAL FOUNDATIONS OF INEQUALITY: CONSTITUTIONALISM IN AMERICA, 1776-1860] (2005) (discussing major examples of each of these models).

16. E.g., MIGUEL ANTONIO CARO, *A la Estatua del Libertador (En la Plaza Mayor de Bogotá)* [To the Statue of the Liberator (In Bogotá's Plaza Mayor)], reprinted in MIGUEL ANTONIO CARO: OBRA SELECTA [MIGUEL ANTONIO CARO: SELECTED WORKS] 1, 1-6 (Carlos Valderrama Andrade ed. 1993) (exalting Simón Bolívar in an 1886 poem as an exemplar of a righteous dictator).

17. See Judith Ewell, *Bolívar's Atlantic World Diplomacy*, in SIMÓN BOLÍVAR: ESSAYS ON THE LIFE AND LEGACY OF THE LIBERATOR, *supra* note 12, at 35, 39 (memorializing Bolívar's belief that the Venezuelan people had a poor understanding of republicanism). In the Bolívarian context, "*La Gran Colombia*" comprised modern-day Venezuela, Ecuador, and Colombia. *Id.* at 38.

of contradictions. He attempted to reconcile a deep republican commitment to respect for civil rights, equality before the law, popular sovereignty, and representative government with what he saw as the “turbulent realities” of Latin America.¹⁸ Since Bolívar believed that political and legal institutions should be adapted to the “realities” of the people and the territory where such institutions are applied,¹⁹ he concluded that Latin America was not prepared to embrace a pure republican government. In 1812, when he was a commander of the Venezuelan liberation movement, he wrote the *Cartagena Manifesto*, a document in which he expressed his concerns about a Spanish *Reconquista* in light of the increasing number of *criollos* (white Latin Americans) who favored the Royalist cause.²⁰ He believed that this lack of support for the independence movement was a consequence of the excessive role Venezuelan elites gave to democracy in the first years of independent life. Bolívar thought it was impossible to organize a democratic regime in a country where most of the population resided in the countryside and was too ignorant to participate in public matters. Learned people understood political issues, but they turned everything into partisan disputes obstructing the rise of a solid state. These considerations led him to argue that Latin America needed a special constitutionalism adapted to the particular local features of the region. For example, Venezuelans did not have political virtues due to their past submission to an absolute monarchy—Spain—which had suppressed the republican spirit and enslaved the people. In light of this backward Hispanic heritage, Venezuelans could not rule themselves as a democratic republic. This experience in Venezuela led him to assert that government:

18. See Collier, *supra* note 12, at 16 (recounting Bolívar’s struggles with the political and social turmoil that inevitably followed independence).

19. Cf. Montesquieu: *The Spirit of the Laws* 124-127 (Anne M. Cohler, Basia Carolyn Miller & Harold Samuel Stone eds. & trans., Cambridge Univ. Press 1989) (1748) (arguing that the type of government varies depending on the territories’ size, culture, and circumstances); Ewald, *supra* note 10, at 1896-97 (asserting that to study a foreign legal system, one must understand that countries’ social, political and economic system as well).

20. See Simon Bolívar, *Cartagena Manifesto*, reprinted in *EL LIBERTADOR: WRITINGS OF SIMON BOLÍVAR* 3, 4-5 (David Bushnell ed. 2003) (castigating the *criollo* leadership’s leniency in quashing rebellions, its frivolous use of public funds, and its overall disunity and incoherence).

must necessarily adjust itself, so to speak, to the context of the times, men, and circumstances in which it operates. If these are prosperous and serene, [the government] has to be gentle and protective, but if they are calamitous and turbulent, it has to be severe and armed with a strength equal to the dangers, *without regard for laws or constitutions until such time as happiness and peace are restored.*²¹

A backward population, i.e. a people without virtue, demanded a severe government that did not need to follow the law or constitution until the population acquired the necessary virtues to practice a pure republican government.

The Decree of War to the Death signed by Bolívar in 1813 was an example of Bolívar's commitment to overriding laws in order to transform a vicious population.²² This decree was enacted in the midst of the independence wars against the Spanish, who, according to Bolívar, corrupted the good *criollo* population.

Let the monsters who have infested Colombian soil, covering it with blood, vanish forever; let their punishment be equal to the enormity of their perfidy . . . Spaniards and Canarians, even if you profess neutrality, know that you will die unless you work actively to bring about the freedom of America.²³

In this early phase of independence, Bolívar divided the population between Spaniards and Americans. Bolívar thought that the former were vicious and corrupt, and should be eliminated unless they acquired the virtues of the latter.²⁴ The struggle for independence was not a time for legality, then, not only because of the circumstances of war as such, but also because some "corrupt men" lived in American territory. Legality would reemerge once this

21. *Id.* at 6 (emphasis added).

22. Simon Bolívar, *Decree of War to the Death*, reprinted in *EL LIBERTADOR: WRITINGS OF SIMON BOLÍVAR* 115 (David Bushnell ed., 2003).

23. *Id.* at 115-16.

24. See Carmen L. Bohórquez, *La Tradición Republicana. Desde Los Planes Monárquicos Hasta aa Consolidación del Ideal y la Práctica Republicanas en Iberoamérica* [*The Republican Tradition. From the Monarchical Plans to the Consolidation of the Republican Ideal and Practice in Ibero-America*], in *EL PENSAMIENTO SOCIAL Y POLÍTICO IBEROAMERICANO DEL SIGLO XIX [IBERIAN AMERICAN SOCIAL AND POLITICAL THOUGHT OF THE NINETEENTH CENTURY]* 65, 84 (Arturo Andrés Roig ed., 2000) (concluding that all Spaniards needed to be qualified as enemies in order to create American identity and nationalistic virtue in the independence movement).

corrupt population was eliminated.

Bolívar pushed further the idea of the correspondence between legal and political institutions and the characteristics of the people after he failed in his attempt to free Venezuela from the Spanish *Reconquista*. In 1814, before going into a voluntary exile, he wrote the *Manifiesto de Carúpano* where he explained that Venezuela was an enslaved country that failed to achieve independence because its people lacked political virtue.²⁵ Accordingly, he did not support the adoption of a liberal democratic government for Venezuela:

How could the simple theory of political philosophy, based only on truth and nature, prevail over vice, *vice armed with unfettered license* limited only by one's appetite and suddenly transformed by the prestigious veneer of religion into a political virtue and a form of Christian charity? No, it is impossible for ordinary men to appreciate the high value of the realm of freedom or to choose it over blind ambition and vile greed. In this crucial matter our fate depended on the choice of our compatriots, who in their corrupted condition chose against us; the rest was a consequence of a decision that was more dishonorable than fatal and more to be lamented for its essence than for its results.²⁶

Bolívar was convinced that a political philosophy based on truth and nature was inapplicable in a society invaded by vice, such as Venezuela. His main point was that some enlightened men offered liberty to Venezuela; however, the majority of the vicious population did not appreciate the full value of liberty. After this traumatic experience, Bolívar did not believe that the Spanish element was the only cause for the vice of the population; Venezuelans, and Americans in general, were responsible for this situation. Hence he strongly advocated for a constitutional design that reflected this particular condition of Latin America and allegedly rejected the adoption of foreign models. In his 1815 Jamaica Letter, written in his exile after the *Reconquista*, Bolívar argued that under the Spanish yoke, *criollos* were not able to rule their own destinies and were even denied the possibility of establishing their own tyranny.²⁷ This

25. Simon Bolívar, *Manifiesto of Carúpano*, reprinted in EL LIBERTADOR: WRITINGS OF SIMON BOLÍVAR, *supra* note 20, at 126.

26. *Id.* at 128.

27. Simon Bolívar, *The Jamaica Letter: Response from a South American to a Gentleman from This Island*, reprinted in EL LIBERTADOR: WRITINGS OF SIMON BOLÍVAR, *supra* note 20, at 12, 19 [hereinafter *Jamaica Letter*] (explaining that the

exclusion was problematic for *criollos* because they could not develop the necessary abilities and virtues for running a republic.

The Americans, within the Spanish system still in force, and perhaps now more than ever, occupy no other place in society than that of servants suited for work or, at best, that of simple consumers, and even this role is limited by appalling restrictions We were never viceroys, never governors, except in extraordinary circumstances; hardly ever bishops or archbishops; never diplomats; soldiers, only in lower ranks; nobles, but without royal privileges Americans have made their debut on the world stage suddenly and without prior knowledge or, to make matters worse, experience in public affairs, having to enact the eminent roles of legislators²⁸

An enslaved society could not establish a political system according to a pure conception of liberty. The Spanish monarchy left behind a population that did not appreciate freedom. In 1819, after returning from his exile in Jamaica but before starting the Liberating Campaign that brought definitive independence to Venezuela, Colombia, Ecuador, Perú and Bolivia,²⁹ Bolívar addressed his supporters in Venezuela, explaining the problems of vice amongst the population of Latin America:

Enslaved by the triple yoke of ignorance, tyranny and vice, we American people have never experienced knowledge, power or virtue A corrupt people can indeed attain freedom but lose it at once. *We endeavor in vain to show them that happiness consists in the practice of virtue, that the rule of law is more powerful than the rule of tyrants* because the former is inflexible and everything must yield to its beneficent rigor, that good habits, not force, are the columns of the law, and finally that the practice of justice is the practice of freedom *Our weakened citizens* will have to strengthen their spirits mightily before they succeed in digesting the healthful nourishment of freedom Can they approach near enough to admire its splendid beams of light and breathe its pure air without oppression? . . . [I]t is the people, not their governments, who drag

Spanish rule of Latin America prevents the native Latin Americans from governing themselves).

28. *Id.* at 19-21 (emphasis added).

29. See John Lombardi, *Epilogue: History and Our Heroes—The Bolívar Legend*, in SIMON BOLÍVAR: ESSAYS ON THE LIFE AND LEGACY OF THE LIBERATOR, *supra* note 12, at 176, 176 (citing a prestigious Venezuelan historical dictionary that credits Bolívar as directing the independence of several South American countries, making him popularly known as The Liberator).

tyranny in tow.³⁰

Bearing in mind this pessimistic view about the peoples of Latin America, Bolívar believed that constitutions in the region should establish strong governments that would prevent the dissolution of the newly independent countries.³¹ Since Latin Americans were not prepared to “swallow the pill” of freedom and purely representative institutions, he rejected Federalism as being “too perfect” and impracticable considering the particularities of Latin America.³² This system of government was ideal for “our brothers to the north” because they had acquired the appropriate “political skills and virtues” through a much more enlightened colonial power—the British.³³ Federalism with its “perfectly representative institutions” was against the “characters, customs and current level of knowledge and experience” of Latin America.³⁴

Before the 1820s, Bolívar did not believe that the solution to these problems was the adoption of a monarchy for Latin America. He thought that such systems of government were prone to conquer more territory, a feature that could cause war among the new states.³⁵ However, he admired the English monarchy as the most perfect system of government of its kind because there was an aristocratic and educated element that could check the vices of the ordinary population and foster its virtues. But like federalism, England was too perfect for backward Latin America. Bolívar wrote:

Since the most perfected form of republic and monarchy is beyond our capacity, let us avoid falling into demagogic anarchy or monocratic

30. Simon Bolívar, *The Angostura Address*, reprinted in *EL LIBERTADOR: WRITINGS OF SIMON BOLÍVAR*, *supra* note 20, 34-5 (David Bushnell ed., 2003) (emphasis added).

31. *See, e.g.*, Collier, *supra* note 12, at 24 (describing Bolívar’s idea for a Chamber of Morality to act as a moral police force and a Chamber of Censors in a tricameral congress that would be in charge of morality, science, the arts, education, and the press).

32. *See Jamaica Letter*, *supra* note 27, at 25.

33. *Id.* at 23. Bolívar also placed great hope on some form of alliance with Great Britain that would facilitate Latin America’s growth in commerce, education, and military power. *Cf.* Collier, *supra* note 12, at 27.

34. *See Jamaica Letter*, *supra* note 27, at 23.

35. *Id.* at 25 (indicating that a king’s authority grows by possessing more powers, whether through the acquisition of a neighboring country or by instilling fear in his citizens).

tyranny. Let us seek a middle way between these opposite extremes
Let us strive not for the best but for the most likely of attainment.³⁶

Even though this was Bolívar's explicit rejection of "perfect" systems of government, the English model still attracted him. Insofar as he sought to transform the people in order to make them worthy of a perfect system of government, Bolívar believed that a constitution with some checks on the vices of the majority of the population should be adopted in Colombia. Therefore, in the early 1820s, he proposed a political organization in which an upper legislative hereditary body "mediate[d] between the frustrations of the people and unpopular governmental decrees."³⁷ A lower legislative body should be "freely elected, as unencumbered by restrictions as the English House of Commons."³⁸ However in 1826, after he defeated the Spanish in Alto Perú, present day Bolivia, Bolívar drafted a constitutional text with dramatic monarchical overtones.³⁹ He proposed a monarch-like President that was:

like the Sun, immovable at the center of the universe, radiating life. This supreme authority should be permanent, because in systems without [established social] hierarchies, a fixed point around which magistrates and citizens and men and events revolve is more necessary than in other systems. Give me a fixed point . . . and I will move the earth.⁴⁰

He also disregarded elections and stressed that a hereditary President was a permanent source of stability: "Compare the orderly succession of rulers occurring in legitimate monarchies with the terrible crises provoked by these events in a republic."⁴¹ Regarding emergency powers, Article 123 of the Bolivian constitution gave Presidents the power to "suspend . . . any [of the] formalities prescribed in this chapter" in times of emergency.⁴² Article 152

36. *Id.*

37. *Id.* at 26.

38. *Id.*

39. Simon Bolívar, *The Bolivian Constitution: Address to the Constituent Congress*, reprinted in EL LIBERTADOR: WRITINGS OF SIMON BOLÍVAR, *supra* note 20, at 54, 57 (using Haiti as an example to show why Bolivia needed a president appointed for life, with the power to choose his successor).

40. *Id.* at 56-57.

41. *Id.* at 59.

42. Simon Bolívar, *The Bolivian Constitution: Draft of a Constitution for Bolivia*, reprinted in EL LIBERTADOR: WRITINGS OF SIMON BOLÍVAR, *supra* note

stated that “[t]he constitutional powers may not suspend the Constitution, nor the rights enjoyed by Bolivians, except in the cases and circumstances expressed in the Constitution itself, indicating without fail the period that the suspension is to last.”⁴³

Bolívar believed that emergency powers suspended the constitution, a view that other constitutional thinkers and statesmen of his time did not share. Unlike the Bolivian constitution, drafted exclusively by Bolívar, the 1821 Colombian constitution did not provide for the suspension of constitutional clauses in times of emergency.⁴⁴ The Great Colombia was the first territory in the northern part of South America to achieve its independence from Spain.⁴⁵ The constitution, adopted in 1821, named Bolívar as President and Santander, one of his main political antagonists, as Vice-President. The charter also gave emergency powers to the President, which allowed Bolívar to continue his Liberating Campaign in the South.⁴⁶ Article 55 specially provided for the powers of the President and Congress in light of the war of independence.⁴⁷ It authorized Congress to concede to the Executive “those Extraordinary Powers which may be deemed indispensably necessary in the places actually the theatre of Military Operations, as well as in those recently liberated from the Enemy; defining them, nevertheless, as clearly as possible, and also restricting the time, which shall not exceed what may be absolutely necessary.”⁴⁸ Also, Article 128 established that “in cases of interior Commotion and armed Revolt threatening the security of the Republic,” the President can, with authorization of the Congress, “[enact] all the extraordinary Measures [deemed necessary to quell the commotion] This extraordinary authority shall be entirely confined to the places and

20, at 64, 82.

43. *Id.* at 85.

44. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] (draft Aug. 30, 1821); *cf. infra* text accompanying notes 49–50 (detailing what the Congress and President may do in times of emergency).

45. *See* DAVID BUSHELL & NEILL MACAULAY, *THE EMERGENCE OF LATIN AMERICA IN THE NINETEENTH CENTURY* 305-06 (2d ed. 1994) (providing a chronology of the Latin American revolutions that eventually ousted the European colonial powers).

46. *See generally* CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] (draft Aug. 30, 1821).

47. *Id.* art. 55.

48. *Id.* art. 55, cl. 25.

times when it may be indispensably necessary.”⁴⁹ In 1824, Bolívar and Santander discussed the scope of these emergency powers. Bolívar was fighting as a commander of the armies, struggling for the independence of Perú, when he sent a message to the Congress asking for extraordinary powers that would allow him two things: (1) the power to negotiate a loan with the English government and (2) the authority to raise an army of Colombians to aid the Peruvian struggle against Spain. Santander, who was the chief executive while Bolívar was in Perú, argued before Congress that the 1821 constitution clearly established that extraordinary powers should be granted only when the state was in danger or threat of perishing.⁵⁰ The Peruvian struggle for independence did not threaten the existence of Colombia. Therefore, Santander concluded that if Congress agreed to give emergency powers to Bolívar, the country could be exposed to great danger.

The government [of Colombia] has not given any support to Perú because there is no law that authorizes it to do so, and the rules of conduct of the government are the laws. If The Liberator deems necessary, in order to accomplish the mission that he voluntarily imposed himself of liberating Perú, that the Colombian government should give him the few resources that it has to defend the Republic, then The Liberator has forgotten that the Executive branch has a code of laws to which it is subject and a body of representatives of the nation that examines and should scrupulously examine, if the Executive has fulfilled its duties [to the nation]. Giving a friendly nation one man, one gun, without a law that authorizes such help . . . cannot be excused under the statute providing extraordinary attributions.⁵¹

While Bolívar believed that extraordinary times and people demanded measures outside the law, Santander stressed that the executive branch was compelled to follow the laws under every circumstance, even in times of emergency, regardless of the population's virtue. Accordingly, one month after this address,

49. *Id.* art. 128.

50. See DAVID BUSHNELL, *THE SANTANDER REGIME IN GRAN COLOMBIA* 72 (Greenwood Press 1970) (1954) (describing Santander's response to Bolívar's assertion of emergency powers and noting his general displeasure as evidenced by Santander's letter to Congress).

51. FRANCISCO DE PAULA SANTANDER, *ESCRITOS POLITICOS Y MENSAJES ADMINISTRATIVOS 1820-1837* [POLITICAL WRITINGS AND ADMINISTRATIVE MESSAGES 1820-1837] 77-78 (1988).

Santander asked the Senate to review the extraordinary powers the legislative branch gave to Bolívar three years before. He argued that because Perú named Bolívar President and Liberator, Congress should resolve whether a President of a foreign state, Perú, could lawfully hold the extraordinary powers of another, Colombia.⁵²

Bolívar reacted against Santander's attempts to cut back his extraordinary powers.⁵³ The two men disagreed over which was the most important branch of government. While Santander thought that the legislative branch was foremost in authority, Bolívar countered with his long-held opinion that the executive should be in charge of holding back a vicious population that could not fully appreciate and peacefully live under a pure republican government. Thus, he claimed that if the 1821 constitution fostered a strong Congress that could limit the extraordinary powers of the President, this charter was not tailored to the special character of the people inhabiting the territory and should be reformed. Bolívar's model of emergency power proposed in the 1826 Bolivian constitution was an attempt to limit the challenges he previously faced in exerting those powers, as in the case of Colombia described above.⁵⁴ While in Colombia every extraordinary power had to be authorized by the Senate, the Bolivian charter allowed the President to suspend the constitution himself, thereby avoiding the "legalistic" arguments that Santander and his supporters raised in Colombia.

Bolívar believed that he had drafted a perfect constitution in Bolivia. He then aimed to reform the 1821 Colombian constitution to match the Bolivian charter.⁵⁵ Although Article 191 of the Colombian Constitution forbade a complete reform of the charter for ten years,⁵⁶

52. *Id.* at 86.

53. *See, e.g.,* BUSHNELL, *supra* note 50, at 71-72 (analyzing the contentious relationship between The Liberator and his Vice-President during the Peruvian campaign).

54. *See id.* at 331 (asserting that Bolívar created the Bolivian Constitution as a cross between an autocracy and a republic); *see also* CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] (draft Aug. 30, 1821) (limiting presidential emergency power provisions to only those necessary for expelling the remaining Spanish forces from Colombia).

55. *See* BUSHNELL, *supra* note 50, at 331-32 (describing Bolívar's efforts to mobilize public opinion to reform the Colombian constitution in favor of greater presidential emergency powers).

56. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 191 (draft Aug. 30, 1821) (noting Congress' ability to establish a "grand Convention of Colombia" not

Bolívar's lieutenants sponsored the rise of provincial military leaders, who signed *pronunciamientos* in which they asked Bolívar to reform the constitution or seize power in Colombia. In light of these spontaneous manifestations by the "people," the Liberator thought that he could legitimately call a Constituent Assembly in 1828 to amend the constitution and avoid the curtailment of the executive's powers. When the Assembly was in session, his supporters were outnumbered and walked out of the Convention, hindering the majority's deliberation in absence of quorum. Without a charter, Bolívar enacted a dictatorial decree and seized the Presidency of the country.⁵⁷ Historian Frank Safford describes this process in the following terms:

As president of Colombia, Bolívar used military-led *pronunciamientos* to subvert the constitutional system in an attempt to implant his own constitutional project. When he failed to gain adoption of his wishes in a constitutional convention he happily embraced rule by dictatorship, offered to him by popular meetings that, at the outset, were organized by military lieutenants.⁵⁸

Safford further argues that Bolívar became increasingly authoritarian and that as of 1825 he abandoned republican commitments of elections and alternation of power to embrace a model of constitutional monarchy, which he proposed for Bolivia in 1826.⁵⁹ These contradictions vanish, though, when his quest is framed as the pursuit of developing the correct legal and political institutions for a corrupt citizenry.

In 1812 and 1813 Bolívar could not have been more committed to a liberal democracy, once the Spaniards left America; however, he was more prone to monarchy in later years. This is perhaps understandable, given his analysis of the character of the population of Latin America after the *Reconquista*. Bolívar was always faithful

before 1831).

57. See BUSHNELL, *supra* note 50, at 357-58 (recounting the rise and fall of Bolívar's dictatorship).

58. Frank Safford, *Bolívar as Triumphant State Maker and Despairing "Democrat"*, in SIMÓN BOLÍVAR: ESSAYS ON THE LIFE AND LEGACY OF THE LIBERATOR, *supra* note 12, at 99, 100.

59. See *id.* at 104-105 (opining that Bolívar's gradual move toward authoritarianism was motivated by anxiety about the intervention by the European Holy Alliance and fear of political instability).

to two ideas: (1) constitutions should be drafted according to the particular characteristics of time, circumstances, and men, and (2) Latin America was a territory inhabited by backward people that needed sheer authority imposed on them before a pure representative government could be established and preserved. Consequently, he supported the reform of the 1821 constitution because he believed that perilous times justified the overriding of legal institutions. As he argued in his 1828 address to the failed constitutional convention: “Only some horrible danger could have . . . proven superior to the devotion we professed for the legitimate institutions we ourselves had conceived and whose foundations had won us the desired emancipation.”⁶⁰

Bolívar sought to avoid the chaotic situation in Gran Colombia—namely the secession of Venezuela and Ecuador—by proposing a strong executive. He believed that the 1821 constitution gave too much power to the legislative branch through the fiction of “the will of the people.”⁶¹ In Bolívar’s view, the legislators did not reflect the will of the people and instead were elite lawyers “who had not shed blood in the cause of independence and yet expected to rule the new Republic. Bolívar’s hostility to[ward] lawyers was shared by many military officers who were his most loyal supporters.”⁶² In a bitter criticism against the legislative branch, he said in 1828:

We have transformed the legislature into the sovereign body, whereas it should be no more than a constituent part. We have subjected the executive branch to the legislative, granting the latter far more power in the general administration than legitimate interest allows. Worst of all, all power has been inscribed in what is presumed to be the will of the people, all weakness in the official proceedings of the social order.⁶³

To Bolívar, the executive had too little power. It was “unable to ward off invasions from without or subversion from within except by assuming dictatorial authority.”⁶⁴ Accordingly, Bolívar called for a

60. Simon Bolívar, *Message to the Convention of Ocaña*, reprinted in *EL LIBERTADOR: WRITINGS OF SIMON BOLÍVAR*, *supra* note 20, at 86, 87 [hereinafter *Message to the Convention of Ocaña*].

61. *See id.* at 87-88 (criticizing the power delegated to the legislature as being too great and the ratio of representatives too large).

62. Safford, *supra* note 58, at 99, 103.

63. *Message to the Convention of Ocaña*, *supra* note 60, at 87.

64. *Id.* at 89.

constitution that gave more power to the executive branch, recognizing that it was “unavoidable to use strict measures to curb widespread destructive behavior.”⁶⁵ He concluded his 1828 address to the Congress by asking for a strong executive that could foster the virtue of a vicious population.

A firm, strong, just government is what your country cries out for Give us a government where the law is obeyed, where the judge is respected, where the people are free, a government that forbids any transgression against the popular will, against the mandate of the people. Consider, Legislators, that *strength in the forces of order is the safeguard for the weakness of the individual, the threat that makes aggressors tremble, and the hope of society Consider, without strength there is not virtue, and without virtue the republic perishes* In the name of Colombia I beg you with a thousand prayers that you give us, in the image of the Providence you represent, as arbiters of our destiny, for the people, for the army, for the judge, and for the president, . . . inexorable laws!⁶⁶

Bolívar thought that Colombia needed strong laws in order to progressively acquire virtue. Since Colombia was not prepared for a perfect government, it was necessary to install an authoritarian one in which virtues would be built. Too much liberty would lead to vice while more authority would slowly develop republican virtues. This struggle around the scope of executive and emergency powers concluded with Bolívar naming himself dictator in order to “liberate [the people] from anarchy and preserve the means for its conservation.”⁶⁷

B. ECHOES OF BOLÍVAR’S RHETORIC

Bolívar was not alone in his views about vicious Latin Americans. In the southern cone, there were also two political leaders that shared Bolívar’s views on emergency powers. Juan Manuel de Rosas, who ruled the province of Buenos Aires between 1829 and 1852, also used a republican rhetoric to justify the emergency powers that the legislative granted him twice—first between 1829 and 1832, and

65. *Id.* at 88.

66. *Id.* at 93-94 (emphasis added).

67. *Decreto Orgánico de la Dictadura de Bolívar*, BIBLIOTECA VIRTUAL MIGUEL DE CERVANTES (Aug. 27, 1828), <http://www.cervantesvirtual.com/servlet/SirveObras/01371296566724896320035/index.htm> (translation).

then from 1835 to 1852. Rosas established a regime of terror that violently suppressed any opposition with the support of the military, secret police, and the church. He often invoked republican ideals and virtues to excuse his retaliatory actions.⁶⁸ Even though he embraced republican arguments in justifying these measures, Argentine liberals believed that Rosas' discourse was traditionalist and emphasized the preservation of social structures inherited from colonial times.⁶⁹

Rosas ruled the province with the emergency powers that the Buenos Aires' representatives gave him in 1829, which included the use of any measure necessary to protect the province from any political or civil danger.⁷⁰ In his address to Congress accepting the emergency powers, the *caudillo* argued that the country needed a "strong hand to preserve the social order."⁷¹ Although in this address he also promised to make prudent use of the emergency powers, in 1832, Buenos Aires legislators questioned his ruthless methods. When the provincial legislature forced Rosas to step down as dictator, he delivered a speech in Congress where he not only returned the emergency powers granted, but argued that his job was not accomplished in light of the vice that had grown among the inhabitants of Buenos Aires.

There is no doubt that the political turmoil in a State is born of the *moral disposition* of its inhabitants and that when the cause of order suppresses anarchic explosions, without extinguishing the germs that produced it, then the reaction is more terrible. *Our common and ordinary laws have never been enough* to preserve the country from the different political

68. GARGARELLA, *supra* note 15, at 148.

69. See JOHN LYNCH, ARGENTINE DICTATOR: JUAN MANUEL DE ROSAS 1829-1852 99-100 (1981) (noting that Rosas' close association with social conservatives and his ties to his colonial upbringing tended to influence his governing style, favoring authority and hierarchy).

70. Presentación a la Legislatura del Proyecto de Ley de (renovación de) Facultades Extraordinarias [Presentation to the Legislature of the Law Project for (renewal of) Extraordinary Powers], art. 1 (Jul. 21, 1830), reprinted in JORGE MYERS, ORDEN Y VIRTUD – EL DISCURSO REPUBLICANO EN EL REGIMEN ROSISTA [THE REPUBLICAN DISCOURSE IN THE ROSISTA REGIME] 125-26 (Universidad de Quilmes 1995); accord GARGARELLA, *supra* note 15, at 147 (summarizing Rosas' power, which eventually influenced the entire Argentine nation, as being without oversight due to the legislature's granting "the sum of all public power" to him).

71. HECTOR R. BAUDON, ESTADO DE SITIO [STATE OF SIEGE] 36 (M. Gleizer ed. 1939) (translation).

troubles.⁷²

Rosas believed that laws did not change the population; like Bolívar and Montesquieu before him, he argued that laws should reflect the people, and if they did not understand the consequences or meaning of federalism, then an ordinary constitution would not remedy any difficulties.⁷³

In 1835, Rosas returned to power again with emergency powers. Once again, he justified his extraordinary attributions with a republican argument:

The experience of many centuries teaches us that the remedy to these evils cannot be subject to forms, and that the application [of such remedies] should *be quick and prompt, and consistent with the circumstances of the moment*, as much as it is impossible to foresee all the hidden and terrible means used by the spirit of conspiracy, but also *to fix the rules of legal criteria for intentions hidden in a thousand different ways, and always covered with the veil of secrecy* [Let us be sure that] from this race of monsters there not be one among us and that their persecution be so ruthless and vigorous that it will serve to scare the rest that may come after us.⁷⁴

Rosas viewed the protection of the State as particularly difficult in vicious Argentina. Like Bolívar in his 1813 Decree of War to the Death, Rosas' goal was to eliminate the corrupt elements of Argentine society.⁷⁵ Law could not be applied in such moments;

72. Juan Manuel de Rosas, Nota del Gobernador devolviendo las Facultades Extraordinarias [Note from the Governor Returning the Extraordinary Powers] (May 7, 1832), in MYERS, *supra* note 70, at 157 (translation).

73. Carta de la Hacienda Figueroa: Juan Manuel de Rosas a Facundo Quiroga [Letter of the Figueroa Estate: Juan Manuel de Rosas to Facundo Quiroga] (Dec. 20, 1834), in MYERS, *supra* note 70, at 158 (noting that the desire of a constitution would not automatically unify the people nor would it usher in unity and tranquility in the Argentine Republic, and that such erroneous belief in what a constitution can do would lead to catastrophe).

74. Juan Manuel de Rosas, Proclama del Gobernador y Capitán General de la Provincia de Buenos Aires a todos sus habitantes [Proclamation of the Governor and General Captain of the Province of Buenos Aires to all its inhabitants] (Apr. 13, 1835), in MYERS, *supra* note 70, at 162-63 (translation) (emphasis added).

75. *See id.* at 163 (explaining to the citizens of Buenos Aires that because of the struggle they had endured thus far, they should support Rosas and resolve to rid the city of "the impious, the sacrilegious, the thief, the murderer, and above all the perfidious and traitor"); *see also* Simon Bolívar, Proclama del General en Jefe del Ejército Libertador de Venezuela a los Venezolanos [Proclamation of the General

instead, he preferred to use authoritarian methods that were flexible enough to accommodate the circumstances. In other words, the backward character of the Argentine people encumbered the application of the rule of law.

Rosas stepped down from power in 1852. After a liberal army defeated him during the civil war, Rosas, wounded in the field, wrote a letter to Congress returning the extraordinary powers given to him, arguing that his job was done and thus emergency powers were no longer needed.⁷⁶ Rosas and Bolívar believed that the rule of law, purely representative government, perfect democratic institutions, and federalism should be delayed in Latin America for an uncertain future. Sheer authority, not law, was necessary as long as the population lacked what Bolívar and Rosas believed were the appropriate political virtues.

In Chile, Diego Portales, one of the main political leaders of that country in the 1830s, shared Rosas' and Bolívar's republican view. Along with the conservative elite of his country, Portales believed that anarchy had taken over Chile in the 1820s. According to conservatives, the liberals' experiments with democracy and representative governments had the country on the verge of failure. In the early 1820s, before he became a major political figure of the country, Portales obtained a monopoly of liquor and tobacco production in Valparaíso. The failure of his enterprise, which he attributed to Chilean anarchy and chaos, made him join with the conservatives in the late 1820s.⁷⁷ Portales' refrain was similar to that of Bolívar and Rosas:

The democracy that the naïve so amply proclaim, is an absurdity in countries like the [South] American countries, *full of vices and where*

in Chief of the Liberator Army of Venezuela to the Venezuelans] (Jun. 15, 1813), in Jose Felix Blanco, 4 DOCUMENTOS PARA LA HISTORIA DE LA VIDA PUBLICA DEL LIBERTADOR DE COLOMBIA, PERU Y BOLIVIA [DOCUMENTS FOR THE HISTORY OF THE PUBLIC LIFE OF THE LIBERATOR OF COLOMBIA, PERU, AND BOLIVIA] 621, 622 (1876) (granting amnesty to any Spaniard who aids his cause and condemning to death any Spaniard who does not support his military campaign).

76. See LYNCH, *supra* note 69, at 334 (returning power to the House of Representatives after falling at the battle of Caseros).

77. See SERGIO VILLALOBOS-RIVERA, PORTALES: UNA FALSIFICACIÓN HISTÓRICA [PORTALES: A HISTORICAL FALSIFICATION] 59 (1989) (asserting that there was much perversion, abuse, bribery, and deceit in businesses at that time, which were not mentioned in the papers of those years).

*citizens are lacking in all virtue, as is necessary to establish a real republic. Monarchy is not the [South] American ideal . . . ? A Republic is the system to adopt, but do you know how I understand it for these countries? A strong centralizing government whose men would be a true model of virtue and patriotism and thus will straighten citizens through the path of order and virtues. Once they are moralized, then comes the completely liberal government, free and full of ideals, where all the citizens can take part.*⁷⁸

Like Bolívar, Portales placed Latin American countries in a middle ground between monarchies and pure republics.⁷⁹ In such middle ground, law was also put on hold because the most important goal of government was to achieve a stable political order that would foster the virtues of the population. The key role of political and legal institutions was as a moralizing force. Therefore, the rule of law could be suspended for the sake of protecting a legal and political order that sought this moral task. Portales believed that law should not limit this role and, in a letter written in 1834 to one of his closest friends, he complained that lawyers gave too much importance to law in times of emergency. He argued that, at least in times of crisis, the executive branch should have broad powers to protect moral and political order regardless of the laws and constitution:

If we follow Egaña's criteria . . . the government should stand with its arms crossed unless the individual is caught red-handed. With the men of the laws it is impossible to agree; what the hell is the purpose of Constitutions if they are incapable of remedying an evil that is known to exist, that is going to be produced, and that cannot be prevented *Damn the law if it does not permit the arm of the government to freely proceed in the opportune moment! . . . Let me tell you that in my view with the law or without her, this lady that they call the Constitution should be raped*⁸⁰ *when the circumstances are extreme Tell [the jurist] that his*

78. Letter from Diego Portales to José M. Cea (Mar. 1822), in ROBERTO HERNÁNDEZ PONCE, DIEGO PORTALES: VIDA Y TIEMPO [DIEGO PORTALES: LIFE AND TIME] 25 (Orbe eds. 1974) (translation).

79. *Id.* at 25 (expressing his view that South American countries were not ready for republican governments for lack in virtue, but nor was a monarchy the right answer because the South Americans had just rid themselves of a monarchy).

80. The Spanish word used here is *violarla*. In Spanish *violar* is both “to violate or infringe” and “to rape.” Clearly Portales is playing with the two meanings, given his feminine characterization of “the Constitution.”

philosophies are irrelevant for this case.⁸¹

II. THE ECONOMIC PROGRESS RHETORIC

Republican discourse was not the only rhetoric used to support the use of emergency powers. In 1830s Chile and 1850s Argentina, legal thinkers were not only concerned about their countries' backwardness in the republican sense, but also in economic prosperity. Constitutional thinkers argued that the goal of constitutions was to achieve economic prosperity, and they believed that emergency powers were necessary to achieve two different goals: (1) order and stability, and (2) the fostering of economic growth. The former, advanced by the legal and political elites such as Andrés Bello and Mariano Egaña in Chile, was a precondition for economic goals.⁸² They thought that the executive branch should have the authority to suspend the constitution when chaos and anarchy threatened the order and stability of their countries. The latter goal—actually achieving economic prosperity—came from the belief that Latin American countries were economically stunted, and thus that the executive should have the ability to do whatever is necessary to foster growth, even if that meant suspending the constitution.⁸³ Therefore, constitutional thinkers justified the use of emergency powers as tools to help Latin Americans in their struggle against scarce resources.

A. EGAÑA AND BELLO IN CHILE

The 1833 Chilean constitution established a system of emergency powers with complex terminology that combined states of siege, the suspension of the constitution, and extraordinary powers.⁸⁴ The President could ask Congress for extraordinary powers,⁸⁵ and declare

81. Letter from Diego Portales to Antonio Garfias (Dec. 6, 1834), in *EPISTOLARIO DE DON DIEGO PORTALES 1821-1837* [COLLECTED LETTERS OF DON DIEGO PORTALES 1821-1837] 378, 378-79 (Ernesto de la Cruz & Guillermo Feliu Cruz eds., 1937) (translation) (emphasis added).

82. See discussion *infra* Part II.A.

83. See discussion *infra* Part II.B.

84. See CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] arts. 36.6, 82, 161.

85. *Id.* art. 36.6 (permitting the conferral of extraordinary powers by Congress to the President).

a state of siege, which automatically suspended the constitution.⁸⁶ The President always had to ask the legislative branch for emergency powers, except when the latter was not in session; in such cases, the executive had to consult with the State Council.⁸⁷ Hence, the Chilean Constitution emphasized the powers of the President in times of emergency even more than the 1821 Colombian and 1826 Bolivian constitutions had.⁸⁸

The two main jurists behind the Chilean constitutional design were Andrés Bello and Mariano Egaña. Bello advised the Chilean government on constitutional, international, and private law issues. He proposed a Civil Code for Chile, which was adopted with only slight modifications.⁸⁹ Along with Egaña, he was one of the main drafters and supporters of the 1833 constitution. In his constitutional proposal, Bello did not argue that order was necessary to bring virtue to the corrupted Chileans, nor did he think that Chile was unprepared for a pure republican and democratic government.⁹⁰ Instead, he

86. *Id.* art. 161.

87. See GARGARELLA, *supra* note 15, at 150, 155 (explaining that the State Council first appeared in France under Napoleon's rule as part of the executive branch but, during the nineteenth century in Latin America, it morphed into the *Consejo de Estado*, a body whose members were an enlightened elite giving advice to the President about governmental matters).

88. Compare CONSTITUCIÓN POLÍTICA DE BOLIVIA [C.P.] art. 30, 83 (granting the Legislature the ability to give the President extraordinary powers and allowing the President to use the National Militia, within their regular limits, for internal security and beyond their regular limits with the Legislature's consent), and CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 55.25, 128 (giving the Legislature the power to grant the Executive "Extraordinary Powers" to specifically fight the war of independence and giving the President power to take "extraordinary measures", but only when "indispensably necessary" and with the prior or later consent of the Legislature if it is not in session at the time), with CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 36.6, 82, 161 (authorizing the President to assert the power to declare a state of siege due to "foreign attack" in one or more areas of the country with only the consent of the Conservatorial Council needed, and specifically stating that a state of siege suspends the Constitution).

89. See M.C. MIROW, *LATIN AMERICAN LAW: A HISTORY OF PRIVATE LAW AND INSTITUTIONS IN SPANISH AMERICA* 138 (2004) (citing Bello's combination of the French Civil Code with Spanish and Roman law, which was adopted in Venezuela and Colombia, as well-suited to the particular conditions in Latin America at the time).

90. See Andrés Bello, *Reforms to the Constitution*, in *SELECTED WRITINGS OF ANDRÉS BELLO* 255, 256 (Iván Jaksić ed., Frances M. López-Morillas trans., Oxford Univ. Press 1997) (1833) (noting that this constitutional reform prevented

asserted that political institutions had to respect the “clear and unequivocal rules for administering the public interest.”⁹¹ The main goal of the 1833 constitution was, according to Bello, “to assure the *general prosperity* by establishing a solid administration.”⁹²

The order and stability discourse was different from that of Bolívar, Rosas, and Portales. For Bello, political instability impaired the main goal of political institutions—prosperity.⁹³ Bello’s view was that Chile’s previous regimes were not successful because those in charge “were not given the means to fulfill their chief obligations” in times of unrest.⁹⁴ Consequently, he believed constitutions should “avoid [the] judicial formulas” that limited the “supreme chief.”⁹⁵ Emergency powers were thus necessary to maintain countries on the path to achieving prosperity.⁹⁶ In 1849, Bello argued before the Senate against the limitation of emergency powers already approved by the House of Representatives. In his view, Congress could not limit the emergency powers of the President through an ordinary statute; in fact, he argued that Congress was powerless to limit the emergency powers of the executive branch under the constitution.⁹⁷

Alongside Bello, Mariano Egaña was behind the design of emergency powers in the 1833 Chilean constitution. He was the son of another famous political thinker, Juan Egaña, who drafted the 1825 constitution. In 1824, Mariano Egaña, then an ambassador

ill-meaning persons from leading the Chilean people).

91. *See id.* at 256.

92. *Id.* (emphasis added).

93. *See* ALLAN R. BREWER-CARIAS, *LA CONCEPCION DEL ESTADO EN LA OBRA DE ANDRES BELLO [THE CONCEPTION OF THE STATE IN THE WORK OF ANDRES BELLO]* 45 (1983) (analyzing “prosperity” in light of “the public’s trust in tranquility and internal order” that were the responsibility of a nation by means of moderation and circumspection).

94. Bello, *supra* note 90, at 257.

95. *Id.*

96. *See* BREWER-CARIAS, *supra* note 93, at 44-45 (explaining that Bello’s view on order to achieve posterity required that a country have the right to adopt any measures or extraordinary powers to defend itself against any danger, anarchy, or crisis).

97. *See, e.g.*, ANDRES BELLO, *XVII: LABOR EN EL SENADO DE CHILE [XVII: LABOR IN THE SENATE OF CHILE]* 737-37 (Ministerio de Educacion ed., 1958) (arguing that the 1849 Congress’ use of its power to restrict the ability of future congresses to grant powers to the President violates the powers Congress is granted by constitution).

serving in London, negotiated a loan for the Chilean government.⁹⁸ This experience shaped his constitutional thought, which focused on the achievement of stability and order for the nascent Chilean republic.⁹⁹ Egaña's main difficulty in negotiating a loan in London was that Europeans perceived that Chile was in anarchy.¹⁰⁰ In a letter to his father in November 1824, Egaña stated that the British were willing to recognize the independence of Chile and negotiate a loan on the condition that the South American country established stable political and legal institutions.¹⁰¹ Egaña complained that revolutions in Chile were making his job particularly hard.¹⁰²

In a letter written in May 1824, Egaña asked the Ministry of Foreign Relations two things: (1) to require from Congress an enactment of a special statute establishing the type of government adopted by Chile; and (2) to limit the freedom of the press. European capitalists were nervous about news published in Santiago's main papers, which affirmed that anarchy threatened the financial capability of Chile as a country.¹⁰³ Even though the news was true, argued Egaña, such publications should be avoided to protect Chile's

98. See VILLALOBOS-RIVERA, *supra* note 77, at 59 (noting that Chile's prestige abroad declined during the time that Egaña was the ambassador, causing difficulties in securing loans to pay dividends by the government).

99. See *generally* ENRIQUE BRAHM GARCÍA, MARIANO EGAÑA: DERECHO Y POLÍTICA EN LA FUNDACIÓN DE LA REPÚBLICA CONSERVADORA [LAW AND POLITICS IN THE FOUNDATION OF THE CONSERVATIVE REPUBLIC] 50-64 (2007).

100. Letter from Mariano Egaña to the Minister of Foreign Relations, Ventura Blanco Encalada (May 22, 1827), *in* DOCUMENTOS DE LA MISION DE DON MARIANO EGAÑA EN LONDRES (1824-1829) [DOCUMENTS OF THE MISSION OF DON MARIANO EGAÑA EN LONDRES (1824-1829)] 297 (Javier González-Echenique ed., 1984) (explaining that the Europeans wanted news of order and stability in the government since the press was constantly pointing out the state of disarray in the Chilean government, thereby discrediting its standing before the British Government).

101. See Letter from Mariano Egaña to Juan Egaña (Nov. 19, 1824), *available at* http://www.historia.uchile.cl/CDA/fh_article/0,1389,SCID%253D18631%2526ISID%253D405%2526PRT%253D18594%2526JNID%253D12,00.html (describing the passing of the Chilean Constitution).

102. See Letter from Mariano Egaña to Juan Egaña (Dec. 19, 1824), *available at* http://www.historia.uchile.cl/CDA/fh_article/0,1389,SCID%253D18632%2526ISID%253D405%2526PRT%253D18594%2526JNID%253D12,00.html.

103. See Letters from Mariano Egaña to the Ministry of Foreign Relations (May 11, 1824), *in* DOCUMENTOS DE LA MISION DE DON MARIANO EGAÑA EN LONDRES (1824-1829), *supra* note 100 (arguing that it is necessary for the government to take order over the newspapers).

interests.¹⁰⁴ A couple of months after this request, he repeated that the lack of order and stability in Chile affected the possibility of negotiating a loan on good terms with London's capitalists. In his view, the source of Chile's disorder was the excessive faith placed in popular sovereignty. The idea that "citizens can gather when they want and resume the exercise of their sovereignty and decree the changes they please" was holding the country back.¹⁰⁵

In Egaña's view, order and stability in Chile would attract foreign capital, especially from the British.¹⁰⁶ Egaña thought that if the British decided to invest in Chile, the independence of the country was guaranteed—British recognition of independence of Latin American nations typically depended on the amount of English capital invested in the new country.¹⁰⁷ In February 1825, Egaña wrote to his father:

You can observe [the behavior] of a commercial people. Here, they never say, neither the Minister, nor Parliament, nor the representatives, nor the public papers: 'Let us recognize the independence of [Latin] America because those inhabitants deserve to be free, because it is a human cause, etc.' Instead, [they] always [say]: 'Let us recognize the independence of a country because there is a lot of capital and interests of English subjects, because we carry on a fruitful commerce, because we have invested there a huge amount of money, etc.' Thus the independence of *Santo Domingo*, an island that has been free and completely organized, is not recognized; because there are no English capitals or great commerce. And I would not doubt that this [English] government would abandon Perú and Chile if its subjects did not have great interests to lose.¹⁰⁸

104. See Letters from Mariano Egaña to the Ministry of Foreign Relations (May 21, 1825), in DOCUMENTOS DE LA MISION DE DON MARIANO EGAÑA EN LONDRES (1824-1829), *supra* note 100, at 189 (asserting that any press in Chile regarding instability is then published in Argentina in a harsher tone and by the time it reaches London, the news is greatly exaggerated).

105. Letters from Mariano Egaña to the Ministry of Foreign Relations (May 22, 1827), in DOCUMENTOS DE LA MISION DE DON MARIANO EGAÑA EN LONDRES (1824-1829), *supra* note 100, at 297, 297-98 (translation).

106. Letter from Mariano Egaña to Juan Egaña (Jan. 12, 1825), available at http://www.historia.uchile.cl/CDA/fh_article/0,1389,SCID%253D18633%2526ISID%253D405%2526PRT%253D18594%2526JNID%253D12,00.html.

107. *Id.* (suggesting to his father that Chile follow the Colombian and Mexican example of attracting British capital).

108. Letter from Mariano Egaña to Juan Egaña (Feb. 18, 1825), available at http://www.historia.uchile.cl/CDA/fh_article/0,1389,SCID%253D18680%2526ISID%253D405%2526PRT%253D18594%2526JNID%253D12,00.html.

Egaña claimed that independence and political institutions should be discussed in light of economic purposes. He designed the model of emergency powers in the Chilean constitution,¹⁰⁹ where the state of siege automatically suspended its operation and gave the President powers above the law. This was the first step in stabilizing a country that needed to walk the path toward capitalist investment.

B. ALBERDI AND HIS "BASES"

Juan Bautista Alberdi proposed a model of emergency powers, inspired by the Chilean constitution, for the 1853 Argentine Constitution.¹¹⁰ Alberdi was one of the liberals who lived in exile during Rosas' regime. In 1852 he published an influential book, *Las Bases*, where he proposed a new constitution and justified why Argentina should adopt it.¹¹¹ After Rosas' defeat, a liberal elite drafted the document, which prohibited Congress and provincial legislatures from granting extraordinary powers to a single man.¹¹² However, Article 23 adopted the same terminology of the 1833 Chilean charter, stating that in the event a state of siege is declared, constitutional guarantees are immediately suspended.¹¹³

D%253D405%2526PRT%253D18594%2526JNID%253D12,00.html (translation).

109. Egaña's influences in this respect were the Napoleonic Constitutions and the charters of the French Restoration. The provisions regarding the state of siege and the suspension of the constitution were inspired, respectively, by the 1799 French Constitution and the 1815 *Acte additionel aux Constitution de l'Empire*; his innovation was the connection of the two figures established in Article 161 that the state of siege entailed a suspension of the constitution. See GARCÍA, *supra* note 99, at 87-118.

110. See JUAN BAUTISTA ALBERDI, *BASES Y PUNTOS DE PARTIDA PARA LA ORGANIZACIÓN POLITICA DE LA REPÚBLICA ARGENTINA* [BASIS AND STARTING POINTS FOR THE POLITICAL ORGANIZATION OF THE ARGENTINEAN REPUBLIC] 74 (La Cultura Argentina ed., 2nd ed. 1915) [hereinafter ALBERDI (1915)] (asserting that the powers Chile allocated to the President gave the country the order offered by a monarchy while retaining a republican form of government).

111. See *generally id.*

112. Art. 29, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.) (prohibiting Congress and the provincial legislatures from giving extraordinary powers to the executive and governor, respectively, due to the dangers of betrayal the power carried with it).

113. *Id.* art. 23; see also *id.* art. 67.26 (bestowing on Congress the power to declare a state of siege or to extend, or end, its declaration by the President); *id.* art. 86.19 (restricting the President's power to declare a state of siege with the permission of the Senate only if there is a foreign attack or when Congress is in recess and there is a national disturbance).

Alberdi also believed that Latin America was backward because it lacked the appropriate virtues that could foster economic prosperity. He believed that the most urgent task for Argentina was to follow the path of the United States, which had “civilized” a backward American population through European immigration. Alberdi even included encouraging European migration in the constitution for Argentina.¹¹⁴ Unlike Bolívar, Rosas, and Portales, Alberdi believed that the signs of “civilization” were not political virtues but rather signs of economic prosperity.¹¹⁵ He thought that populating a country like Argentina should proceed pursuant to scientific criteria found in the “science of political economy,” which saw population as an “element of prosperity.”¹¹⁶ Alberdi encouraged Latin America to follow the trends of the United States.¹¹⁷ In the period of independence, he argued, “democracy [and independence] w[ere] the sole purpose[s]; wealth, material progress, commerce, population, industry, in themselves all the economic interests were accessory, secondary interests, poorly known and poorly studied.”¹¹⁸ In his view, most of the constitutions drafted in Latin America were deficient because they did not consider the real aims of legal and political institutions in the mid-nineteenth century:

This is the goal of constitutions today: they should aim to organize and constitute the great practical means to pull out an emancipated America from the *obscure* and *subaltern* state in which it finds itself. Those means should appear today at the forefront of our constitutions. Just like before, we placed independence, liberty, the cultured, today we must place *unrestricted immigration, free commerce, iron roads, industry without obstacles . . .* as the essential means to achieve, that they stop being words and become a reality. . . Our constitutional contracts or agreements in

114. ALBERDI (1915), *supra* note 110, at 18; *see* Art. 25, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

115. ALBERDI (1915), *supra* note 110, at 17 (noting that populating leads to wealth when the population is intelligent and civilized, and inferring that to do so would require a European population).

116. *See id.* at 19 (describing a population as a vehicle and reflection of a country’s prosperity) (translation).

117. *See id.* at 16 (arguing for the need to follow the United States’ example of artificially stimulating migration with talk of liberty and respect for all men that eventually did lead to freedom and industry).

118. JUAN BAUTISTA ALBERDI, BASES Y PUNTOS DE PARTIDA PARA LA ORGANIZACION POLITICA DE LA REPUBLICA ARGENTINA [BASIS AND STARTING POINTS FOR THE POLITICAL ORGANIZATION OF THE ARGENTINEAN REPUBLIC] 18 (1952) [hereinafter ALBERDI (1952)] (translation).

South America must be a type of commercial contracts of collective corporations formed specifically to give settlers to these deserts that we baptized with the pretentious names of Republics¹¹⁹

Therefore, Alberdi believed that the backwardness of Latin America could be improved with civilized populations of Europe that would bring free commerce and “industry.” However, Alberdi also argued that Argentina needed “peace and internal order,” as a precondition to attract full-scale migration of civilized Europeans.¹²⁰ In the years after independence, he claimed, many constitutional thinkers adopted the ideas of popular sovereignty. As a consequence of such an approach, the first constitutional texts in Latin America weakened executive power and strengthened individual guarantees. Alberdi concluded that this was a necessary phase of Latin American constitutionalism insofar as the main purpose of the independence movement was to stress the freedom of each nascent country. However, the mid-nineteenth century demanded an emphasis in “public guarantees” through the executive that could give effect to “the constitutional order and peace,” that are necessary conditions for “liberty, institutions, wealth and progress.”¹²¹ He concluded that the Argentine constitution should also establish peace, along with economic prosperity and European migration, as one of its goals.¹²²

Henceforth, Alberdi argued that the U.S. Constitution was an appropriate model for the Argentines because it triggered European migration and prosperity for America. Additionally, Alberdi thought that legal and political institutions should be adapted to the particular features of the time period, race, and traditions of the population.¹²³ But unlike Bolívar, Rosas, or Portales, Alberdi did not believe that

119. ALBERDI (1915), *supra* note 110, at 67 (translation) (emphasis added).

120. *See* ALBERDI (1952), *supra* note 118, at 96-97 (arguing that without peace and internal order, efforts to advance the country’s institutions would be in vain because they are necessary for the formation and development of republics) (translation).

121. ALBERDI (1915), *supra* note 110, at 170 (explaining that the individual guarantees in South America would have no meaning if they were not protected through the public guarantees that rely on peace to make progress) (translation).

122. *Cf. id.* (arguing that stability and peace arises from Chile’s constitution and not the disposition of its people or its geography).

123. *See generally id.* at 201-09 (outlining what constitutes an appropriate constitution for Argentina based on the needs of the people at the current time and in light of the missteps of the previous constitutions).

the Latin roots of Argentine institutions made it impossible for his country to establish a democratic and representative government.¹²⁴ One particularity of Argentina, besides being a backward place in the economic sense, was that the Spanish heritage compelled them to adopt a strong executive power, a main feature of the government since the colonial administration of the *La Plata* viceroyalty. In this respect, Argentina should not follow the U.S. Constitution because that charter did not give sufficient power to the President.¹²⁵

Alberdi favored the 1833 Chilean constitution as a model for organizing Argentina's executive power.¹²⁶ His first argument to justify the "transplant" of Chile's emergency powers to Argentina was that South American constitutions should respect the Hispanic tradition of a strong executive power.¹²⁷ This argument shared one thing with the republican rhetoric of Bolívar, Rosas and Portales—the idea that legal and political institutions mirrored some objective characteristics of the specific society. Alberdi, however, differed to the extent that he gave more weight to the historic tradition as a factor determining the constitution, and less to the characteristics of the population.¹²⁸ His differences from the republicans were more pronounced in the second argument used to justify the need for and use of emergency powers—ensuring economic prosperity in Argentina to achieve ideal standards. In light of such goals, emergency powers could also be used as a tool to suspend the rule of

124. *Id.* at 201 (contrasting the political character of the Spanish that mirrored the Argentine, with the Greeks and Italians to demonstrate that not all countries with similar political traits were incapable of republican governments, as the latter countries were the birthplace of the legislature and government).

125. *Id.* at 166, 169 (emphasizing that the Argentine constitution should give as much power to the executive branch but only through the constitution, unlike the U.S. Constitution).

126. *Id.* at 168 (praising the Chilean constitution for finding a solution for the executive in a republic that was previously in the hands of monarchies, by finding a middle ground where a republican president could assume the powers of "a king" when anarchy threatened the republic).

127. *See, e.g.*, NATALIO R. BOTANA, *LA TRADICIÓN REPUBLICANA: ALBERDI, SARMIENTO Y LAS IDEAS POLÍTICAS DE SU TIEMPO* [THE REPUBLICAN TRADITION: ALBERDI, SARMIENTO, AND THE POLITICAL IDEALS OF THEIR TIME] 352 (Sudamericana ed. 1984) (discussing Alberdi's agreement with Simon Bolívar to have a strong executive in the form of a monarch but called president, in order to keep the regional tradition of political order).

128. *Id.* at 351 (explaining that tradition was necessary for Alberdi to maintain and "legitimize the political order," because it was needed for society to progress).

law and lead the country towards the roads of industry and wealth.

If order, that is to say the life of the constitution, demands in America the flexibility of the power in charge of carrying out the constitution, with greater reason it is required by enterprises that are interested in material progress and enhancement of the country. *I do not see why in certain cases absolute faculties care to be given to defeat the backwardness and poverty, when given to defeat disorder . . .*"¹²⁹

Defeating backwardness—in an economic sense—was the main justification for the absolute power of the executive in special circumstances. A new sense of backwardness of the population and territory was, once again, the main factor that justified the suspension of the constitution in South America. As long as Argentina was considered backward, it was not only possible, but also necessary, to suspend the constitution. Alberdi even proposed an article in *Bases* that established the responsibility of the President when he “jeopardized the progress of the country, delaying the population growth, omitting the construction of roads, and limiting the freedom of commerce.”¹³⁰ This proposal was rejected by Domingo Faustino Sarmiento, who was one of Alberdi’s main antagonists in constitutional matters and an influential liberal thinker in nineteenth century Argentina.¹³¹ Sarmiento believed that such a provision was too broad and ambiguous but did not disagree with the goals promoted by Alberdi in *Bases*. He argued that a constitution’s purpose was to ensure the educated class their exercise of liberties and the right to property.¹³² Sarmiento concluded that Alberdi was correct and that “roads, commerce, navigation, population and wealth [were] the mission of the Executive Power.”¹³³ Since Alberdi

129. ALBERDI (1915), *supra* note 110, at 168 (translation) (emphasis added).

130. ALBERDI (1952), *supra* note 118, at 230 (translation).

131. *See generally* DOMINGO FAUSTINO SARMIENTO, FACUNDO: CIVILIZATION AND BARBARISM (U. of Ca. Press ed., Kathleen Ross trans., 2003) (1845). Sarmiento argued that Argentina was in a struggle between civilization and barbarism. Liberalism, democracy and republic represented the former, while the *caudillos* that ruled his country through despotic means stood for the latter. *Id.*

132. DOMINGO FAUSTINO SARMIENTO, COMENTARIOS DE LA CONSTITUCIÓN [COMMENTARIES OF THE CONSTITUTION OF THE ARGENTINEAN CONFEDERATION] 36 (1895) (contrasting the idea that the “educated” and “ordinary” people use distinct Constitutional rights with the former preferring the right to liberty of action and thought, and the latter preferring the ordinary and enforced laws).

133. *Id.* at 365 (translation).

and Sarmiento shared the rhetoric of economic prosperity, the debate between them centered on the latter's thought that the Argentine constitution should follow the U.S. model and all its doctrine, whereas the former, as mentioned above, believed that the constitution should respect some particular traditions. Hence, Sarmiento believed that the state of siege was the equivalent to the suspension of habeas corpus under the U.S. Constitution, rather than a balance of the Hispanic heritage that Chileans invented in their 1833 charter.¹³⁴ However, in the 1850s, the main constitutional thinkers of Argentina apparently agreed on the idea of civilizing their backward countries through industry and commerce and using emergency powers to foster this trend.

CONCLUSIONS

The republican rhetoric and economic progress argument envisioned Latin America as a backward territory. Within such frameworks, constitutional thinkers described their countries as territories that needed a moment "without law"—or its suspension through emergency powers—to overcome their inherent political or economic backwardness and achieve a virtuous or prosperous society. The "rule of law" was either left for an uncertain future or seen as a characteristic of our "brothers to the north" who had the skills for its practice in light of their more enlightened colonial past and their civilized immigration policy. Thus, shortly after independence from the Spanish crown, Latin America started to build a theoretical justification for emergency powers that became a key issue in the constitutional debates of the nineteenth century.

These ideas about emergency powers, which have colonial undertones, were encouraged by Latin American thinkers themselves and not necessarily by external powers wishing to dominate them. The clues about Latin America's backwardness lie not only in the ways in which European and Anglo-American legal thought characterized the region,¹³⁵ but also in the discourses promoted by

134. *See id.* at 355 (indicating that the powers given to the President in the Chilean constitution to arrest someone without a formal process is the same procedure permitted under habeas corpus in the United States; the concept was anything but innovative in South American constitutional law).

135. *See generally* Jorge L. Esquirol, *The Fictions of Latin American Law (Part I)*, 1997 UTAH L. REV. 425 (1997) (analyzing Latin American law through a

local jurists. These local legal elites used a contextualist and particularistic approach as a way of justifying the adoption of a “backward” legal system for a “backward” population. This insistence on backwardness made, and continues to make, Latin America a territory where global powers are needed to civilize it through legal, economic, and political intervention.¹³⁶ If Latin American jurists would like to build their legal and political systems through internal dialogue and not by the imposition of global powers, they need to reinterpret their constitutional history and understand the diverse roles played by the idea of backwardness.

sociological argument that describes Latin America as attempting to assimilate to a European system).

136. See generally Jorge L. Esquirol, *The Failed Law of Latin America*, 56 AM. J. COMP. L. 75 (2008) (arguing that the view of failed law in Latin America reinforces the shortcomings of law in the region).