

# THE AUTHORITY OF A FOREIGN TALISMAN: A STUDY OF U.S. CONSTITUTIONAL PRACTICE AS AUTHORITY IN NINETEENTH CENTURY ARGENTINA AND THE ARGENTINE ELITE'S LEAP OF FAITH

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### SYNOPSIS

Contrary to arguments of social scientists as far back as Hegel, the adoption of a successful foreign constitution as a model may offer advantages to a country that has not yet consolidated its political institutions. The nineteenth century experience of Argentina with the U.S. Constitution shows that not only may rules from transplanted constitutional models take root, but that such rules may enjoy extra authority because of the prestige of the foreign model. Argentina's elite adopted U.S. constitutional practice not only as a model, but as a source of authority. Sometimes U.S. practice governed regardless of Argentine needs and regardless of the result that textual interpretation of the Argentine Constitution might have prescribed. Although the rules adopted may not always have been suited ideally to Argentina's conditions, the prestige of the model helped consolidate a constitutional system where none had existed previously. Blind copying is inappropriate, but because a foreign model may enjoy greater authority than an autochthonous one, the Argentine example shows that countries emerging from long periods of dictatorship or instability should consider the extent to which foreign models and international law may be harnessed to add to the authority of weak domestic structures.

### INTRODUCTION

Scholars studying political development must consider to what extent foreign models matter. With dozens of countries undergoing transitions to democracy, constitution drafters face basic issues of whether, how, and to what extent they should invoke foreign models. The issues are not new. Many countries have used the U.S. Constitu-

tion and others as models during the past two centuries.<sup>1</sup> Until now, however, scholars rarely have done more than note the degree to which specific constitutional provisions have been borrowed or have offered comparisons focused on specific government practices.<sup>2</sup> This Article will examine the issues underlying the constitutional authority and effectiveness of a constitutional transplant, focusing on Argentina's nineteenth century experience with the U.S. Constitution. By examining in detail the experience of a single country, Argentina, the Article will focus on the authority enjoyed by a constitutional transplant. Thus, although this Article will need to establish the degree to which the United States provided a model for specific constitutional provisions, its aim is to establish to what degree previously non-existent rules actually came to operate in practice and the extent to which the authority of a transplant was affected by the fact that it came from abroad. Remarkably, Argentina offers an example not only of the adoption of a foreign constitutional model, but of the foreign model quickly becoming an article of faith, thereby increasing the legitimacy of the Argentine Constitution and the stability of Argentine political life.

Successful constitutionalism usually is ignored in explaining Argentina's enormous economic success in the late nineteenth and early twentieth century. Between 1880 and 1913 Argentina was neck-and-neck with Japan for the title of fastest growing economy in the world,<sup>3</sup> and between 1869 and 1914 high European immigration helped boost Argentina's population from 1.7 to 7.9 million people, a growth rate of 3.4% per year.<sup>4</sup> Real Gross Domestic Product grew at an average rate of at least 5% per year in the fifty years preceding World War I,<sup>5</sup> and jumped to an average growth rate of 6.7% between 1917 and 1929.<sup>6</sup> In 1930, Argentines were better fed, healthier, had better access to higher education, and in general

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1. See Andrzej Rapaczynski, *Bibliographical Essay: The Influence of U.S. Constitutionalism Abroad*, in CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD 405, 407-12 (Louis Henkin & Albert J. Rosenthal eds., 1990) (explaining impact of U.S. Constitution on development of political systems in Canada, Australia, Israel, India, Scandinavia, Europe, Africa, and Latin America).

2. See *id.* at 406 (stating that "[e]xtensive scholarly research in this area is virtually nonexistent" and offering a bibliography of literature on the influence of the U.S. Constitution). Alan Watson is the only scholar to extensively examine the use of foreign models as a source of authority, and his work focuses entirely in the private law sphere. See ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 56-57 (2d ed. 1993).

3. See W. ARTHUR LEWIS, *GROWTH AND FLUCTUATIONS 1870-1913*, at 197 (1978).

4. See CARLOS F. DÍAZ ALEJANDRO, *ESSAYS ON THE ECONOMIC HISTORY OF THE ARGENTINE REPUBLIC* 3, 421 (1970).

5. See *id.* at 3.

6. See *id.* at 52-53.

enjoyed higher consumption levels, than most Europeans.<sup>7</sup> Despite its poor road system, Argentina had more automobiles per capita than Great Britain in 1930.<sup>8</sup> Scholars usually describe this spectacular growth, followed from the 1930s by equally striking stagnation, in terms of economic causes and the responses of different interest groups to changes in the world trading system and Argentina's domestic economy.<sup>9</sup>

One hardly can doubt that political stability is a necessary precondition for extended growth, however. Investors and immigrants could show little long-term interest in Argentina during the civil wars and political murders that characterized post-independence Argentina from the early 1820s through the 1850s.<sup>10</sup> Nor could immigrants and investors have felt comfortable with the cycles of military governments, unrestrained populism, and bloodletting that increasingly dominated Argentine politics from the 1930s through the 1970s. Constitutionalism provided late nineteenth century Argentina with the political stability needed for growth.

Perhaps one reason why social scientists ignore Argentina's constitutionalism is that even in the late nineteenth and early twentieth century it was imperfect. Most elections until the presidential elections of 1916 were fraudulent.<sup>11</sup> Major revolts occurred in 1874, 1880, 1890, 1891, and 1905.<sup>12</sup> Federalism, extensively provided

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7. See CARLOS H. WAISMAN, *REVERSAL OF DEVELOPMENT IN ARGENTINA: POSTWAR COUNTERREVOLUTIONARY POLICIES AND THEIR STRUCTURAL CONSEQUENCES* 7 (1987).

8. See DÍAZ ALEJANDRO, *supra* note 4, at 56.

9. See generally PAUL H. LEWIS, *THE CRISIS OF ARGENTINE CAPITALISM* 1-7 (1990) (describing and classifying traditional approaches taken by scholars on Argentine political economy); WILLIAM C. SMITH, *AUTHORITARIANISM AND THE CRISIS OF THE ARGENTINE POLITICAL ECONOMY* 1-10 (1989) (noting that economic causes fail to entirely explain changes in Argentina's political system); WAISMAN, *supra* note 7, at 3-23 (describing how economic change and crises produced new interest groups and political instability).

10. See *infra* notes 54-92 and accompanying text (tracing evolution of Argentina's political system from 1820 to 1853).

11. See *infra* Part V.

12. Rather than a source of regression, these revolts tended to be led by the more democratically oriented forces in Argentine society, or at least by forces presenting themselves as seeking a more open political structure. Former President Bartolomé Mitre, who presented himself as the standardbearer of liberal interests seeking a more open political system, led an unsuccessful revolt in 1874 alleging fraud in that year's presidential elections. See DAVID ROCK, *ARGENTINA 1516-1987: FROM SPANISH COLONIZATION TO ALFONSÍN* 130 (1987). In 1880, the Province of Buenos Aires led an unsuccessful revolt which led to the federalization of the City of Buenos Aires and its separation from the Province. See *id.* at 155. In 1890, a coalition of liberal politicians seeking political reform led an unsuccessful revolt with assistance from segments of the army which, while defeated, ultimately forced President Miguel Juárez Celman to resign. See *id.* at 160. In 1893 and 1905, the Unión Cívica Radical led uprisings calling for honest elections and expanded suffrage. See *id.* at 183, 186. For a succinct discussion of this period, see *id.* at 118-213.

for in the Constitution, never became a reality.<sup>13</sup> Despite its gaps, however, much of the Argentine Constitution did become the basis of Argentine political life. Many important rules having scant Argentine precedent quickly entered into practice. The process is astonishing if one considers the complete lack of institutional and constitutional rights until the 1850s, and is worthy of analysis by the many countries that find themselves needing to establish constitutional government after long periods of chaos or dictatorship.

One of the lessons to be learned is that copying a foreign constitution can work. Moreover, in the Argentine case, one of the reasons why it worked was precisely because it was a copy. As far back as Hegel, many scholars have worked from the premise that a constitution cannot be copied, but must develop from established foundations in each society. For example, Atilio Borón, a leading Argentine sociologist, begins examining Latin America's modern constitutional failure by quoting Hegel's argument that "[a] constitution is not [just something] manufactured; it is the work of centuries, . . . the consciousness of rationality so far as that consciousness is developed in a particular nation."<sup>14</sup> According to Borón and many others, Latin American societies were unprepared for liberal constitutional models at the time of independence.<sup>15</sup> Latin America, with a

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13. See *infra* notes 365-69 and accompanying text.

14. Atilio A. Borón, *Latin America: Constitutionalism and the Political Traditions of Liberalism and Socialism*, in CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 339-40 (Douglas Greenberg et al. eds., 1993 (quoting GEORG WILHELM FRIEDRICH HEGEL, THE PHILOSOPHY OF RIGHT 286-87, addition to ¶ 274 (T.M. Knox trans., Oxford Univ. Press 1967))); see, e.g., ROBERT B. SEIDMAN, THE STATE, LAW AND DEVELOPMENT 34-36 (1978) (referring to what author calls "The Law of Non-Transferability of Law"); Saïd Amir Arjomand, *Constitutions and the Struggle for Political Order: A Study in the Modernization of Political Traditions*, 33 ARCHIVES EUROPÉENNES DE SOCIOLOGIE 39, 49, 75 (1992) (emphasizing the diversity of historical processes behind constitutions, which produces distinct patterns of constitutional politics and inconsistent results); Alemante G. Selassie, *Ethnic Identity and Constitutional Design for Africa*, 29 STAN. J. INT'L L. 1, 4-5 (1992) (utilizing Seidman's principle of non-transferability to analyze Africa's constitution-making). But see Howard J. Wiarda, *Law and Political Development in Latin America: Toward a Framework for Analysis*, 19 AM. J. COMP. L. 434, 442-443 (1971) (noting that "a great deal of nonsense [has been] written about the inappropriateness . . . of the legal-constitutional models adopted by the Latin American nations in the nineteenth century").

15. See Borón, *supra* note 14, at 339-40; see also SUSAN CALVERT & PETER CALVERT, ARGENTINA: POLITICAL CULTURE AND INSTABILITY 48 (1989) (stating that social and economic conditions were not ripe in Latin America for the adoption of Western political models); JACQUES LAMBERT, LATIN AMERICA: SOCIAL STRUCTURE AND POLITICAL INSTITUTIONS 121-22 (Helen Katel trans., Univ. of Cal. Press 1967) (concluding that elite control led to spread of Western ideas in Latin America); James L. Busey, *Observations on Latin American Constitutionalism*, 24 THE AMERICAS 46, 49, 53 (1967) (stating that Latin American constitutions were artificial because they either were adopted from abroad or were created by "small, unrepresentative elites"); Keith S. Rosenn, *The Success of Constitutionalism in the United States and its Failure in Latin America: An Explanation*, 22 U. MIAMI INTER-AM. L. REV. 1, 9-11, 21-25 (1990) (contrasting American experience with self-government to the lack of such experience in Latin American nations to explain failure of constitutionalism in Latin America).

colonial history of Hispanic authoritarianism, huge landholdings and little self-government, lacked the traditions needed to support constitutions based on liberal values, and as a consequence, the new constitutions lacked the necessary psychological acceptance.<sup>16</sup> By contrast, the United States, with a tradition of colonial self-government and of protecting fundamental rights, was well prepared to establish its own liberal constitution.<sup>17</sup>

Hegel, moreover, goes beyond insisting merely that constitutions cannot be copied. For Hegel, constitutions cannot even act as a source of significant change, but rather must reflect the state of the people they govern. "[T]he constitution of any given nation depends in general on the character and development of its self-consciousness. In its self-consciousness its subjective freedom is rooted and so, therefore, is the actuality of its constitution."<sup>18</sup> On this view, copied constitutions must fail, because no constitution can exceed what members of society are prepared to accept in terms of the internalized values of society. The longing of isolated individuals for a better constitution is not enough.<sup>19</sup> The constitution itself must enjoy what this Article describes as a talismanic status.

[I]t is absolutely essential that the constitution should not be regarded as something made, even though it has come into being in time. It must be treated rather as something simply existent in and by itself, as divine therefore, and constant, and so as exalted above the sphere of things that are made.<sup>20</sup>

A copied constitution hardly would seem "divine," "constant," and "exalted."

In the Argentine case, however, not only is Hegel's premise proved wrong, but it is possible to go a step further and argue that the country's Constitution acquired extra effectiveness precisely because of its foreign origin. For much of the Argentine elite, the recognized success of the U.S. Constitution gave that Constitution a talismanic authority which the drafters of Argentina's Constitution of 1853/1860 took advantage of. Talismanic authority is defined here as authority based on the presumed extraordinary effects of an object or docu-

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16. See Borón, *supra* note 14, at 339-40; see also CALVERT & CALVERT, *supra* note 15, at 48 (explaining that values and attitudes from colonial period prevented immediate acceptance of adopted political structures in Latin America); Busey, *supra* note 15, at 49 (stating that Latin American constitutions failed to represent the result of real social forces); Rosenn, *supra* note 15, at 21-24 (stating that Latin American nations, for the most part, "have never undergone real social revolutions").

17. See Rosenn, *supra* note 15, at 9-11 (relating conditions in pre-revolutionary America).

18. HEGEL, *supra* note 14, at 178-79, ¶ 274.

19. See *id.* at 286-87, addition to ¶ 274.

20. See *id.* at 178, ¶ 273.

ment—authority stemming not from rational acceptance of a document because it has been agreed upon, but from a sense that, if the document is followed, problems almost miraculously will be overcome. The invocation of the talismanic authority of the U.S. Constitution in Argentine political debate augmented the authority of both the drafters and interpreters of the Argentine Constitution during its early years. At times invocation of U.S. practice became exaggerated. Decisions of the Argentine Supreme Court exist that can be explained only as a desire to copy U.S. practice.<sup>21</sup> However, in the setting of a political system with few widely accepted sources of authority and few entrenched political rules, sometimes the perfect rule is less important than having a less-than-perfect one that enjoys undisputed authority.

In calling for a constitution that seems “divine,” Hegel expresses a valid concern that a constitution possess an undisputed source of authority. Hegel falls short by failing to recognize that in addition to a sense of law springing from deep traditions, a variety of sources of authority are accepted by societies as legitimate. A century later, Max Weber’s sociology of law offers the first attempt to systematize different types of authority.<sup>22</sup>

Although Weber analyzes law primarily in the context of what he calls “rational” grounds of legitimate domination, meaning government that rests “on a belief in the legality of enacted rules and the right of those elevated to authority under such rules to issue commands,”<sup>23</sup> he also describes two other types of legitimate domination—“traditional” domination and “charismatic” domination.<sup>24</sup> Under traditional grounds of domination, authority rests on “an established belief in the sanctity of immemorial traditions and the legitimacy of those exercising authority under them.”<sup>25</sup> Under “charismatic” grounds of domination, authority rests on acceptance of the exceptional sanctity, heroism, or exemplary character of a particular person and corresponding acceptance of the decisions and laws established by that person.<sup>26</sup> The individual exercising charismatic authority enjoys the ability to exercise authority outside the limits of formal legal rules and of tradition and to personally set,

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21. See *infra* Part V (explaining Argentine Supreme Court’s reliance on U.S. Supreme Court opinions).

22. See MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., Univ. of Cal. Press 1978).

23. *Id.* at 215.

24. See *id.*

25. *Id.*

26. See *id.*

ignore, or rewrite any rules governing his authority and that of others. Weber also notes that none of the three types of domination—rational, traditional, or charismatic—is usually found in “pure” form.<sup>27</sup> Although one form of authority may predominate, societies often exhibit all three types of authority.<sup>28</sup>

However, even Weber’s description of traditional, rational and charismatic authority, although useful in analyzing nineteenth century Argentina, fails to capture the full phenomenon. As Hegel recognizes, constitutions do not work merely on the basis of rational authority, particularly in countries emerging from a long period of political disorder and lacking a tradition of respect for rational authority.<sup>29</sup> Similarly, traditional authority counted for little in nineteenth century Argentine politics as, having broken with the Spanish Crown, Argentina faced the problem of a lack of autochthonous political tradition. Moreover, charismatic authority, represented by audacious military figures leading bands of gauchos, was exactly the type of authority nineteenth century Argentina was trying to abandon. The lack or limited availability of traditional, rational, and charismatic authority as the basis for constructing a constitutional system was precisely what led Argentina’s political elite to turn to U.S. practice and to raise it as an icon, a talisman.

Given its chaotic past, Argentina had little choice but to adopt an aspirational constitution in seeking to create entirely new governmental institutions and to establish hitherto unprotected individual liberties. The U.S. Constitution was an important model from the beginning of the process that established the Constitution of 1853, and interestingly, the U.S. influence increased, not decreased, during the following three decades. Although Juan Bautista Alberdi, the most important intellectual figure behind the Constitution of 1853, sought to emulate the United States in general terms, he did not believe in blind imitation. In developing its Constitution in 1853 and 1860, Argentina generally adopted only the U.S. practices that it thought convenient. By the 1880s, however, one can point to examples of U.S. practice being followed even when it made little sense in the Argentine context. The tendency toward greater invocation of the U.S. Constitution as authority would suggest that the U.S. Constitution worked as a unifying force. Invocation of the U.S.

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27. See *id.* at 216 n.2.

28. See *id.* at 262-63.

29. See HEGEL, *supra* note 14, at 178-79, ¶ 274 (“The proposal to give a constitution—even one more or less rational in content—to a nation *a priori* would be a happy thought overlooking precisely that factor in a constitution which makes it more than an *ens rationis*.”).



Constitution and practice began to lessen only toward the turn of the century, by which time Argentina's political institutions were sufficiently well-entrenched so that the U.S. Constitution no longer was necessary as a talisman.

Most of this Article tells the story of nineteenth century Argentine constitutionalism and will follow a roughly chronological approach. Part I focuses on the backward nature of Argentine government prior to the 1853/1860 Constitution—an unstable, authoritarian government that was antithetical to the “liberal” model subsequently adopted.<sup>30</sup> Part II examines the Alberdian vision, a vision of the future of Argentina inspired by the rapid growth of California once it became part of the United States in 1848. The vision expounded by Juan Bautista Alberdi in 1852 became the guiding political philosophy of the Argentine political elite. Part III examines the history and politics behind Argentina's Constitutional Conventions of 1853 and 1860, how the constitutional structure made use of the U.S. Constitution, and how the Argentine elite became increasingly exaggerated in its invocation of U.S. constitutional practice. Part IV considers whether the Constitution provided effective rules and will distinguish those rules that actually became part of Argentine practice from those that did not. Part V offers examples of the importance of U.S. practice in interpreting the Argentine Constitution, detailing when rational interpretation of the document sometimes took a back seat to U.S. practice even when it offered no political advantages to the decisionmaker. From this analysis, it can be observed that the Argentine elite, and particularly its courts, took the U.S. model so seriously that they would overrule reasonable interpretations of the Argentine Constitution solely because the precedent involved was contrary to their increasing understanding of U.S. practice. Moreover, although the significance of U.S. practice began to decline in the late 1890s, the Court relied heavily on contemporary U.S. practice on critical occasions in the 1920s and 1930s when changes to long-established readings of the Argentine Constitution were necessary. Changes in U.S. practice gave the Court a basis for re-interpreting Argentine law. Finally, this Article concludes that not only can foreign models provide constitution writers and interpreters with practical suggestions, but, that under the right conditions, foreign models may offer authority that otherwise would be lacking. The analysis of the origins of the Argentine Constitution and early practice

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30. “Liberal” is used as the nineteenth century use of the term, emphasizing limited government interference with individual conduct and the economy.

will be quite extensive, but it is only by examining those origins that one can begin to appreciate the extent of the Argentine elite's leap of faith.

Two important asides are necessary before delving into Argentine history. First, it must be understood that the relative success of a constitutional system can be measured in a variety of ways. For example, nineteenth century Argentine constitutionalism was a failure if analyzed in terms of social and economic equality, the democratic nature of its elections, or the implementation of all aspects of its written text. It was an enormous success, however, in terms of what its designers wished to accomplish—to encourage immigration and to stimulate economic growth. It also was successful in establishing a system of mutual security under which the political opposition, even in the absence of democratic elections, knew that it would suffer only limited oppression, and where the parties in power knew that even if the opposition came to power, it would not do them serious harm.<sup>31</sup> In recognition that not all parts of Argentina's written Constitution were equally effective—or, as will be seen, were intended to achieve equal effectiveness—rather than discuss rights, liberties, and restraints on government power in terms of constitutional rights and limitation, this Article will instead often use the term “rules of mutual security.” Argentine constitutionalism successfully established rules of mutual security that gave both those in government and in opposition the sense that certain rules limited government repression. Full compliance with the Constitution is a different matter.

Second, although this Article will focus on U.S. constitutional practice as a source of authority, it was not the only source of authority. Rational authority, invoking the text of the Constitution and the intent of its Framers' was always important. Likewise, past practices that were not in conflict with the Constitution inevitably continued to enjoy authority as the way that things had always been done. What makes the Argentine case fascinating, however, is that for several decades the authority derived from its foreign talisman was equally if not more important than both rationalism and tradition.

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31. See generally ROBERT A. DAHL, *POLYARCHY* 1-16 (1971) (developing the concept of mutual security as central to the development of democratic government). This Article uses mutual security as a measure for successful constitutionalism. Dahl uses it in similar terms as an element in the growth paths of nascent democracies. However, Dahl's work is not concerned with the development of constitutional rules, but rather with the general sense of security that exists between those in government and their political opposition.

## I. ARGENTINE LAW AND GOVERNMENT PRIOR TO 1853

In 1850, while exiled in Chile, future Argentine President Domingo F. Sarmiento lamented:

North America separated from England without renouncing the history of its liberties, its juries, its parliaments and its letters. We, the day after the revolution, had to turn our eyes to all parts searching for something to fill the vacuum inevitably left by the destroyed inquisition, the absolute power defeated, religious exclusiveness flattened.<sup>32</sup>

Little in Argentine colonial history, or in the decades following independence in 1810, indicated that Argentina would find itself poised in 1853 to adopt much of the U.S. constitutional model successfully. During the colonial period, governmental structures left Argentina unprepared for independence, let alone for a liberal system of government. In the decades prior to 1853, civil war and dictatorship left Argentina even further afield from the U.S. model. Although the philosophy of the European Enlightenment found followers among a small sector of the colonial elite, its impact was theoretical, not institutional. An examination of the legal institutions that governed Argentina during its colonial period and from independence through 1852, reveals that the protection of individual liberties and the appearance of judicial review in the 1853/1860 Constitution are surprising innovations, not products of Argentine political tradition.

Unlike the British colonies of North America, the Spanish colonies in Central and South America received almost no experience in self-government during their colonial period. Apart from its desire to convert and offer limited protection to the local native populations, Crown policy in the Americas was designed to maximize government revenues, particularly from gold and silver mining,<sup>33</sup> and hence sought to maximize its control over sources of income.<sup>34</sup> The Crown

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32. DOMINGO FAUSTINO SARMIENTO, *RECUERDOS DE PROVINCIA* (1850) [hereinafter SARMIENTO, *RECUERDOS*], in 3 *OBRAS COMPLETAS DE SARMIENTO* 117 (Editorial Luz del Día, 1950), quoted and analyzed in NATALIO R. BOTANA, *LA TRADICIÓN REPUBLICANA: ALBERDI, SARMIENTO Y LAS IDEAS POLÍTICAS DE SU TIEMPO* 265 (1984).

33. See CHARLES GIBSON, *SPAIN IN AMERICA* 103-05 (1966); see also C. H. HARING, *THE SPANISH EMPIRE IN AMERICA* 313-14 (1947).

34. To prevent smuggling and tax evasion, as well as for security, the Crown restricted all trade to two annual fleets, each numbering fifty or more ships, which gathered in Seville and Cadiz and left as a group, with one fleet sailing for Veracruz on the Gulf Coast of Mexico and the other for Panama and Cartagena, see GIBSON, *supra* note 33, at 101-02. All shipments from Spain were dominated by the Seville merchant guild, which, until 1765, successfully excluded even merchants from other parts of Spain. See *id.*; HARING, *supra* note 33, at 316-17.

therefore virtually always appointed Spaniards born in Spain to be viceroys, and assigned peninsular Spaniards to most lower offices.<sup>35</sup> To deter its officials from developing local attachments, the Crown did not even permit senior officials or their children to marry in the colonies without its consent.<sup>36</sup> When it did grant permission, the officials often were transferred to another territory.<sup>37</sup>

The concept of separation of powers did not exist in colonial Spanish America; rather, the system emphasized multiple functions.<sup>38</sup> Checks on viceroys and governors existed, but from other organs that also exercised multiple functions.<sup>39</sup> Officials who exercised executive functions were subject to the *residencia*, an inspection by an examiner named by the viceroy or the Council for the Indies (the senior body advising the King on colonial affairs). The *residencia* was conducted at the conclusion of the official's term in office, although special investigations often were ordered during an official's term.<sup>40</sup> Further, because all officials acted in the service of the King, abuses by one official could be reported by another to the King or to the Council for the Indies.<sup>41</sup>

At that time, the closest thing to a judicial body was the *audiencia*. This board was presided over by the viceroy or governor and heard appeals in a variety of cases. As time went on, the *audiencia's* powers increasingly were restricted to judicial functions, although it retained important non-judicial functions.<sup>42</sup> Its members acted as advisors to the viceroy or governor, approved emergency spending by the viceroy or governor, played a role in the appointment of lower government officials, and took over the viceroy's functions in the event of his absence.<sup>43</sup> The system contained nothing remotely similar to judicial review. Because the Crown possessed absolute authority and colonial officials were merely agents of the Crown, there was no need for

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35. See GIBSON, *supra* note 33, at 102.

36. See HARING, *supra* note 33, at 316-17.

37. See *id.*

38. See RICARDO ZORRAQUÍN BECÚ, *LA ORGANIZACIÓN JUDICIAL ARGENTINO EN EL PERÍODO HISPÁNICO* 19 (1981).

39. See *id.*

40. During the *residencia*, members of the public also received the opportunity to present complaints and to support their complaints with evidence. See HARING, *supra* note 33, at 148-57; ZORRAQUÍN BECÚ, *supra* note 38, at 189-94.

41. See ZORRAQUÍN BECÚ, *supra* note 38, at 144-45.

42. See *id.*

43. See *id.* For a description of the gradual narrowing of the functions of the *audiencias*, see *id.* at 208; HARING, *supra* note 33, at 129-37 (describing powers of *audiencias* vis-à-vis viceroys and captains-general); RICARDO LEVENE, *INTRODUCCIÓN A LA HISTORIA DEL DERECHO INDIANO* (1924), in 3 OBRAS DE RICARDO LEVENE 99 (Academia Nacional de la Historia 1962).

judicial review or for the concept of division of powers—controls existed only to prevent abuse of the King's authority.<sup>44</sup>

In 1777, Spain created the Viceroyalty of the River Plate and designated Buenos Aires as the capital. Until the 1770s, Buenos Aires had been a minor military garrison and a center for illegal smuggling with the Portuguese and the British.<sup>45</sup> But the creation of the viceroyalty, which included all of modern day Argentina, Bolivia, Paraguay, and Uruguay, as well as part of Chile, dramatically changed its status.<sup>46</sup> Buenos Aires became the viceroyalty's sole legal center for trade with Spain, and when wars cut-off supplies from Spain, a center for trade with foreigners as well.<sup>47</sup> As a consequence, the city's population grew from 20,000 in 1766 to 42,000 in 1810.<sup>48</sup> During this period, the interior cities of northern Argentina also thrived, both as sources of supplies for silver mining activities in Potosí (in present day Bolivia) and as stops along the trading routes to Potosí.<sup>49</sup>

However, the Argentine independence movement did not result from local economic and political development, but from external forces. Independence would have lagged for many years were it not for the turmoil that enveloped Spain during the Napoleonic Wars.<sup>50</sup> In 1808, Napoleon held the Spanish monarch, Ferdinand VII, prisoner in France, placed his brother, Joseph Bonaparte, on the Spanish throne, and then invaded Spain to maintain his brother in power. Consequently, Argentina's elite, like elites across Latin America, was forced to choose among allegiance to a new French

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44. See ZORRAQUÍN BECÚ, *supra* note 38, at 19. This is not to say that law was not important; it was. The King's power, although theoretically absolute, with both legislation and justice originating from the King, was restricted by a self-imposed obligation to follow the law and to act in accordance with natural justice. See *id.* at 14-15. Distance obviously weakened the Crown's authority. Colonial officials had the power to stay the execution of orders from the Crown if local application would be inappropriate, and often instructions simply were ignored. See HARING, *supra* note 33, at 122-24. Legislation establishing monopoly privileges and governing trade was important for ensuring appropriate license and tax payments to the Crown, however. See *id.* at 314-21. Legislation to protect the Indians was required as part of the official mission of the Spanish Crown to proselytize the Americas—the grounds on which the Crown initially received its grant of control from the Pope. See *id.* at 43, 48-49. See generally *id.* at 42-74 (analyzing the legislation governing Indian rights and obligations and its degree of observance). Property and inheritance rights also were central. These rights were interpreted with a goal of furthering Crown policies, particularly its policy in the sixteenth century of curbing the emergence of feudal structures in the Americas that might compete with its authority, see ZORRAQUÍN BECÚ, *supra* note 38, at 144, although the Crown could not ignore property and inheritance rights without serious risk of revolt, see GIBSON, *supra* note 33, at 58-62.

45. See ROCK, *supra* note 12, at 40-45.

46. See *id.* at 62-63.

47. See *id.* at 61-62.

48. See *id.* at 64.

49. See *id.* at 55-58.

50. See NICOLAS SHUMWAY, *THE INVENTION OF ARGENTINA* 18 (1991).

ruler, allegiance to the Spanish Resistance, or independence, with independence offering the lure of free trade with Great Britain.<sup>51</sup> On May 25, 1810, prompted by the Spanish Resistance's loss of Seville to French forces, the Buenos Aires creole elite overthrew the viceroy, whom the Spanish Resistance had appointed the previous year, and established an independent government that claimed to rule in the name of Ferdinand VII.<sup>52</sup> By 1816, the pro-independence forces had solidified their position sufficiently to declare independence in spite of Ferdinand VII's return to the Spanish throne.<sup>53</sup>

Independence resulted in war and chaos. Spanish America's wars for independence from Spain lasted much longer than the United States' war for independence from Great Britain. The wars lasted from 1808 to 1824, and not only caused tremendous destruction, but also dislocated all previous political and trading arrangements.<sup>54</sup> Buenos Aires lost the hegemony it had enjoyed as the capital of the viceroyalty.<sup>55</sup> The City of Buenos Aires was too small and too distant to maintain effective authority over the Argentine interior, let alone over Bolivia, Paraguay, and Uruguay, all of which soon broke away. Argentina, with an area approximately the size of the United States east of the Mississippi, had a population of only 500,000 in 1816<sup>56</sup> and had no political group that could generate a military force large enough to control the entire expanse. Local *caudillos*—ranch owners who formed mounted militia with their own peons and those of allied or client ranch owners—seized power in the interior and acted as warlords over as much territory as their militia could control.<sup>57</sup>

Civil war plagued Argentina starting well before Bolivar's final victory over Spanish forces in Perú in 1824. In general terms, the battles were between *federalists*—rural *caudillos* who wished to maintain their autonomy—and *unitarians*—members of the professional and commercial class in Buenos Aires who sought a centralized system of

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51. See generally ROCK, *supra* note 12, at 73-76 (describing early stages of the Argentine independence movement).

52. See *id.* at 76.

53. See *id.* at 92.

54. See *id.* (analyzing effects of the wars).

55. See *id.* at 82; JAMES R. SCOBIE, ARGENTINA: A CITY AND A NATION 93-94 (2d ed. 1971).

56. See ROCK, *supra* note 12, at 114.

57. See John Lynch, *From Independence to National Organization*, in ARGENTINA SINCE INDEPENDENCE 15-18 (Leslie Bethel ed., 1993) [hereinafter Lynch, *From Independence to National Organization*]; SCOBIE, *supra* note 55, at 91-92 (discussing role and influence of local *caudillos* during first half of nineteenth century in Argentina); see also JOHN LYNCH, CAUDILLOS IN SPANISH AMERICA 1800-1850, at 3-9 (1992) [hereinafter LYNCH, CAUDILLOS] (describing characteristics and historical significance of *caudillos* in Spanish America).

government with themselves in charge.<sup>58</sup> The 1820s were marked by nearly continuous warfare until a federalist, General Juan Manuel de Rosas, established a dictatorship over the City and Province of Buenos Aires.<sup>59</sup>

The reign of General Rosas constituted the ultimate submission of Buenos Aires to *caudillo* government. He believed in order through authority and fear, and openly despised the liberal values that some of his unitarian opponents espoused.<sup>60</sup> When Rosas assumed the governorship of Buenos Aires in 1829, he did so on the condition that the provincial legislature formally grant him "the entire sum of public power."<sup>61</sup> In 1832, when the legislature hesitated at renewing such sweeping authority, he resigned rather than rule subject to any legal controls.<sup>62</sup> He assumed the governorship again in 1835 only after he had sufficient political control over the legislature to receive a new grant of absolute power.<sup>63</sup> The Decree of March 7, 1835 which appointed him announced:

Brigadier General Rosas is appointed Governor and Captain-General of the Province for the term of five years. The entire sum of public power is deposited in his hands, without further restrictions than the following:

1. He shall defend and protect the holy Catholic religion.
2. He shall sustain and defend the national cause of federation as proclaimed by all the people of the Republic.
3. This extraordinary power shall continue for such time as the Governor-elect shall judge to be necessary.

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58. See 1 CARLOS ALBERTO FLORIA & CÉSAR A. GARCÍA BELSUNCE, *HISTORIA DE LOS ARGENTINOS* 461-62 (1992).

59. The first battle occurred in early 1820, when federalist cavalry forces from the provinces of Santa Fé, Entre Ríos, and Corrientes, responding in part to Buenos Aires' river blockades, defeated Buenos Aires unitarians and took the city. They agreed to leave in return for 25,000 head of cattle, promises of free river navigation of the River Plate and its tributaries, and non-interference by Buenos Aires in their affairs. See ROCK, *supra* note 12, at 93-94. However, fighting between federalist caudillos permitted Buenos Aires, under unitarian control, to start blockading river traffic again the following year. See *id.* at 96-97. From 1825 through 1827, with Buenos Aires unitarian forces in control, Argentina fought an unsuccessful war with Brazil over control of Uruguay, and in 1827, General Manuel Dorrego, a federalist, displaced the then unpopular unitarians and became Governor of Buenos Aires. See *id.* at 102-03; 1 FLORIA & GARCÍA BELSUNCE, *supra* note 58, at 471-80. But after only a few months in power, Dorrego was overthrown and executed by a unitarian army under General Juan Lavalle, who in turn was defeated in 1829 by General Rosas. See *id.* at 480-86; JOHN LYNCH, *ARGENTINE DICTATOR, JUAN MANUEL DE ROSAS, 1829-1852*, at 38-41 (1981); ROCK, *supra*, at 102-03.

60. See LYNCH, *supra* note 59, at 154.

61. *Id.* at 48.

62. See *id.* at 49.

63. See *id.* at 49, 162.

4. He is to appear on the 11th and swear to exercise faithfully the power entrusted to him, in the way that he believes most suitable for the well-being of the province and the Republic in general.<sup>64</sup>

Rosas' power exceeded that of the most absolutist Spanish monarchs of the colonial period, and he used it to the fullest. Rosas legislated by decree and decided many judicial cases himself. His justices of the peace, who generally were restricted to handling minor matters, also were his political agents in their districts.<sup>65</sup> Starting in 1831, Rosas ordered the justices of the peace to create lists recording the names of opposition members along with the property they owned in their respective districts.<sup>66</sup> Property confiscations grew to the point that land became worthless, because no landowner, unless a friend of Rosas, had security of tenure.<sup>67</sup> Moreover, friends of Rosas had little need for the market, as they usually could acquire land through confiscations, sales under pressure, or grants of newly opened territories along the Indian frontier.<sup>68</sup> Rosas pronounced 2000 confiscations during his tenure, including 500 *estancias* and approximately one million head of cattle.<sup>69</sup> He eliminated all opposition press early in his regime,<sup>70</sup> and his terror squad, known as the *Mazorca*,<sup>71</sup> openly brandished long knives that were used to cut the throats of adversaries, frequently killing them in public and leaving their bodies in the street.<sup>72</sup>

The bloodshed diminished in the later years of the regime, as all opposition had been killed or had fled, and the lessons of earlier years made discipline easy to maintain.<sup>73</sup> Nevertheless, even in those

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64. *Id.* at 162-63 (translation by Lynch).

65. *See id.* at 169-71.

66. *See id.* at 212.

67. *See id.* at 66-67 (discussing prevalence and impact of land confiscations).

68. *See id.* at 56-60.

69. *See* LYNCH, *supra* note 59, at 56-60.

70. *See id.* at 158.

71. The formal name was "*Sociedad Popular Restauradora*" (Popular Society for Restoration). The name "*Mazorca*" comes from "*más horca*," more hanging. *See id.* at 215. *But see* WILLIAM HADFIELD, *EL BRASIL, EL RÍO DE LA PLATA Y EL PARAGUAY* 138 (1854) (Betty B. de Cabral trans., 1943) (citing British sources claiming that the name came from a torture technique using corn cobs). The terror reached its peak between 1838 and 1842, during and following a French naval blockade of Buenos Aires from 1838-40. *See* ROCK, *supra* note 12, at 109-10.

72. *See* LYNCH, *supra* note 59, at 216-46. Perhaps the most striking act of terror was the murder of the President of the Chamber of Deputies at his desk for allegedly sympathizing with unitarian enemies of the regime. *See id.* at 226. Rosas' victims were selected carefully, and many came from the educated elite. *See id.* at 209-46; L.S. ROWE, *THE FEDERAL SYSTEM OF THE ARGENTINE REPUBLIC* 37 (1921). The unitarians subsequently claimed that the death toll reached 5884, not counting individuals killed in battle or executed for desertion. On the other hand, the government newspaper *Gazeta Mercantil* claimed that the number did not exceed 500 during the period from 1829 through 1843. *See* LYNCH, *supra* note 59, at 242-43.

73. *See id.* at 209-10, 220, 223-24, 228, 235, 238-39, 241-46 (describing Rosas' strategic use of terror as mechanism of control).



more subdued times, John Pendleton, the newly-arrived *Chargé d' Affaires* from the United States, began his first Despatch to the Secretary of State on September 22, 1851, with this harsh indictment:

The government of Buenos Aires and of those states originally forming the Argentine Confederation—and not now in open rebellion against them, is I suppose the most simple and rigorous despotism in the entire world. . . .

[Rosas] unites in his own person all the powers of the state—makes the laws—executes them, controls in every possible respect the whole subject of the finances and currency . . . settles disputes as he pleases . . . causes to be shot any citizen of that State at his pleasure—and such is the terror of his system that no subject dare ever speak of it, much less complain.<sup>74</sup>

When Rosas was forced from power in February 1852, it was not due to internal dissent. Indeed, he maintained substantial support within the lower classes until the very end.<sup>75</sup> Known as a figure who governed and raised armies based on the strength of his character, his toughness made him a popular figure among the rural poor.<sup>76</sup> Most of his terror tactics were not aimed at the rural poor, but instead focused on keeping the commercial and professional elite in line.<sup>77</sup>

Rosas' defeat came at the hands of General Justo José de Urquiza, the *caudillo* of the Entre Ríos province, who led a combination of forces from the provinces of Entre Ríos, Santa Fé, and Corrientes, with support from Uruguay, Brazil, and a contingent of unitarian exiles.<sup>78</sup> Urquiza, a rich *estanciero* and longtime federalist, apparently was provoked in part by Rosas' decision in 1848 to close the River Plate system to upriver foreign traffic.<sup>79</sup> But he also justified his attack on Rosas, arguing that the time had come to give Argentina its first real national constitution.<sup>80</sup>

Until this time, Argentina had never had a successful experience with liberal governmental institutions even with a national government. Colonial rule, existing primarily to siphon wealth to Spain and offering no self-government, at least had offered stability and administrative recourse against capricious conduct by colonial

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74. John Pendleton, Despatch No. 1 to the Secretary of State, Buenos Aires, Sept. 22, 1851, *microformed on* Despatches From the United States Ministers to Argentina, 1817-1906, Microcopy No. 69, reel 9 (National Archives Microfilm Publications).

75. See LYNCH, *supra* note 59, at 305.

76. See *id.*; SHUMWAY, *supra* note 50, at 117-19.

77. See generally LYNCH, *supra* note 59, at 201-46 (describing the nature of Rosas' terror).

78. See 2 FLORIA & GARCÍA BELSUNCE, *supra* note 58, at 66-67.

79. See ROCK, *supra* note 12, at 112.

80. See BEATRIZ BOSCH, URQUIZA Y SU TIEMPO 167-69 (1971).

officials.<sup>81</sup> The previous four decades had provided only wars with Spain and Brazil, civil wars, and dictatorship. A National Constitution, sanctioned in December 1826, by a unitarian-dominated Congress, had provided for a powerful central government and a system of division of powers based on the U.S. Constitution,<sup>82</sup> but that Constitution was rejected almost immediately by most of the provinces.<sup>83</sup> An earlier unitarian Constitution drafted in 1819 never went into effect because of a federalist invasion of Buenos Aires.<sup>84</sup> Other provisional organic statutes and regulations, passed by congresses acting both as constitutional assemblies and as ordinary legislative bodies, never lasted more than two or three years.<sup>85</sup> Some zeal for reform certainly existed during the first years after independence,<sup>86</sup> with prohibition of slavery,<sup>87</sup> elimination of prior censorship of the press,<sup>88</sup> some protection against arbitrary searches and criminal prosecutions,<sup>89</sup> and the beginning of a sense of the need to limit executive power.<sup>90</sup> But the reformers' political dominance was limited to very short stretches of time.

The situation of the judiciary was particularly bleak. During the period of predominantly unitarian control of Buenos Aires immediately following independence, a court of appeals took over the judicial functions of the *audiencia*, including, in some periods, the critical

81. See *supra* notes 60-70 and accompanying text.

82. The text of the 1826 Constitution can be found in LAS CONSTITUCIONES DE LA ARGENTINA 1810/1972, at 309-23 (Arturo Enrique Sampay ed., 1975).

83. See 1 FLORIA & GARCÍA BELSUNCE, *supra* note 58, at 467-71.

84. See SANTOS PRIMO AMADEO, ARGENTINE CONSTITUTIONAL LAW: THE JUDICIAL FUNCTION IN THE MAINTENANCE OF THE FEDERAL SYSTEM AND THE PRESERVATION OF INDIVIDUAL RIGHTS 15-18 (1943). The text of the 1819 Constitution can be found in LAS CONSTITUCIONES DE LA ARGENTINA 1810/1972, *supra* note 82, at 269-79.

85. See generally 1 ASAMBLEAS CONSTITUYENTES ARGENTINAS 3-614 (Emilio Ravignani ed., 1937) (containing transcripts of the proceedings of all legislatures from 1813-1820 that had the power to draft a constitution as well as organic statutes and regulations); AMADEO, *supra* note 84, at 11-18 (describing Argentina's early attempts at writing a constitution).

86. See generally DAVID BUSHNELL, REFORM AND REACTION IN THE PLATINE PROVINCES, 1810-1852 (1983) (offering a study of the rise of liberalism in Argentina in the early years after independence, what the author describes as a conservative reaction under Rosas, and the return of liberalism in 1852).

87. See *Decreto de la Asamblea de 1813 (Feb. 4, 1813)*, in LAS CONSTITUCIONES DE LA ARGENTINA 1810/1972, *supra* note 82, at 126.

88. See *Decreto de la Libertad de Imprenta, art. 1 (Oct. 26, 1811)*, in LAS CONSTITUCIONES DE LA ARGENTINA 1810/1972, *supra* note 82, at 121.

89. See *Decreto de Seguridad Individual (Nov. 23, 1811)*, in LAS CONSTITUCIONES DE LA ARGENTINA 1810/1972, *supra* note 82, at 120 (offering guarantees of due process in criminal proceedings, arts. 1, 2 & 5, and placing restrictions on searches and seizures, arts. 3-4).

90. See *Reglamento de la división de poderes sancionado por la Primera Junta Conservadora (Oct. 22, 1811)*, in LAS CONSTITUCIONES DE LA ARGENTINA 1810/1972, *supra* note 82, at 109-13 (placing limits on the Executive); *Constitución de las Provincias Unidas en Sud América (Apr. 22, 1819)*, in LAS CONSTITUCIONES DE LA ARGENTINA 1810/1972, *supra* note 82, at 269-79 (establishing separate executive, legislative and judicial branches).

areas of customs disputes and other tax matters.<sup>91</sup> In most provinces between 1810 and 1852, as in Buenos Aires under Rosas, what justice existed was exercised personally by the local caudillo.<sup>92</sup>

## II. THE ALBERDIAN VISION

The Argentine Constitution of 1853/1860 emerged from the intellectual vision of a small group of Argentine thinkers who lived in exile during Rosas' reign and were inspired by the model of the United States. Unlike the U.S. Constitution, which enshrined governmental institutions that already had strong roots, the Argentine Constitution was a forward-looking vision of what its drafters wished Argentina to become. Juan Bautista Alberdi and Domingo Faustino Sarmiento, the two leaders of the group, had important academic and political differences, although both shared a basic constitutional vision consisting of free immigration, economic growth, and the full protection of the individual liberties necessary to encourage immigration and investment. The vision did not, however, include political rights, and regarded federalism—the burning political issue of the post-independence period—as a necessary evil that could be omitted from the model if it were possible politically.<sup>93</sup>

Alberdi (1810-1884) and Sarmiento (1811-1888) often have been associated with a literary circle formed in Buenos Aires in 1837, referred to as the Generation of '37, although Sarmiento lived in the province of San Juan in 1837 and participated only vicariously. The literary circle, led by poet Esteban Echeverría, sought inspiration in European and U.S. culture and believed that through the power of their ideas a small intellectual elite could transform the country.<sup>94</sup> The circle did not last very long with Rosas in power. Organized in May 1837, the circle met for conversation in a Buenos Aires bookstore. Starting in November 1837, the group published a literary magazine which although it prudently lauded Rosas and his policies, was shut down anyway in April 1838. Most of the circle left the country shortly thereafter. Alberdi and Sarmiento, as well as most group members, wrote the bulk of their work while in exile. In 1852, Alberdi provided the single most important statement of the Generation of '37's political vision in *Bases y puntos de partida para la organización política de la República Argentina* (Bases and Points of

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91. See ZORRAQUÍN BECÚ, *supra* note 38, at 216.

92. See *id.* at 215.

93. See *infra* notes 124-60 and accompanying text.

94. See generally SHUMWAY, *supra* note 50, at 126-32 (describing the Generation of '37 literary circle and its activities).

Departure for the Political Organization of the Argentine Republic),<sup>95</sup> probably the most politically influential book in Argentine history. His vision was fundamental at the Constitutional Convention of 1853, and was essentially realized in the following years.

Alberdi published *Bases* in Chile in May 1852,<sup>96</sup> and immediately sent a copy to General Urquiza,<sup>97</sup> the key figure for making any constitutional innovation a reality. *Bases* examined what Alberdi perceived to be the fundamental ills besetting Argentine society, offered a manifesto of fundamental constitutional principles to cure them, and in the second edition published later that year, included a draft constitution in an appendix. Urquiza responded to *Bases* enthusiastically in a public letter<sup>98</sup> and immediately ordered the printing of an edition in Argentina.<sup>99</sup> Sarmiento called it a "monument," "our banner, our symbol" and forecast that "it will become the Argentine decalogue."<sup>100</sup>

*Bases* argued that an Argentine constitution should not be limited to a legal framework incorporating the status quo because the status quo in Spanish America was a failure.<sup>101</sup> "[F]or these republics of one day, the future is everything, the present, hardly anything."<sup>102</sup> Thus Alberdi's constitution unavoidably was a project to remake the country. "There are constitutions of transition and creation, and definitive constitutions which conserve. The [constitutions] which America asks for today are of the first type; they are for exceptional times."<sup>103</sup> Alberdi's goal was prosperity,<sup>104</sup> and he argued that to realize the goal, a constitution must seek to "organize and establish the great practical measures to take emancipated America out of the dark and subordinate state in which it finds itself."<sup>105</sup>

Alberdi offered a straightforward program. With only one million inhabitants, Argentina was an empty, under-utilized expanse with little agriculture, no railroads, and no vibrant cities except for Buenos

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95. See JUAN BAUTISTA ALBERDI, *BASES Y PUNTOS DE PARTIDA PARA LA ORGANIZACIÓN POLÍTICA DE LA REPÚBLICA ARGENTINA* (1852) [hereinafter ALBERDI, *BASES*], in 3 *OBRAS COMPLETAS DE JUAN BAUTISTA ALBERDI* 371 (Buenos Aires, La Tribuna Nacional 1886).

96. See *id.* at 383.

97. See BOSCH, *supra* note 80, at 259; 1 JORGE M. MAYER, *ALBERDI Y SU TIEMPO* 529 & n.215 (1973).

98. See BOSCH, *supra* note 80, at 259; 1 MAYER, *supra* note 97, at 531.

99. See 1 MAYER, *supra* note 97, at 541.

100. *Id.* at 552.

101. See ALBERDI, *BASES*, *supra* note 95, at 426.

102. *Id.* at 405.

103. *Id.* at 410.

104. See *id.* at 409.

105. *Id.*

Aires.<sup>106</sup> Facilitating progress required encouraging European immigration to fill the empty expanses and improve the cultural level of the country, permitting free commerce, and attracting the investment needed to build railroads and establish industry.<sup>107</sup>

He argued that immigrants could be attracted to Argentina by offering them ample individual liberty. The rights conferred on immigrants would include: tolerance of their religious practices,<sup>108</sup> legislation allowing marriage of persons of different religions,<sup>109</sup> freedom of movement within Argentina,<sup>110</sup> equal rights in private law matters,<sup>111</sup> access to the lower ranks of public employment,<sup>112</sup> the right to property,<sup>113</sup> freedom to work and engage in industry,<sup>114</sup> freedom of commerce,<sup>115</sup> easy transfer of property,<sup>116</sup> and an efficient judicial system to provide redress.<sup>117</sup> The model for this program was the State of California, which in the few years since it had been seized by the United States from Mexico had achieved spectacular growth through the opportunities it offered to newcomers—opportunities unavailable under Mexican rule.<sup>118</sup> In the draft constitution included as an appendix to *Bases*, Alberdi afforded both citizens and foreigners essentially the same rights as those of the U.S. Bill of Rights, but with a greater emphasis on economic liberties than in the U.S. Constitution.<sup>119</sup>

Alberdi further extended his argument for protection of civil liberties to encourage growth in *Sistema económico y rentístico de la Confederación Argentina según su Constitución de 1853* (Economic and Tax System of the Argentine Confederation under the Constitution of 1853),<sup>120</sup> published two years after *Bases*. In *Sistema económico*, all individual liberties in the 1853 Constitution were described in terms

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106. See *id.* at 451, 456.

107. See *id.* at 409, 426-38. Reduced to a slogan, his message was "to govern is to populate." *Id.* at 527.

108. See *id.* at 430, 449-51, 455.

109. See *id.* at 440, 451.

110. See *id.* at 431-32.

111. See *id.* at 452.

112. See *id.*

113. See *id.*

114. See *id.*

115. See *id.* at 455.

116. See *id.* at 440, 441-42.

117. See *id.* at 440.

118. See *id.* at 403, 411-13, 453, 457.

119. See *id.* at 561-63 (arts. 16-20).

120. JUAN BAUTISTA ALBERDI, *SISTEMA ECONÓMICO Y RENTÍSTICO DE LA CONFEDERACIÓN ARGENTINA SEGÚN SU CONSTITUCIÓN DE 1853* (1854) [hereinafter ALBERDI, *SISTEMA ECONÓMICO*], in 4 *OBRAS COMPLETAS DE JUAN BAUTISTA ALBERDI* 143 (Buenos Aires, La Tribuna Nacional 1886).

of the contribution they make to economic growth. For example, Alberdi argued that a free press is required because the press itself is a type of industry, because it improves productive techniques by spreading knowledge, and because it acts as a watchdog "to denounce and combat . . . the errors and abuses which hinder industry."<sup>121</sup> Personal security is required because without it there can be no confidence in the promises made by a merchant who might be attacked at any time and thrown into prison, no agricultural production or mining if workers might suddenly be pressed into army service, and no confidential business dealings if private correspondence might be opened.<sup>122</sup> In the political economy of Alberdi's Constitution, individual liberties were a means for achieving economic prosperity, the essential mission of the Constitution,<sup>123</sup> rather than ends in themselves.<sup>124</sup>

At their heart, both *Bases* and *Sistema económico* are adaptations of liberal, laissez faire capitalism to an empty land populated largely by Indians and gauchos too uncouth (or perhaps too free-spirited?) to form a stable workforce. Significantly, the vision did not include free suffrage or a widening of the ranks of those wielding political power.<sup>125</sup> In *Bases*, Alberdi argued that "[i]t is utopian, it is a dream and pure falsity to think that our hispanic-american race as formed by the hands of our dreadful colonial past can today realize a representative republic" when in the entire world only the United States and the Swiss cantons have succeeded in doing so.<sup>126</sup> In *Sistema económico*, Alberdi carefully distinguished "economic liberty," which all are capable of exercising, from "political liberty," which "requires education, if not science" and affects the future of others, not just oneself.<sup>127</sup> "I do not participate in that fanaticism, inexperienced when not hypocritical, which asks for abundant political liberties for peoples who only know how to employ them to create their own tyrants."<sup>128</sup> He sought only the individual liberties necessary for "those endeavoring to populate, enrich and civilize these countries, not the political liberties, an instrument of agitation and ambition in our hands, never longed for or useful to the foreigner, who comes to

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121. *Id.* at 159.

122. *See id.* at 168.

123. *See id.* at 148-52, 525, 527.

124. *See id.* at 175.

125. *See* NATALIO R. BOTANA, *EL ORDEN CONSERVADOR: LA POLÍTICA ARGENTINA ENTRE 1880 Y 1916*, at 50-54 (1977).

126. ALBERDI, *BASES*, *supra* note 95, at 523.

127. *See* ALBERDI, *SISTEMA ECONÓMICO*, *supra* note 120, at 150.

128. *Id.* at 188.

us seeking well-being, family, dignity and peace."<sup>129</sup> Alberdi's approach toward political rights is central to understanding the rules of mutual security that actually were established in the Argentine Constitution, because as will be seen, political rights, although formally part of the Constitution of 1853/1860, were not operative as rules of mutual security until at least 1912.<sup>130</sup>

Like Alberdi in *Bases*, Sarmiento also wrote a book in the early 1850's directed in part toward General Urquiza and his aspiration to offer the country a constitution.<sup>131</sup> Titled *Argirópolis*, some aspects of this book are spur of the moment fantasy from a writer who writes provocatively but leaves loose ends. Thus, his proposal to move Argentina's capital to Martín García, a deserted island in the middle of the River Plate, safely can be ignored<sup>132</sup>—as it was by Sarmiento himself in his later work. Like Alberdi two years later, however, Sarmiento argued that Argentina must imitate the progress of the United States,<sup>133</sup> and particularly of California,<sup>134</sup> to become the United States of South America.<sup>135</sup> He argued that Argentina needed a national government "which proposes as its sole objective to devote itself to populating the country and creating riches."<sup>136</sup> Argentina's present population would need five hundred years to fill up its empty spaces through reproduction and would only fill them with more of the same—people lacking in knowledge and industry.<sup>137</sup> The European immigrant would bring his arts and sciences with him.<sup>138</sup> Commerce needed to be freed by eliminating internal tariff barriers<sup>139</sup> and by opening the interior to international trade.<sup>140</sup> Foreign capital could be attracted to build canals and railroads if Argentina became a more stable environment, thereby

129. *Id.*

130. See *infra* notes 402-12, 427 and accompanying text.

131. Written in Chile in 1850 when Urquiza was beginning to assert his independence from Rosas, *Argirópolis* begins by indicating to Urquiza that he, Urquiza, is the man who can challenge Rosas and establish a national constitution, and therefore, he should pay careful attention to the ideas that follow. See DOMINGO FAUSTINO SARMIENTO, *ARGIRÓPOLIS* (1896) [hereinafter SARMIENTO, *ARGIRÓPOLIS*], in 13 *OBRAS COMPLETAS DE SARMIENTO* 17-18 (Editorial Luz del Día, 1950).

132. See *id.* at 67-69. He combines this with a recommendation that Paraguay and Uruguay rejoin Argentina, a recommendation that was hardly likely to be acceptable to Paraguay or Uruguay. See *id.*

133. See *id.* at 17, 76, 91.

134. See *id.* at 73, 101.

135. See *id.* at 103.

136. *Id.* at 93.

137. See *id.* at 91.

138. See *id.* at 93.

139. See *id.* at 56.

140. See *id.* at 64-65, 83.

limiting the risks capital would face.<sup>141</sup> Sarmiento did not discuss individual liberties in depth in *Argirópolis*, but he clearly intended that they be part of any future constitution.<sup>142</sup> In later work he would describe liberty as a type of "capital," arguing that it was through the liberty offered to their citizens that the great economic powers achieved their success.<sup>143</sup>

Sarmiento also shared Alberdi's preference for government by men of reason and not by Argentina's uneducated populace.<sup>144</sup> In newspaper articles written in the 1840s, he advocated "democracy by national intelligence and not by national will."<sup>145</sup> In fact, in a later work he argued that the Constitution did not exist for the Argentine masses, because they were not prepared to understand a liberal constitution.<sup>146</sup> The bulk of the population only needed to deal with ordinary civil and criminal matters, the judges who decide their cases, and the police.<sup>147</sup> "It is the educated classes that need a Constitution which assures freedom of action and thought, the press, public speech, and property," because unlike the masses of the population, these classes can "understand the rules of the institutions which they adopt."<sup>148</sup>

141. See *id.* at 101-02.

142. See *id.* at 102.

143. See DOMINGO FAUSTINO SARMIENTO, COMENTARIOS DE LA CONSTITUCIÓN DE LA CONFEDERACIÓN ARGENTINA (1853) [hereinafter SARMIENTO, COMENTARIOS], in 8 OBRAS COMPLETAS DE SARMIENTO 101 (Editorial Luz del Día, 1950); see also DOMINGO FAUSTINO SARMIENTO, *Principios y táctica de la Prensa*, in EL NACIONAL, Mar. 7, 1856, reprinted in 25 OBRAS COMPLETAS DE SARMIENTO 142 (Editorial Luz del Día, 1950).

144. See SARMIENTO, *Principios y táctica de la Prensa*, *supra* note 143, at 55-58.

145. *Id.*

146. See SARMIENTO, COMENTARIOS, *supra* note 143, at 29.

147. See *id.*

148. *Id.* Sarmiento's best known book is DOMINGO FAUSTINO SARMIENTO, FACUNDO: CIVILIZACIÓN Y BARBARIE EN LA REPÚBLICA ARGENTINA (1845) [hereinafter SARMIENTO, FACUNDO], in 7 OBRAS COMPLETAS DE SARMIENTO 14 (Editorial Luz del Día, 1950). In the book, he describes Argentina's civil wars as a battle between the European culture of Argentina's cities and the gaucho barbarism of the countryside, and recounts the bloody exploits of Juan Facundo Quiroga, a leading federalist *caudillo* and ally of Rosas who was murdered in 1835. The gaucho, used by Sarmiento as a term to define the mass of the population in the countryside (and accordingly the country), does not work and seeks to live free of all rules and government. See *id.* at 33, 48. Life in the outdoors "has developed the physical qualities of the gaucho, without any qualities of intelligence." *Id.* at 33. Even if the unitarians had succeeded in killing Rosas before he came to power, the countryside would have discovered another, equally barbarous leader. See *id.* at 125. When Rosas returned to the governorship of Buenos Aires in 1835 with a new grant of absolute power, "there never was a government more popular, more sought after, or better supported by [public] opinion." *Id.* at 192; see SHUMWAY, *supra* note 50, at 118-19. Sarmiento argued that Argentina's useless gaucho population needed to be replaced with European immigrants, see SARMIENTO, FACUNDO, *supra*, at 238-39, not placed in control of the government, see Nicolas Shumway, *Sarmiento and the Narrative of Failure*, in SARMIENTO AND HIS ARGENTINA 51, 54-55 (Joseph T. Criscenti ed., 1993).



Alberdi and Sarmiento's vision of federalism is harder to establish, but both were frustrated unitarians at heart. Alberdi opted for a federal system based on the U.S. Constitution,<sup>149</sup> but only because geographical distances were too great<sup>150</sup> and local bases of power too strong to allow a unitary system of government.<sup>151</sup> Alberdi also insisted that historically "unity is not the point of departure, [but] it is the final achievement of governments."<sup>152</sup> The unitarians, who failed in their 1826 attempt to establish a unitary system of government, did not present "a bad principle, but a principle impractical in the country in the period and manner that they desired."<sup>153</sup> In Alberdi's view, they were not wrong, just too precocious.<sup>154</sup> Further, Alberdi would have been a Hamiltonian in the United States. He expected the nation to embark on great projects, and in his draft constitution indicated that Congress shall:

Provide for the prosperity, defense and security of the country; for the advancement and well-being of the Provinces, stimulating the progress of education and industry, immigration, the construction of railroads and navigable canals, the colonization of empty lands and those inhabited by Indians, the establishment of new industries, the importation of foreign capital, [and] the exploration of navigable rivers, through laws directed towards these ends and through the concession of temporary privileges and enticements for progress.<sup>155</sup>

Alberdi does not desire to limit the powers of the federal government merely to temporarily permit a structure allowing provincial government.<sup>156</sup>

In *Argirópolis*, Sarmiento is less precise but little different. A federal system is necessary not because of its merits, but because the unitarians have failed politically.<sup>157</sup> Sarmiento called for Argentina to copy U.S. federalism,<sup>158</sup> but never suggested that any limits be placed on the federal government's powers and called for the federal government to contribute to the country's growth.<sup>159</sup> He certainly did not place much faith in the administrative capacity of the

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149. See ALBERDI, BASES, *supra* note 95, at 470.

150. See *id.* at 460-61.

151. See *id.* at 461-62, 463-67.

152. *Id.* at 462.

153. *Id.*

154. See *id.*

155. *Id.* at 570, art. 67, § 3. This section later became incorporated into the CONST. ARG. OF 1853 art. 64, § 16, and the CONST. ARG. OF 1860 art. 67, § 16.

156. See BOTANA, *supra* note 124, at 358-59.

157. See SARMIENTO, ARGIRÓPOLIS, *supra* note 131, at 56.

158. See *id.* at 102.

159. See *id.* at 101.

provinces. In other writings, he argued that most provinces in the interior of the country were too backward even to administer their own judicial systems.<sup>160</sup> Like Alberdi, he saw federalism as a political necessity given the provinces' aversion toward Buenos Aires. Although he appreciated the success of federalism in the United States, his basic political tendencies were unitarian and his conduct, once he began to hold posts in the federal government, was consistently unitarian.<sup>161</sup>

### III. THE GENESIS OF THE ARGENTINE CONSTITUTION OF 1853/1860

In 1852, General Urquiza commanded an army of 30,000 men, the largest army hitherto assembled in Argentina.<sup>162</sup> He saw the establishment of a national constitution as his fundamental task, but it took ten years to establish the national unity necessary to make the constitution a national reality. Two features would mark the process. First, Buenos Aires would move from occupation by Urquiza's army following the defeat of Rosas in 1852 to control of the national government in 1861. This change would set back the cause of federalism permanently. Second, although the Argentine Constitution increasingly would come to look like that of the United States, the effective rules of mutual security would become those of Alberdi's vision: ample individual liberties, but only limited federalism and little protection of political rights.

#### A. *The Agreement of San Nicolás and the Constitutional Convention of 1853*

In September 1852, only seven months after defeating Rosas, General Urquiza lost control of the Province of Buenos Aires. Many of the exiled unitarians who had accompanied him rejected him after his victory for having once been Rosas' lieutenant, accusing him of being too similar to the federalist *caudillo* he replaced.<sup>163</sup> Sarmiento was perhaps the most vociferous in his condemnation.<sup>164</sup> Some of

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160. See SARMIENTO, *COMENTARIOS*, *supra* note 143, at 225.

161. See DARDO PÉREZ GUILHOU, *SARMIENTO Y LA CONSTITUCIÓN* 76-79 (1989) (including an excellent summary of Sarmiento's writings on federalism); see also CARLOS OCTAVIO BUNGE, *SARMIENTO (ESTUDIO BIOGRÁFICO Y CRÍTICO)* 134 (1926); ALLISON WILLIAMS BUNKLEY, *THE LIFE OF SARMIENTO* 406, 472-76 (1969) (noting Sarmiento's unitarian tendencies when in federal government).

162. See 2 FLORIA & GARCÍA BELSUNCE, *supra* note 58, at 67.

163. See *id.* at 75-76.

164. See DOMINGO FAUSTINO SARMIENTO, *CARTA DE YUNGAY* (1852) [hereinafter SARMIENTO, *CARTA DE YUNGAY*], in 15 *OBRAS COMPLETAS DE SARMIENTO* 21, 28, 34-36, 38 (Editorial Luz del Día, 1950). This open letter forms part of a collection known as *Las ciento y una*. See *id.*

Urquiza's actions showed a certain sympathy towards Rosas. When Urquiza's army entered the city, he limited executions to a handful of high ranking officers and a regiment that revolted.<sup>165</sup> Urquiza refused to confiscate Rosas' property,<sup>166</sup> and with the help of the British Ambassador, Rosas himself escaped to Britain aboard a British naval vessel.<sup>167</sup> Further, in a move with enormous symbolic importance, Urquiza encouraged the population to wear a scarlet ribbon—the traditional symbol of Argentine federalism—emphasizing that despite opposing Rosas, he remained a federalist.<sup>168</sup>

At the core of the liberal exiles' objections, however, was the concern that Urquiza represented *caudillos* from the interior provinces who sought to retain their own power as a condition of national unity, whereas they wished to control the nation themselves from Buenos Aires.<sup>169</sup> Further, and of concern not so much to the former exiles as to Buenos Aires' *estancieros* and trading interests, Urquiza actively sought a national constitution that would federalize the City of Buenos Aires as the nation's capital and would place its customs revenues in the hands of the national government.<sup>170</sup>

In May 1852, Urquiza met with some of the leading political figures of the Province to test their reaction to his plan to federalize the City of Buenos Aires, a test balloon that met strong resistance.<sup>171</sup> In June of that same year, he held a summit with governors and representatives from all the provinces that resulted in the Agreement of San Nicolás.<sup>172</sup> This Agreement had two important aspects. First, it established Urquiza with the title of Provisional Director of the Argentine Confederation. Although the provinces previously had designated him as responsible for handling the nation's foreign

165. See BOSCH, *supra* note 80, at 221, 228; JAMES R. SCOBIE, *LA LUCHA POR LA CONSOLIDACIÓN DE LA NACIONALIDAD ARGENTINA, 1852-62*, at 25-26 (2d ed. 1964); SHUMWAY, *supra* note 50, at 170-71.

166. See SCOBIE, *supra* note 55, at 53.

167. See *id.* at 17-23.

168. See *Proclamation of General Urquiza to the People of Buenos Aires (Feb. 21, 1852)*, in BEATRIZ BOSCH, *PRESENCIA DE URQUIZA 118-20* (1953); SCOBIE, *supra* note 165, at 26-27. Sarmiento naturally joined the protests against its use. See SARMIENTO, *CARTA DE YUNGAY*, *supra* note 164, at 26.

169. See John Pendleton, Despatch No. 34 to the Secretary of State, Buenos Aires, June 24, 1853, *microformed on* Despatches From the United States Ministers to Argentina, 1817-1906, *supra* note 74 (noting that Buenos Aires wanted a Constitution with which it could rule the country); 2 FLORIA & GARCÍA BELSUNCE, *supra* note 58, at 75 (noting that this "nationalist" line was led by Bartolomé Mitre). Mitre was one of the most prominent of the exiles who joined Urquiza's army, and led Buenos Aires' military forces in all of its subsequent battles with Urquiza. See ROCK, *supra* note 12, at 122; SHUMWAY, *supra* note 50, at 188-90.

170. See BOSCH, *supra* note 80, at 247; SCOBIE, *supra* note 165, at 34.

171. See SCOBIE, *supra* note 165, at 34-35.

172. See *id.* at 35-37. For a discussion of what occurred at the Congress and its results, see generally *id.* at 35-39.

affairs, as the temporary national Executive he was now granted the authority to quash any disorder.<sup>173</sup> Second, and more important, it provided for a Constitutional Convention that would draft a Constitution without any subsequent ratification by the provinces,<sup>174</sup> with decisions at the Convention made by majority vote,<sup>175</sup> and with all provinces at the Convention receiving equal representation.<sup>176</sup> As the largest province in the country and the one with the most to lose from a Constitutional Convention where each province had one vote, Buenos Aires' reaction was predictable. The treaty, which Urquiza's puppet Governor of the Province had signed,<sup>177</sup> was rejected vociferously by the provincial legislature and led to a successful provincial coup by anti-Urquiza forces.<sup>178</sup> Rather than enter into a new battle with Buenos Aires, however, Urquiza decided to continue with the plans for the Constitutional Convention, in the hope that Buenos Aires eventually might be coaxed into participating.<sup>179</sup> The Convention began in November 1852, without delegates from the Province of Buenos Aires, and in the midst of a war by proxy between Urquiza and the Province.<sup>180</sup> During most of the Convention, dissident rural Buenos Aires forces, with military support from Urquiza, engaged in a failed blockade of the City of Buenos Aires.<sup>181</sup>

The absence of the Province of Buenos Aires from the Constitutional Convention probably had minimal impact on the product that resulted. The 1853 text conflicted with Buenos Aires' interests only in its declaration of the City of Buenos Aires as a federal capital forming an independent federal district<sup>182</sup> and its nationalization of customs revenues.<sup>183</sup> If anything, the absence of the Province of Buenos Aires motivated the delegates to adopt a more unitarian text than otherwise, so that the Confederation would be better able to stand up to Buenos Aires.<sup>184</sup> Roughly two-thirds of the text used the

173. See *Acuerdo de San Nicolás de los Arroyos*, arts. 12-18, in *LAS CONSTITUCIONES DE LA ARGENTINA 1810/1972*, *supra* note 82, at 335, 337-38.

174. See *id.* art. 12, at 337.

175. See *id.* art. 6, at 336.

176. See *id.* art. 5, at 336.

177. See SCOBIE, *supra* note 165, at 40-48.

178. See *id.* at 56-58.

179. See *id.* at 60.

180. See SCOBIE, *supra* note 55, at 104.

181. See SCOBIE, *supra* note 165, at 56-95 (offering detailed description of relations between Urquiza and Province of Buenos Aires between September 1852 and July 1853).

182. CONST. ARG. [CONSTITUCIÓN DE LA CONFEDERACIÓN ARGENTINA, arts/ 3. 34. 42 [hereinafter CONST. ARG. OF 1853]].

183. CONST. ARG. OF 1853 art. 64(1).

184. For example, during a debate at the Constitutional Convention regarding whether it was appropriate to adopt a constitution when the country was so divided, Juan Seguí, a delegate from the Province of Santa Fé, argued that a National Constitution was needed to prevent

same approach as Alberdi's draft, and approximately two-thirds originated in the United States' Constitution—often by way of Alberdi.<sup>185</sup> With respect to a number of individual liberties, the 1853 Constitution looked to France's Declaration of the Rights of Man and Citizen of 1789.<sup>186</sup>

Like the U.S. Constitution, the 1853 text provided for a federal system of government<sup>187</sup> with the power of the federal government divided between a President,<sup>188</sup> a Judiciary,<sup>189</sup> and a bicameral Congress,<sup>190</sup> with a Senate having equal representation for each province<sup>191</sup> and a House of Deputies having representation based proportionately on population.<sup>192</sup> Unlike the U.S. Constitution, there was no separation of Church and State,<sup>193</sup> the Executive enjoyed comparatively stronger powers<sup>194</sup> but sat for only a single consecutive six-year term,<sup>195</sup> and the federal government possessed broader authority vis-à-vis the states and explicit authorization to take over provincial governments in the case of unrest.<sup>196</sup> The 1853 Constitution's only draconian aspect was a grant of authority to the President to declare a state of siege to suspend most constitutional

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division and to show Buenos Aires what the Confederation was capable of. See Congreso General Constituyente de la Confederación Argentina [hereinafter Constitutional Convention of 1853], Session of Apr. 20, 1853, in 4 ASAMBLEAS CONSTITUYENTES ARGENTINAS, 1813-1893, at 467, 468-87 (Emilio Ravignani ed., 1937) [hereinafter 4 ASAMBLEAS CONSTITUYENTES ARGENTINAS]; see also SCOBIE, *supra* note 165, at 104 (offering general observation that the threat from Buenos Aires probably caused the provinces to accept greater federal authority than they would have under other circumstances).

185. Alberdi's draft and the Argentine Constitution of 1853 may be conveniently compared in LAS CONSTITUCIONES DE LA ARGENTINA 1810/1972, *supra* note 82, at 341-53 (Alberdi's draft), 358-72 (Constitution of 1853). An article by article account of similarities and differences among Alberdi's draft, the U.S. Constitution, and the Argentine Constitution of 1853 would be a waste of space. Many scholars have offered comparisons of the three texts. See, e.g., AMADEO, *supra* note 84, at 28-35; ALBERTO PADILLA, LA CONSTITUCIÓN DE ESTADOS UNIDOS COMO PRECEDENTE ARGENTINO 103-23 (1921); 1 SEGUNDO V. LINARES QUINTANA, TRATADO DE LA CIENCIA DEL DERECHO CONSTITUCIONAL 419, 427-34 (1977); JORGE REINALDO VANOSSI, LA INFLUENCIA DE LA CONSTITUCIÓN DE LOS ESTADOS UNIDOS DE NORTEAMÉRICA EN LA CONSTITUCIÓN DE LA REPÚBLICA ARGENTINA 10-11, 73, 74-75, 81, 107 (1976).

186. See VANOSSI, *supra* note 184, at 107. Compare Declaration of the Rights of Man and Citizen of 1789 art. 5, with CONST. ARG. OF 1853 art. 19.

187. See CONST. ARG. OF 1853 arts. 1, 5, 101-107.

188. See *id.* arts. 71-83.

189. See *id.* arts. 91-100.

190. See *id.* arts. 32-70.

191. See *id.* art. 42.

192. See *id.* arts. 33-35.

193. See *id.* art. 2.

194. See *id.* art. 66 (incorporating line item veto); art. 83, § 10 (allowing cabinet ministers to be named without subsequent Senate consent); art. 83, § 19 (granting president power to announce a state of siege, with the consent of the Senate required if in session); art. 83, § 20 (authorizing detention of persons threatening public tranquility).

195. See *id.* art. 74.

196. See *id.* art. 6.

rights in the face of external attack or internal disorder, with the consent of the Senate required if it was in session,<sup>197</sup> and authority for the President to detain individuals who threaten public tranquility for up to ten days while waiting for a sitting Senate to declare a state of siege.<sup>198</sup> The list of individual liberties protected is more extensive than that of the U.S. Constitution and places particularly heavy emphasis on economic rights.<sup>199</sup> Under the framework, foreigners enjoyed equal rights<sup>200</sup> and freedom from military service.<sup>201</sup>

Most of the delegates to the Constitutional Convention of 1853 were liberals who shared the Alberdian vision and its admiration for the United States. Although Sarmiento and many other liberals who recently had returned from exile allied themselves with the interests of Buenos Aires, enough remained loyal to Urquiza to help him develop a progressive document. Alberdi missed the Convention, remaining in Chile as Urquiza's ambassador<sup>202</sup> and defending Urquiza against attacks by Sarmiento in the Chilean press.<sup>203</sup> However, the two key draftsmen at the Convention, Juan María Gutierrez and José Benjamín Gorostiaga, were likewise indistinguishable from the liberals allied with Buenos Aires in their political values and fascination with the United States. Gutierrez, a novelist and critic, attended high school with Alberdi,<sup>204</sup> actively participated in the activities of the Generation of '37 literary circle,<sup>205</sup> and later traveled with Alberdi in exile in Europe.<sup>206</sup> Gorostiaga was much younger than the members of the Generation of '37, but certainly read English<sup>207</sup> and was influenced heavily by U.S. constitutional practice.<sup>208</sup> Even Urquiza himself was captivated by the United

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197. See *id.* arts. 23, 83, § 19.

198. See *id.* art. 83, § 20.

199. See *id.* arts. 14-19.

200. See *id.* art. 20.

201. See *id.* art. 21 (providing that, even if they become citizens, foreigners enjoy a ten-year exemption from military service).

202. See 1 MAYER, *supra* note 97, at 557.

203. See *id.* at 557-58. Alberdi's best known defense of Urquiza during the Constitutional Convention was a series of public letters known as the "*Cartas quillotanas*," written at his home in Quillota, Chile. See JUAN BAUTISTA ALBERDI, *Cartas sobre la prensa y la política militante de la República Argentina* (1853), in 4 OBRAS COMPLETAS DE JUAN BAUTISTA ALBERDI 5 (Buenos Aires, La Tribuna Nacional 1886); see also BOTANA, *supra* note 125, at 340; SHUMWAY, *supra* note 50, at 182-86 (offering analysis of the debate).

204. See SHUMWAY, *supra* note 50, at 85.

205. See *id.* at 129; 1 MAYER, *supra* note 97, at 214-15.

206. See 1 MAYER, *supra* note 97, at 355.

207. See JORGE REINALDO A. VANOSSI, *LA INFLUENCIA DE JOSÉ BENJAMÍN GOROSTIAGA EN LA CONSTITUCIÓN ARGENTINA Y SU JURISPRUDENCIA* 27 (1970).

208. At the Constitutional Convention, he was the first to emphasize the drafting committee's use of the U.S. Constitution as a model. See Constitutional Convention of 1853, Session of Apr. 20, 1853, *supra* note 184, at 468; see also VANOSSI, *supra* note 207, at 26 (noting

States and its history.<sup>209</sup> He looked to George Washington as his model<sup>210</sup> and appointed his eldest son the Ambassador to the United States.<sup>211</sup> According to John Pendleton, the U.S. Chargé d' Affaires, he received privileged treatment compared with other diplomatic representatives because of Urquiza's eagerness to approximate the United States' model of government.<sup>212</sup> He accompanied Urquiza to the summit of Governors at San Nicolás,<sup>213</sup> was given the first copy of the resulting agreement,<sup>214</sup> and later received one of the first copies of the 1853 Constitution.<sup>215</sup>

The delegates to the Constitutional Convention of 1853 clearly were aware both that they were drafting a forward-looking document to create a system of government that had not existed previously in Argentina and that the United States, as a successful constitutional model, could provide authority for their endeavor. There was surprisingly little explicit discussion of Alberdi or his vision, given the extent to which the Drafting Committee and Convention relied on his draft. During the debate on freedom of religion, Gutiérrez responded to conservative critics from an Alberdian perspective, arguing that

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that Gorostiaga was familiar with U.S. constitutional law).

209. See John Pendleton, Despatch No. 8 to the Secretary of State, Buenos Aires, Mar., 1852, *microformed on Despatches From the United States Ministers to Argentina, 1817-1906*, *supra* note 74. This letter from the U.S. Chargé d' Affaires notes:

Should Genl Urquiza continue at the head of affairs, he will exercise a controlling influence, and will endeavor to conform the work as near as possible to the model of our own government. He says so at any time and to any body, without reserve—and his preference for North Americans is undisguised—expressed in the most open manner.

*Id.*

210. Urquiza often compared himself to George Washington and was compared to Washington in correspondence that sought to flatter him. See BOSCH, *supra* note 168, at 286 (quoting letter from Urquiza to Mitre in 1860 which read, "Without pretending in any way to merit the glories of Washington I very much wish and endeavor to imitate his example."); *id.* at 205, 246, 254, 367, 438, 463 (noting that Washington's portrait hung in Urquiza's living room), 673 (citing correspondence). When the Constitutional Convention of 1853 sent the completed Constitution to Urquiza and wished to praise him, it wrote: "The Congress confers upon you the glory of Washington. You can aspire to no other." Constitutional Convention of 1853, Session of Apr. 20, 1853, *supra* note 184, at 468.

211. See John Pendleton, Despatch No. 13 to the Secretary of State, (Buenos Aires, July 9, 1852), *microformed on Despatches From the United States Ministers to Argentina, 1817-1906*, *supra* note 74.

212. See John Pendleton, Despatch No. 10 to the Secretary of State, (Buenos Aires, Apr. 28, 1852), *microformed on Despatches From the United States Ministers to Argentina, 1817-1906*, *supra* note 74.

213. See *id.*

214. See John Pendleton, Despatch No. 11 to the Secretary of State, (Buenos Aires, June 1, 1852), *microformed on Despatches From the United States Ministers to Argentina, 1817-1906*, *supra* note 74.

215. See John Pendleton, Despatch No. 30 to the Secretary of State, (Buenos Aires, June 1, 1853), *microformed on Despatches From the United States Ministers to Argentina, 1817-1906*, *supra* note 74.

it would be impossible to attract foreigners without allowing them to practice their religion.<sup>216</sup> His opponents, alarmed by this aspect of the Alberdi draft, indicated that the people of their provinces were distressed by Alberdi's emphasis on religious freedom<sup>217</sup> and that Catholic immigration could satisfy Argentina's needs.<sup>218</sup> Other references to Alberdi are minimal.<sup>219</sup> However, as even the above discussion of religious freedom and immigration indicates, the delegates to the Convention understood that a plan of action for the future was at stake, not the consolidation of an existing system. This focus on hopes for the future surfaced most clearly in a debate generated at the beginning of the Convention when Facundo Zuviría, the President of the Convention, asserted that it was inappropriate to draft a Constitution with Buenos Aires still separated from the other provinces, with an uneducated populace unprepared for liberal government, and with the country facing constant hostilities both with Buenos Aires and within the provinces.<sup>220</sup> Gutiérrez, however, responded that "[t]he Constitution is the solution for these evils: it is the best element for order because it indicates to everyone their duties and their rights."<sup>221</sup> If one waits, "it is like waiting for the sick patient to recover before giving him medical treatment."<sup>222</sup> If the people lack republican customs, then it is necessary to "enroll them as soon as possible in the school of constitutional life."<sup>223</sup> Another delegate then added that "the Constitution is a powerful tool for pacifying and instructing the People,"<sup>224</sup> and a third delegate described the need to be forward-looking as a necessary difference between United States and Argentine constitutionalism:

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216. See Constitutional Convention of 1853, Session of Apr. 24, 1853, *supra* note 184, at 511 (statement of Gutiérrez).

217. See *id.* at 512 (statement of Fray Manuel Pérez). Friar José Manuel Pérez, a member of the Dominican Order, was a delegate from the Province of Tucumán. See 5 VICENTE OSVALDO CUTOLO, *NUEVO DICCIONARIO BIOGRÁFICO ARGENTIN* 432-33 (1971).

218. See Constitutional Convention of 1853, Session of Apr. 24, 1853, *supra* note 184, at 511 (statement of Manuel Leiva).

219. Aside from the two references in the text, Alberdi is mentioned by name twice during the Convention—once to imply (incorrectly) that Alberdi did not favor nationalization of customs duties, see *id.* at 501 (statement of Manuel Leiva), and once to refute that claim, see *id.* at 504 (statement of Gorostiaga). In fact, Alberdi's draft constitution clearly provided that Congress would create customs offices and establish customs duties. See Juan Bautista Alberdi, *Proyecto de Constitución de Juan Bautista Alberdi*, art. 68, § 5, in *LAS CONSTITUCIONES DE LA ARGENTINA 1810/1972*, *supra* note 82, at 341, 344.

220. See Constitutional Convention of 1853, Session of Apr. 20, 1853, *supra* note 184, at 469-79 (statement of Facundo Zuviría).

221. *Id.* at 480 (statement of Juan Maria Gutiérrez).

222. *Id.*

223. *Id.* (blaming Argentina's anarchistic and despotic history on lack of good republican citizens).

224. *Id.* at 483 (statement of Martin Zapata).



Constitutions are sometimes the result and many other times the cause of the moral order of Nations.—In England, in the United States, the Constitution has been the result of [existing] order and good custom.—Among us, as in many other parts, the Constitution will be the cause, she will be the instrument which tempers our habits and which educates our Peoples.<sup>225</sup>

Zuviría's proposal for delay did not receive significant support.<sup>226</sup>

In 1853, the invocation of the United States as authority was not nearly as pronounced as it would become in 1860, but it certainly was apparent. Thus, Gorostiaga introduced the Drafting Committee's draft to the Convention indicating that it was "cast in the mold of the Constitution of the United States, the only model of a true federation which exists in the world,"<sup>227</sup> and Gutiérrez repeated Gorostiaga's statement almost verbatim later in the same session.<sup>228</sup> Once the Convention had approved the constitutional text, even Zuviría, who had earlier insisted that the time was not yet ripe for a constitution, remarked that Argentine federalism "would be well understood if understood as that of the United States of the North, the only model of a federation which exists in the civilized world."<sup>229</sup> Gorostiaga also cited U.S. practice on the critical issue of import and export duties, to justify these being placed in the hands of the federal government,<sup>230</sup> and on two occasions delegates felt it necessary to explain variations between their proposals and the U.S. Constitution, because of specific differences in local conditions.<sup>231</sup> The number of references to the U.S. Constitution during the Convention of 1853 is insufficient to prove that it had a talismanic function, but the references constitute an important trend that would become marked in 1860.<sup>232</sup>

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225. *Id.* (statement of Huergo); *see id.* at 479 (statement of Juan Maria Gutiérrez) (noting that there are two ways to form a country: (1) to write a constitution considering the customs, values, and character of the country; or (2) to write a constitution hoping to create the required corresponding values).

226. *See id.* at 488 (voting to proceed with Drafting Committee Report).

227. *Id.* at 468 (statement of José Benjamin Gorostiaga).

228. *See id.* at 479 (statement of Juan Maria Gutiérrez).

229. *Id.* at 539 (statement of Facundo Zuviría).

230. *See id.* at 502 (statement of José Benjamin Gorostiaga).

231. Thus, a provision authorizing Congress to impeach governors in the case of serious crimes was explained as necessary given Argentina's high level of instability. *See id.* at 521-22 (statement of Zavala). Similarly, a provision authorizing national civil, commercial, penal, and mining codes was justified on grounds that Argentina did not share the common law tradition of the United States in which much of this law was based (an explanation that obviously does not explain why the power to write codes was given to the Congress and not to the provincial legislatures). *See id.* at 529 (statement of José Benjamin Gorostiaga).

232. *See generally* PADILLA, *supra* note 185, at 103-07 (describing references to U.S. Constitution at Convention).

The Convention approved the new Constitution on May 1, 1853, and its approval ushered in both a new rivalry between Buenos Aires and the Confederation and a unique debate between Alberdi and Sarmiento regarding the nature of the Argentine Constitution.

*B. Alberdi (and the Confederation) Versus Sarmiento (and Buenos Aires)*

The Alberdi-Sarmiento constitutional debate, as opposed to mere scrapping over whether Urquiza was fit to govern the country, began when Sarmiento published *Comentarios de la Constitución de la Confederación Argentina* (*Commentaries on the Constitution of the Argentine Confederation*) in September 1853.<sup>233</sup> Although *Comentarios* displays Sarmiento's partisanship for the Province of Buenos Aires against the Confederation, it is less partisan than most of Sarmiento's writing. Sarmiento begins by congratulating the delegates at the Constitutional Convention of 1853 for their wise decision to follow the model of the U.S. Constitution,<sup>234</sup> a surprising start, because he admits he boycotted the Convention due to his differences with Urquiza.<sup>235</sup> Sarmiento's thesis is that the Argentine Constitution must be interpreted precisely in accordance with U.S. constitutional law.<sup>236</sup> To show how this should be done, he offers extensive citations to *The Federalist*,<sup>237</sup> to Joseph Story's *Commentary on the Constitution of the United States*,<sup>238</sup> and to other works. Although *Comentarios* is not one of Sarmiento's most cited works, the book has the virtue of foreshadowing the approaches that the Argentine Supreme Court would come to take once it was established in 1863.

*Comentarios* can be read in two ways, and each echos later in the Argentine Supreme Court's style. One way to read *Comentarios* is as an excessively rational work. Noting the identical content of the preambles of the U.S. and Argentine Constitutions, Sarmiento argues that "it would be monstrous, if not to say ridiculous, to pretend that the same ideas, expressed with the same words, for the same ends, might produce different results in our Constitution or have a different meaning."<sup>239</sup> Having appreciated the success of the United States, it was the intention of the legislators to assure the same results.<sup>240</sup>

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233. See SARMIENTO, *COMENTARIOS*, *supra* note 143, at 30.

234. See *id.* at 33.

235. See *id.*

236. See *id.* at 33-35.

237. See *id.* at 83 (discussing the distribution of power under a federal system).

238. See *id.* at 61 (discussing Justice Story's description of the preamble's purpose).

239. *Id.* at 60.

240. See *id.* at 60-61.

Further, because the Constitutional Convention adopted a text based on that of the U.S. Constitution, he argues:

North American constitutional law, the doctrine of its statesmen, the declarations of its tribunals, the constant practice in analogous or identical points, are authority in the Argentine Republic, can be alleged in litigation, . . . and adopted as genuine interpretation of our own Constitution. The [Constitutional] Congress wanted the young Federation, inexperienced in the practice of the form of government which it embraced, not to launch itself on a new path blindly and without a guide, and therefore gave it all the science and all the practice of the only federation which exists.<sup>241</sup>

Just as a judge often will look to legislative intent for assistance in interpreting the law, anyone interpreting the Argentine Constitution may look to the United States, because the intent upon adopting a Constitution modeled after that of the United States was to copy its constitutional system in all relevant detail.<sup>242</sup> "North American commentary becomes Argentine commentary; North American practice, Argentine rules, and the decisions of its federal tribunals become antecedents and norms for our own."<sup>243</sup> The interpreter is not expected to focus on Argentine reality, but to trust U.S. law to construct a new Argentine reality. One must understand every sentence, every period of the U.S. Constitution because it forms an interrelated whole.<sup>244</sup> Sarmiento's approach is entirely consistent with an excessively rational approach toward law, that views law as independent of society and able to operate to shape behavior regardless of the situation of the society in which it operates. Law shapes society, society does not shape law.

A second way to view *Comentarios*, which is probably much closer to Sarmiento's mind-set, is that it turns to the U.S. Constitution and its interpreters because of their talismanic authority. It is obviously a big stretch for Sarmiento to assert that because the Argentine Constitution's Preamble tracks the language of that of the United States—"to form a more perfect Union, establish Justice, insure domestic Tranquility"<sup>245</sup> etc.—it also adopts all of U.S. constitutional practice. Although Sarmiento leaves room for variation from U.S. practice when the Argentine Constitution specifically provides

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241. See *id.* at 59.

242. See *id.* at 60 (writing that Constitutional Convention had given Argentina both constitution and case law).

243. *Id.* at 60.

244. See *id.* at 62.

245. U.S. CONST. preamble.

otherwise,<sup>246</sup> U.S. constitutional law is more than an interpretive aid, it must be followed even when one does not understand its reasoning. At one point Sarmiento compares the U.S. Constitution to an herbal remedy, and its commentary to the package insert—if you follow the instructions you can be assured of a fine medicinal brew.<sup>247</sup> The U.S. Constitution and its interpretation have produced enviable results and therefore a cure for Argentina's past failure.<sup>248</sup> Its success has eliminated the possibility of error and taken away authority to interpret the same provisions differently. "What arbitrariness or error can be admitted in the execution of the same dispositions, conceived of in the same terms?"<sup>249</sup> Sarmiento acknowledges that the reader could dismiss a book on constitutional law if it consisted merely of Sarmiento's own opinions, but "to inspire the necessary confidence" he turns to the authority of the U.S. commentators of the U.S. Constitution.<sup>250</sup> The U.S. Constitution exercises authority not just because Sarmiento understands its reasoning and an objective reader will appreciate that reasoning, but because Sarmiento—and presumably his reader—believes in the U.S. Constitution as a source of authority for the proper way to organize a government. The U.S. Constitution is more than a source of new ideas, it is a talisman.

Sarmiento's fawning over the U.S. Constitution was too much for Alberdi. In *Bases*, he called for a forward-looking Constitution to transform Argentina and to create a modern society, but he did not simply copy the U.S. Constitution.<sup>251</sup> Alberdi viewed the Constitution of 1853 as an original work that took into account Argentina's political history in seeking to create a liberal society. His reply, in

246. See, e.g., SARMIENTO COMENTARIOS, *supra* note 143, at 123-27 (recognizing that Argentina's approach to religion and state is different); *id.* at 215-16 (recognizing need for national civil, commercial, penal, and mining codes even though U.S. practice leaves these areas to the states).

247. See *id.* at 29.

248. See *id.* at 60, 69-70.

249. *Id.* at 60.

250. See *id.* at 61; *cf. id.* at 30 (arguing that revisiting the authority of U.S. system will not inspire confidence).

251. See, e.g., ALBERDI, *BASES*, *supra* note 95, at 448 (noting that any constitution must look at Argentine history and reality in developing a federal system of government); see *id.* at 521 (describing a constitution as a compromise among political interests); see *id.* at 389-90 (noting that Argentina and United States have different needs in the areas of foreign relations and economic development). Some commentators have described the differences between Alberdi and Sarmiento as depending, at least in part, on differing views of Argentine history. Sarmiento simply discards Argentina's past of barbaric *caudillos* as offering nothing for Argentina's future. Alberdi never rejects the past as irrelevant and sometimes identifies characteristics that can be used as foundation. See BOTANA, *supra* note 125, at 263-84; SHUMWAY, *supra* note 50, at 122-23, 132, 135, 181-84.

*Estudios sobre la Constitución Argentina de 1853* (*Studies on the Argentine Constitution of 1853*),<sup>252</sup> appeared only three months after *Comentarios*<sup>253</sup> and begins with blast after blast at Sarmiento's use of the U.S. Constitution as authority. "To dissolve the unity or national integrity of the Argentine Republic, it is enough to apply the exact letter of the Constitution of the United States, converting into States entities which are and were provinces of a single state."<sup>254</sup> "To falsify or bastardize the National Constitution of the Argentine Republic, one need only interpret it with the commentaries of the Constitution of the United States."<sup>255</sup> Sarmiento's work is "anarchist"<sup>256</sup> and *Estudios* must re-establish the understanding of the Argentine Constitution after the "disorder and anarchy" created by *Comentarios*.<sup>257</sup>

*Estudios* has no purpose other than to rebuff Sarmiento, and Alberdi does so by making two principal points. First, he asserts that Sarmiento is foolish if he thinks a foreign model can be imported and made to work ignoring all local history. Citing Alex de Tocqueville, he argues that every nation has a constitution consisting of its past governmental practices, and that this past inevitably carries forward into a new constitution.<sup>258</sup> He notes that Joseph Story, the writer Sarmiento cites most often, devotes long sections of his treatise to American constitutional history before and after the Revolution before analyzing the Constitution itself.<sup>259</sup> In Argentina's case, constitutional scholars must recognize its long experience with Spanish public law, where all power resided in the King. It is "the product of this legislation; and while we should change the ends, the means for a long time must be those under which we were educated."<sup>260</sup> That difference in public law traditions between the United States and Argentina explains why Argentina needs a stronger Executive Branch than the United States,<sup>261</sup> and why Argentina

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252. JUAN BAUTISTA ALBERDI, *ESTUDIOS SOBRE LA CONSTITUCIÓN ARGENTINA DE 1853* (1853) [hereinafter ALBERDI, *ESTUDIOS*], in 5 *OBRAS COMPLETAS DE JUAN BAUTISTA ALBERDI* 148 (Buenos Aires, La Tribuna Nacional 1886).

253. See 1 MAYER, *supra* note 97, at 595 n.476.

254. ALBERDI, *ESTUDIOS*, *supra* note 252, at 148.

255. *Id.*

256. *Id.*

257. *Id.* at 149.

258. See *id.* at 150.

259. See *id.* at 154.

260. *Id.* at 151.

261. See *id.* at 157.

needs greater control by the central government over the provinces.<sup>262</sup>

Second, Alberdi argues that Sarmiento misreads and distorts the Argentine Constitution of 1853 in thinking it is the same as the U.S. Constitution, because many provisions were written with Argentine history in mind.<sup>263</sup> Sarmiento's ingenuous focus on the Preamble to insist that the constitutions are similar, ignores the fact that the Preamble recites only the ends of the Constitution, not the means by which it will achieve those ends.<sup>264</sup> Argentina's lack of strong traditions of local government led the Convention of 1853 to *require* that each Province write its own constitution and to allow the national Congress to review the consistency of each provincial constitution with the national constitution.<sup>265</sup> Such a provision would have been inappropriate in the United States with its tradition of state autonomy.<sup>266</sup> Joseph Story interprets the U.S. Constitution as preventing the federal government from intervening in a state to restore order if the state's legislature is in place and has not requested federal intervention. The Argentine Constitution of 1853, given Argentina's past of provincial rebellions and disorder, allows federal intervention to put down sedition and to restore public order without a request from provincial authorities.<sup>267</sup> Sarmiento can only claim that the two constitutions are the same by ignoring their text and the reasons for their differences.<sup>268</sup>

If *Comentarios* and *Estudios* are judged as a debate, then any modern day reader will judge Alberdi's *Estudios* the winner. The Argentine Constitution of 1853, while inspired by and modeled after the U.S. Constitution, varied from it substantially in many areas.<sup>269</sup> Moreover, Sarmiento's insistence that a similar preamble means that the two constitutions must be interpreted alike is obviously ludicrous. But the tide at that time was moving against Alberdi. Sarmiento was noted, even among his contemporaries, for his exaggerated admiration of the United States.<sup>270</sup> Yet he was able to accurately indicate that members of the Drafting Committee at the Constitutional Convention (specifically, Gorostiaga and Gutiérrez) declared that the

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262. See *id.* at 159.

263. See *id.*

264. See *id.* at 155.

265. See *id.* at 182-83.

266. See *id.*

267. See *id.* at 194-96.

268. See *id.* at 155-60.

269. See *supra* notes 184-200 and accompanying text.

270. See Michael Aaron Rockland, *Sarmiento's Views on the United States*, in SARMIENTO AND HIS ARGENTINA, *supra* note 147, at 45.

Argentine Constitution was an adaptation of the U.S. Constitution.<sup>271</sup> With even Urquiza, an old federalist, liking to compare himself with Washington,<sup>272</sup> Sarmiento's approach, not Alberdi's, is the approach that prevailed in the constitutional reforms that later followed.

Confrontations between the Confederation and Buenos Aires continued both during and after the Alberdi-Sarmiento debates. After an election in which he ran unopposed, General Urquiza assumed the presidency of the Argentine Confederation in March 1854. He then established a temporary national capital in Paraná, the largest city in his home province of Entre Ríos.<sup>273</sup> The next six years were a period of constant intrigues by Buenos Aires and the Confederation against each other, with each seeking to obtain foreign support and to de-stabilize the other.<sup>274</sup> The Confederation, however, suffered from a shortage of cash. Despite Urquiza's efforts, almost all foreign shipping continued to go to Buenos Aires, a city with over 100,000 inhabitants and the means to pay for goods. None of the Confederation's river ports had more than 10,000 inhabitants, and all lacked the merchant houses and market needed to attract foreign shipping.<sup>275</sup> Starting in 1856, the Confederation began to apply a two-tiered tariff system, requiring goods that entered its territory after passing through Buenos Aires to pay twice the tariff of goods entering directly, but this measure mainly increased smuggling and did little to improve Confederation finances.<sup>276</sup>

Nevertheless, the Confederation continued to muster superior military forces. In October 1859, armies from the two sides again met in battle and Urquiza won.<sup>277</sup> The Province of Buenos Aires was not left prostrate, because much of its army was able to retreat to the City of Buenos Aires, but loss of the battle did lead to the resignation of the hard line anti-Confederation faction that had dominated the government of Buenos Aires, and led to the opening of negotiations.<sup>278</sup> Urquiza conditioned peace on the incorporation of the Province of Buenos Aires into the Confederation, and Buenos Aires agreed, but with conditions. Under the resulting Pact of San José de

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271. See SARMIENTO, *COMENTARIOS*, *supra* note 143, at 52. The comments of Gorostiaga and Gutiérrez are discussed *supra* notes 221-31 and accompanying text.

272. See *supra* note 210 and accompanying text.

273. See SCOBIE, *supra* note 165, at 105-06.

274. See *id.* at 107-12, 134-38, 142-53, 164-94.

275. See *id.* at 118-120, 132.

276. See *id.* at 158-60.

277. See *id.* at 254-55.

278. See *id.* at 254-60; 2 FLORIA & GARCÍA BELSUNCE, *supra* note 58, at 88-89.

Flores,<sup>279</sup> signed on November 11, 1859, the Province of Buenos Aires agreed to incorporate itself fully into the Confederation<sup>280</sup> and to turn over its customs operations,<sup>281</sup> but it was also agreed that Buenos Aires would retain all existing provincial institutions,<sup>282</sup> would have its entire provincial budget paid for by the Confederation for the next five years (to compensate for the lost customs revenues),<sup>283</sup> and could block the loss or division of any of its territory without the consent of its legislature (thereby blocking any attempt to separate the City of Buenos Aires from the Province as the federal capital).<sup>284</sup> Most importantly, however, Buenos Aires retained the right to review the Constitution before accepting it.<sup>285</sup> Within twenty days of signing the Pact, Buenos Aires was obligated to convoke a convention to recommend constitutional changes,<sup>286</sup> and in the event that changes were recommended, the Confederation would hold a new Constitutional Convention to which—unlike the Convention of 1853—each province would send delegates in proportion to its population.<sup>287</sup>

### C. *The Constitutional Changes of 1860*

Remarkably, events proceeded almost exactly as planned. The Province of Buenos Aires held a Convention, which ran from January through May 1860, to recommend changes to the Constitution.<sup>288</sup> That Convention's debates and reports were more extensive than those of the Constitutional Convention of 1853.<sup>289</sup> The Convention was dominated by Bartolomé Mitre and his allies.<sup>290</sup> Mitre had been part of the group of liberal exiles who initially fought at Urquiza's side against Rosas before rejecting him after the victory as a federalist

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279. See Pacto de Unión de San José de Flores (Nov. 11, 1859), in *LAS CONSTITUCIONES DE LA ARGENTINA 1810/1972*, *supra* note 82, at 381.

280. See *LAS CONSTITUCIONES DE LA ARGENTINA 1810/1972*, *supra* note 82, art. 1, at 382.

281. See *id.* art. 8, at 382-83.

282. See *id.* art. 7, at 382.

283. See *id.* art. 8, at 382-83.

284. See *id.* art. 5, at 382.

285. See *id.* arts. 1-5, at 382.

286. See *id.* art. 2, at 382.

287. See *id.* art. 5, at 382.

288. See *Sesiones de la Convención del Estado de Buenos Aires, encargada del examen de la Constitución federal* [hereinafter *Buenos Aires Convention*], in *4 ASAMBLEAS CONSTITUYENTES ARGENTINAS*, *supra* note 184, at 705, 938.

289. Compare *id.* at 705-988 (including not only the floor debates but a summary of sessions of the committee appointed to report to the Convention, and the Committee's report to the Convention), with Constitutional Convention of 1853, *supra* note 184, at 402-536 (containing debates and reports of the 1853 Convention).

290. Mitre led a political grouping called Club Libertad that won a majority of the seats at the Convention. See SCOBIE, *supra* note 55, at 262-64, 273-75.



*caudillo*.<sup>291</sup> He led a "nationalist" wing of Buenos Aires politics which, like Urquiza, desired a national government, but unlike Urquiza, wanted one that Buenos Aires could use to control the country.<sup>292</sup> During the course of the Convention he was successful in a bid for the governorship of Buenos Aires, and took office on May 2, 1860, just as the Convention was coming to a close.<sup>293</sup>

Most of the work of the Buenos Aires Convention was done by a Committee to Examine the Federal Constitution (hereinafter "Examining Committee") of seven persons chosen by the Convention. Mitre presided over the Examining Committee and he and his allies held five votes.<sup>294</sup> Sarmiento and Dalmacio Vélez Sársfield, Buenos Aires' most prominent jurist, were the most active members of the Examining Committee in defending its work on the floor of the Convention. Both supported the Mitre line of sincerely seeking a national government and avoiding changes unacceptable to the Confederation.<sup>295</sup> Mitre and his allies won all votes at the Convention except for an amendment from the floor from more parochial forces that placed export tariffs in provincial hands starting in 1866, the end of the period under which the federal government was obligated under the Pact of San José de Flores to pay for the Provincial budget.<sup>296</sup>

Perhaps even more interesting than what the delegates at the Convention actually did is the manner in which they used the U.S. Constitution to justify their actions. The Report of the Examining Committee reads as though it were Sarmiento's rebuttal to Alberdi's *Estudios*, though Sarmiento would state on the Convention floor that

291. See SHUMWAY, *supra* note 50, at 189-90.

292. 2 FLORIA & GARCÍA BELSUNCE, *supra* note 58, at 75.

293. See SCOBIE, *supra* note 55, at 274-76.

294. See *id.* at 264, 266. Sarmiento indicated that Mitre was the author of the Examining Committee's Report. See Buenos Aires Convention, Session of Apr. 27, 1860, *supra* note 288, at 804 (statement of Sarmiento).

295. See, e.g., Buenos Aires Convention, Informe de la Comisión Examinadora de la Constitución Federal [hereinafter Examining Committee Report], Session of Apr. 26, 1860, in 4 ASAMBLEAS CONSTITUYENTES ARGENTINAS, *supra* note 184, at 768 (on the general approach of making the smallest possible number of changes); *id.* at 787, 791-92 (statement of Vélez Sársfield arguing that the Examining Committee properly kept changes to a minimum); *id.*, Session of Apr. 27, 1860, at 804 (statement of Sarmiento arguing that Mitre in drafting the report of the Examining Committee wanted to avoid further tensions with General Urquiza); *id.* at 868 (statement of Sarmiento noting that the Examining Committee tried to keep changes to a minimum).

296. The reservation of export tariffs for the provinces was proposed initially by Francisco de Elizalde and Rufino Elizalde at a meeting with the Examining Committee and was rejected by the Committee. See *id.* at 853 (statement of Vélez Sársfield); *id.* at 879 (statement of Rufino Elizalde). The issue, however, was then successfully raised and passed on the floor of the Convention. See *id.* (statement of Rufino Elizalde); see also *id.*, Session of May 9, 1860, at 913 (indicating passage of the amendment).

Mitre was the author.<sup>297</sup> According to the Committee, its criteria "in formulating its reforms has been the science and the experience of the analogous or similar Constitution which is recognized as most perfect,—that of the United States—because it is the most applicable and is the standard of the Constitution of the Confederation."<sup>298</sup> Moreover, along with the U.S. Constitution, the Committee used U.S. legislation and constitutional doctrine, without which the Argentine Constitution would "lack meaning."<sup>299</sup>

The Committee then justified its approach in natural law terms. It admitted that "every People has its own way of being," with its own customs, history, and unwritten institutions, and that no nation can be organized without recognizing these features.<sup>300</sup> However, it also insisted that constitutional principles based on reason took precedence over the actual situation of society.<sup>301</sup> "[R]ather than capitulating before the facts" the legislator must recognize that "just as custom may influence the law, law may influence custom."<sup>302</sup> "Free peoples share a political morality and certain fixed principles whose essence cannot be modified."<sup>303</sup> But then the Committee went a step further and equated the U.S. Constitution with natural law! The Committee concluded that:

Given that up to the present the democratic government of the United States has been the ultimate result of human logic, because its Constitution is the only one that has been made by the people and for the people, without taking into account any bastard interest, without compromising with any illegitimate element, it would have been as much presumption as ignorance to pretend to innovate in constitutional law, casting aside the lessons given by the experience, the truths, accepted by the conscience of human-kind.<sup>304</sup>

The United States comes closer to eternal constitutional principles than anything Argentina might write on its own. Particularly in the area of federalism, where the United States has been unique, Argentina has "no right to amend or mutilate the laws of that nation."<sup>305</sup> Moreover, according to the Committee, nothing is lost in ignoring Argentine practices because there are none. "The

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297. See *id.*, Session of Apr. 27, 1860, at 804 (statement of Sarmiento).

298. *Id.*, Session of Apr. 26, 1860, at 769.

299. *Id.*

300. See *id.*

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.*

Argentine Republic does not have a single surviving historical antecedent in the field of national public law."<sup>306</sup> Argentine public law dates only from the Constitution of 1853.<sup>307</sup>

The Examining Committee's statements offer a powerful indication of the thinking of Argentina's political elite, since its composition included Mitre and Sarmiento—both of whom later would become President of the Nation—as well as Velez Sarsfield, who would become Mitre's Secretary of the Treasury and Sarmiento's Secretary of the Interior, and who later would write the Civil Code. This elite maintained that the U.S. Constitution offered a superior form of government to anything Argentina could possibly design. An Argentine creation could be questioned, but not the U.S. Constitution. Vélez Sársfield introduced the Examining Committee's work with the suggestion that the Convention of 1853 took the U.S. Constitution as a model, "but . . . did not respect this sacred text, and an ignorant hand made deletions or alterations of great importance, pretending to improve it."<sup>308</sup> He asserted that the Commission had "done nothing more than restore the constitutional law of the United States in the part that was changed."<sup>309</sup> According to Vélez Sársfield, Argentines were ignorant compared to the drafters of the U.S. Constitution. The failure of the delegates at the Convention of 1853 to incorporate the ninth Amendment of the U.S. Constitution into their document demonstrated only that "those who deleted it knew less than those who made that great Constitution."<sup>310</sup> Acceptance of language from the U.S. Constitution rose to a matter of faith during the debate regarding the jurisdiction of the Argentine federal courts. Sarmiento admitted that he was unable to answer several questions about the proposed text that were put to him on the Convention floor, but asserted that it was sufficient "to know that it is literally copied from the Constitution of the United States, and [because it is an exact copy,] if there is anything which is clear and luminous, it is this part which seems nebulous and obscure to us right now."<sup>311</sup> Sarmiento further insisted, as he had in *Comentarios*,<sup>312</sup> that U.S. constitutional case law should be binding on Argentine

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306. *Id.*

307. *See id.*

308. *Id.* at 791 (statement of Vélez Sársfield).

309. *Id.* (statement of Vélez Sársfield).

310. *Id.*, Session of May 1, 1860, at 843 (statement of Vélez Sársfield). Vélez Sársfield used his reputation as an expert in U.S. law to try to prevent less informed opponents from debating him. *See id.* at 853 (statement of Vélez Sársfield).

311. *Id.*, Session of May 7, 1860, at 872 (statement of Sarmiento).

312. *See supra* notes 233-50 and accompanying text.

courts.<sup>313</sup> He believed that the Argentine Constitution should track the language of the U.S. Constitution as closely as possible "not because it is more or less applicable to us, but *because we will find ourselves with a case law to which no one will be permitted to say, 'this is my opinion'.*"<sup>314</sup>

The U.S. Constitution became the currency of debate. Mitre party opponents raised some minor opposition to the glorification of the U.S. Constitution, but even they sought to cite its text and U.S. practice, though often in error. Thus one delegate sarcastically criticized Sarmiento's admission that he did not understand the jurisdiction of the federal courts in the United States,<sup>315</sup> but later tried to support his own proposal that the provinces retain authority to impose export tariffs by incorrectly asserting that the states in the United States retained this power.<sup>316</sup> Another delegate complained about excessive praise of the U.S. Constitution and then subsequently cited it, erroneously, for the proposition that surplus provincial funds revert to the federal treasury.<sup>317</sup> Perhaps most absurd, however, was a proposed amendment that required Argentina's inhabitants to show the Catholic Church "the highest respect and the most profound veneration,"<sup>318</sup> that was defended by a conservative delegate with extensive discussion of how the religious origins of America's colonization were responsible for its success.<sup>319</sup> The amendment was rejected,<sup>320</sup> but only after extensive debate between Sarmiento and conservative delegates regarding the role of religion in the United States.<sup>321</sup> Such difficulties illustrate that the liberals' invocation of the U.S. Constitution was a double-edged sword.

Notwithstanding the use of the U.S. Constitution as a talisman, the constitutional changes proposed by the Convention were entirely consistent with the needs of the Buenos Aires political elite. Although U.S. practice often was cited as a justification, the final Argentine Constitution was largely the product of concrete political interests.

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313. See Examining Committee Report, Session of May 7, 1860, *supra* note 295, at 870-71 (statement of Sarmiento).

314. *Id.* at 872 (statement of Sarmiento) (emphasis added).

315. See *id.*, Session of May 8, 1860, at 879 (statement of Rufino Elizalde).

316. See *id.* at 879, 893 (statement of Rufino Elizalde) (rebuking Sarmiento and arguing for export tariff proposal); see also U.S. CONST. art. I, § 9, cl. 5 (forbidding Congress to impose export taxes); *id.* art. I, § 10, cl. 2 (barring states from imposing export taxes without congressional consent).

317. See Examining Committee Report, Session of May 9, 1860, *supra* note 295, at 910 (statement of Esteves Seguí).

318. *Id.*, Session of May 11, 1860, at 921 (statement of Frías).

319. See *id.* at 916-21.

320. See *id.* at 930.

321. See *id.* at 922-27.

The most significant constitutional changes generally fell within three overlapping categories: (1) provisions designed to protect specific interests of the Province of Buenos Aires not common to all provinces; (2) provisions taken from U.S. practice to augment the federal nature of the Argentine Constitution; and (3) provisions inspired by U.S. practice designed to limit the power of government or to increase its responsiveness.

The amendments proposed by the Buenos Aires Convention to protect Buenos Aires' interests were the most predictable. Buenos Aires needed to protect its economy, and as a result the Convention provided: (1) that no port could be favored over any other, meaning that customs duties had to be kept uniform across the entire nation<sup>322</sup> (a concern prompted by differential tariffs the Confederation had used to increase its own commerce at the expense of Buenos Aires);<sup>323</sup> (2) that the federal government could not eliminate the customs facilities of existing ports of entry<sup>324</sup> (thereby eliminating Buenos Aires' ability to continue to act as an international port);<sup>325</sup> (3) that the provinces would administer export tariffs after 1866<sup>326</sup> (when Buenos Aires would no longer have the right to have its budget paid for by the federal government, as provided in the Pact of San José de Flores);<sup>327</sup> (4) that customs duties could be paid in the currency of the province where the customs house was located<sup>328</sup> (to create a demand for Buenos Aires paper money);<sup>329</sup> and (5) that the Province of Buenos Aires would only be obligated to comply with international treaties entered into after the Pact of San José de Flores<sup>330</sup> (to put an end to complaints that in drumming up foreign support against the Province of Buenos Aires, the Confederation had improperly agreed to demands by Spain that it exempt the children of Spanish citizens born in Argentina from military service and other

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322. See CONST. ARG. OF 1860 art. 12 & art. 67, § 1.

323. See Examining Committee Report, Session of Apr. 26, 1860, *supra* note 295, at 784 (noting that the change comes from the U.S. Constitution).

324. See CONST. ARG. OF 1860 art. 67, § 9.

325. See Buenos Aires Convention, Sesiones de la Comisión del Estado de Buenos Aires, Examinadora de la Constitución Federal [hereinafter Sessions of the Examining Committee], in 4 ASAMBLEAS CONSTITUYENTES ARGENTINAS, *supra* note 184, at 961; see Examining Committee Report, Session of Apr. 26, 1860, *supra* note 295, at 784.

326. See CONST. ARG. OF 1860 art. 67, § 1.

327. See *supra* notes 279-87 and accompanying text.

328. See *id.*

329. See Examining Committee Report, Session of May 9, 1860, *supra* note 295, at 907-08 (statements of Sarmiento, Riestra, and Elizalde).

330. See CONST. ARG. OF 1860 art. 31.

obligations of Argentine citizens).<sup>331</sup> There were also several provisions that were authorized by the Pact of San José de Flores: (1) that the Capital could not be established in a province without its consent;<sup>332</sup> (2) that the City of Buenos Aires' deputies to Congress would be selected with those of the province, treating the City of Buenos Aires as part of the province and not as a separate district as the Federal Capital as provided in 1853;<sup>333</sup> and (3) that the provinces would retain all authority conferred by pre-existing pacts,<sup>334</sup> preventing the federalization of provincial institutions such as the Bank of the Province of Buenos Aires.<sup>335</sup>

The proposals to increase the federal nature of the Argentine Constitution are more surprising, because the liberals allied with Mitre had previously usually taken a unitarian position, and Mitre and his allies would return to that perspective during his presidency.<sup>336</sup> However with Urquiza's recent military victory over Buenos Aires, the liberals became enthusiastic federalists for a few months, since they worried that Urquiza would control the national government, and not themselves.<sup>337</sup> They justified virtually all of their federalist proposals in whole or in part on U.S. constitutional practice.<sup>338</sup> Thus relying on U.S. practice: (1) The Convention eliminated a provision in the 1853 Constitution giving Congress the right to examine the constitutionality of provincial constitutions,<sup>339</sup> because the courts could judge the constitutionality of any norm.<sup>340</sup> (2) The Convention eliminated a requirement that the provinces provide free public education,<sup>341</sup> in deference to the provinces' right to develop their institutions as they saw fit.<sup>342</sup> (3) The Convention tracked the U.S.

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331. See Examining Committee Report, Session of May 8, 1860, *supra* note 295, at 875-78 (statements of Mármol and Sarmiento); see SCOBIE, *supra* note 165, at 269, 291.

332. See CONST. ARG. OF 1860 art. 3.

333. See *id.* art. 38.

334. See *id.* art. 104.

335. See *Banco de la Provincia de Buenos Aires C/ Nación Argentina*, 186 Fallos 170, 222-24 (1940) (analyzing the Bank's status as a provincial institution that was protected under the Pact of San José de Flores and accordingly under article 104 of the Constitution, and holding that the Bank could not be subject to federal taxation).

336. See 2 FLORIA & GARCÍA BELSUNCE, *supra* note 58, at 79-80, 100-01.

337. See SCOBIE, *supra* note 165, at 270.

338. See *infra* notes 339-52 and accompanying text (reviewing liberal proposals influenced by American practice).

339. See CONST. ARG. OF 1860 art. 5.

340. See Examining Committee Report, Session of Apr. 27, 1860, *supra* note 295, at 809 (statement of Vélez Sársfield); see also *id.* at 808 (discussing utility of U.S. practice).

341. See CONST. ARG. OF 1860 art. 5 (imposing no requirement upon provinces to provide free education).

342. The issue was important for Buenos Aires, because it had the most extensive system of public education in the country, but it was not free. See Examining Committee Report, Session of Apr. 25, 1860, *supra* note 295, at 773. The utility of the U.S. practice of not imposing any

Constitution to narrow the language dealing with federal interventions,<sup>343</sup> allowing the federal government to take over the government of a province only if necessary to "guarantee the Republican form of government, repel a foreign invasion, or establish order if so requested by provincial authorities."<sup>344</sup> (4) The Convention required that senators and deputies be natives of the province that they represent or residents of the province for at least three years.<sup>345</sup> (5) The Convention established that federal officials could not hold provincial positions simultaneously and could not vote in provincial elections if they were not normally residents of the province,<sup>346</sup> thus eliminating the risk that officials sent by the federal government might dominate provincial government.<sup>347</sup> (6) The Convention provided that the existing constitutional provision authorizing Congress to write civil, commercial, criminal and mining codes would nevertheless leave jurisdiction over these areas and family law matters to provincial courts.<sup>348</sup> (7) The Convention eliminated federal jurisdiction over conflicts between branches of a provincial government.<sup>349</sup> (8) The Convention barred the federal government from

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requirements on the states in this area is discussed at the Session of Apr. 27, 1860, *id.* at 808 (statement of Vélez Sársfield).

343. See U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence."); see also Examining Committee Report, Session of Apr. 27, 1860, *supra* note 295, at 808 (statement of Vélez Sársfield) (discussing U.S. practice).

344. CONST. ARG. OF 1860 art. 6; see Examining Committee Report, Session of Apr. 25, 1860, *supra* note 295, at 777; *id.*, Session of Apr. 27, 1860, at 811 (statement of Sarmiento) (discussing need to adopt U.S. practice regarding federal intervention).

345. See CONST. ARG. OF 1860 art. 40; *id.* art. 47; see also Examining Committee Report, Session of Apr. 25, 1860, *supra* note 295, at 775; *id.*, Session of May 1, 1860, at 849 (statement of Sarmiento) (arguing the need to follow the U.S. model).

346. See CONST. ARG. OF 1860 art. 34 (restricting rights of federal officials).

347. See Examining Committee Report, Session of Apr. 25, 1860, *supra* note 295, at 776; Sessions of the Examining Committee, *supra* note 325, at 978 (discussing adherence to U.S. approach).

348. See CONST. ARG. OF 1860 art. 67, § 11, & art. 100 (providing that the national nature of the civil, commercial, criminal and mining codes does not create federal jurisdiction). The effect of the change was to bring Argentine practice closer to that of the United States, requiring that most private law matters be heard in provincial courts, though there is no specific discussion at the Convention of U.S. practice in this area. With regard to family law, Article 97 of the Constitution of 1853 originally gave the Supreme Court jurisdiction over *recursos de fuerza*, which were appeals from ecclesiastical tribunals that handled most marriage and divorce cases. See Examining Committee Report, Session of Apr. 25, 1860, *supra* note 295, at 772-73. This jurisdiction was taken away from the Supreme Court in the new article on the Supreme Court's jurisdiction, see CONST. ARG. OF 1860, art. 100, with reference to the need to follow U.S. law on Supreme Court jurisdiction. See Examining Committee Report, Session of Apr. 25, 1860, *supra* note 295, at 772-73.

349. See CONST. ARG. OF 1860 art. 100. This change also reflected U.S. practice. See Examining Committee Report, Session of Apr. 25, 1860, *supra* note 295, at 781; Sessions of the Examining Committee, *supra* note 325, at 871-72 (acknowledging the centrality of U.S. jurisdictional law).

passing laws that would restrict the freedom of the press or establish federal jurisdiction over the press<sup>350</sup> (out of concern that the federal government could smother local expression).<sup>351</sup> (9) The Convention eliminated the authority of Congress to impeach provincial governors.<sup>352</sup>

Urquiza's control of the federal government not only motivated Mitre and his allies to augment Argentine federalism, but also encouraged them to introduce provisions limiting the power of government and preventing its abuse. Facing an adversary in power, their arguments were consistent with the liberal postures that always had been part of their program. Here as well, the delegates defended proposed changes on the grounds that the Constitution needed to be adapted to match U.S. practice, but they also discussed the rationale behind U.S. practice and its applicability in Argentina. Thus: (1) Sarmiento obtained the incorporation of an article protecting unenumerated rights enjoyed by the people,<sup>353</sup> explaining that, as provided in the Ninth Amendment to the U.S. Constitution, it would protect the multitude of rights inherent in natural law too numerous to list in a constitution.<sup>354</sup> (2) The Drafting Committee expanded the grounds for congressional impeachment and removal of Executive Branch officers and judges from only including serious crimes to include "bad conduct,"<sup>355</sup> because the people required greater control over the acts of officials and the U.S. Constitution provided for impeachment for "misdemeanors."<sup>356</sup> (3) The Convention cited U.S. practice to provide that officers named to posts during a Senate recess would lose their posts automatically if not confirmed during the next legislative session.<sup>357</sup> (4) Sarmiento obtained changes to the provisions governing the Supreme Court to make it more flexible, as

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350. See Examining Committee Report, Session of Apr. 25, 1860, *supra* note 295, at 772-73 (citing liberties granted by the First Amendment of the U.S. Constitution); *id.*, Session of May 1, 1860, at 840-41.

351. CONST. ARG. OF 1860 art. 32.

352. This change corresponds to the U.S. Constitution, but no explanation for the change is offered. See Examining Committee Report, Session of Apr. 25, 1860, *supra* note 295, at 778; *id.*, Session of May 7, 1860, at 857-58; Sessions of the Examining Committee, *supra* note 325, at 980-83.

353. See CONST. ARG. OF 1860 art. 33.

354. See Examining Committee Report, Session of May 1, 1860, *supra* note 295, at 841 (statement of Sarmiento).

355. CONST. ARG. OF 1860 art. 45 (setting forth grounds for impeachment and removal).

356. Sessions of the Examining Committee, *supra* note 325, at 981-83 (translating "misdemeanor" in British and U.S. practice as "*mala conducta*" or "bad conduct," and therefore not requiring commission of a crime for impeachment and removal from office).

357. See CONST. ARG. OF 1860 art. 83, § 22; Examining Committee Report, Session of May 7, 1860, *supra* note 295, at 869 (statement of Sarmiento) (emphasizing that the change was taken literally from U.S. Constitution and reflected common international practice).



in the United States, so that its judges might be made to ride a circuit and thereby brought closer to the people.<sup>358</sup> The Convention also made several liberal changes consistent with U.S. practice without specific discussion of the United States, such as: (1) modifying the general prohibition of slavery to declare the freedom of all slaves from the moment they set foot in Argentine territory;<sup>359</sup> (2) eliminating the president's authority to detain persons threatening public order temporarily, unless he declares a state of siege;<sup>360</sup> and (3) limiting the president's authority to delegate to his ministers<sup>361</sup>—to prevent the exercise of excessive authority by individuals lacking accountability.<sup>362</sup>

Regardless of their pledges of fidelity to the U.S. model, the delegates to the Buenos Aires Convention did not pursue changes that were inconsistent with the interests of Buenos Aires and its governing liberal elite. Many differences with the U.S. model remained, particularly with respect to the authority of the president.<sup>363</sup> The impression that the Convention used the U.S. Constitution as its model, however, helped confer legitimacy on its work.

No significant disagreements or discussions occurred in September 1860, at the National Constitutional Convention held to review the Buenos Aires Convention's proposals and virtually all of its proposals were adopted.<sup>364</sup> Rather than allowing the provinces to apply export tariffs after 1866, the delegates agreed to eliminate the authority of both the federal government and the provinces to apply

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358. See CONST. ARG. OF 1860 art. 94 (altering responsibilities of Supreme Court judges); Examining Committee Report, Session of Apr. 25, 1860, *supra* note 295, at 775; *id.*, Session of May 7, 1860, at 870-71 (statement of Sarmiento) (arguing that the change would enhance the judiciary).

359. See CONST. ARG. OF 1860 art. 15. The primary concern of the convention that prompted the change was an unratified treaty between the Confederation and Brazil promising to return runaway slaves. See Examining Committee Report, Session of Apr. 30, 1860, *supra* note 295, at 829-30.

360. See CONST. ARG. OF 1860 (deleting article 83, section 20, of the Constitution of 1853); Examining Committee Report, Session of May 7, 1860, *supra* note 295, at 868 (statement of Sarmiento) (introducing change on behalf of Examining Committee and arguing that 1853 Constitution gave too much power to President and circumvented proper congressional authority).

361. Compare CONST. ARG. OF 1853 art. 86, with CONST. ARG. OF 1860 art. 89 (the new version eliminating the possibility of Cabinet Ministers issuing resolutions outside the area of their departments even if specially authorized to do so by the President).

362. See Examining Committee Report, *supra* note 295, at 780-81.

363. See *id.*

364. A Committee appointed to review the reforms proposed by the Buenos Aires Convention accepted those reforms virtually unchanged. See *Actas de las Sesiones de la Convención Nacional "ad hoc," Reunida en Santa Fe en 1860, para examinar las reformas propuestas a la Constitución de 1853 [hereinafter Convention of 1860], in 4 ASAMBLEAS CONSTITUYENTES ARGENTINAS, supra note 184, at 1048-50; see SCOBIE, supra note 165, at 290-91; I MAYER, supra note 97, at 525-26.*

export tariffs after that date,<sup>365</sup> a change sought by Buenos Aires *estancieros*.<sup>366</sup> They also agreed to eliminate federal jurisdiction over disputes between provincial governments and their citizens, maintaining it only for disputes between a province and citizens of another province,<sup>367</sup> and agreed to lower the proposed provincial residency requirement to become a member of Congress from three years to two.<sup>368</sup> No one mentioned the illegitimacy of the entire reform process in the face of an article in the 1853 Constitution which barred any amendment for ten years.<sup>369</sup> The Buenos Aires Convention amended this prohibition in its proposed reforms, so as to eliminate the issue, although eliminating the article obviously does not mean that it was not violated.<sup>370</sup> The proposed reforms contained nothing to which the Confederation could object. The Treaty of San Nicolás already had resolved the key issue of the nationalization of the Buenos Aires Customs House and payments to Buenos Aires to make up for the lost revenues. Further, provincial *caudillos* were interested primarily in maintaining their autonomy, and the changes proposed by Buenos Aires only increased the federalist character of the Constitution. No one objected to proposals that slightly weakened the president's powers, because General Urquiza had finished his six-year term as president and had turned the government over to a weaker successor, Santiago Derqui.<sup>371</sup> All of the principal figures present at the Convention, Gorostiaga, Gutiérrez, Sarmiento, and Vélez Sársfield, shared the Alberdian vision, and all made comments at the Constitutional Convention of 1853 or at the 1860 Buenos Aires Convention invoking the U.S. model.

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365. See Convention of 1860, *supra* note 364, at 1049.

366. See JOSÉ NICOLÁS MATIENZO, *EL GOBIERNO REPRESENTATIVO FEDERAL EN LA REPÚBLICA ARGENTINA* 93 (2d ed. 1917).

367. See Convention of 1860, *supra* note 364, at 1049. Compare CONST. ARG. OF 1853 art. 97 (allowing federal jurisdiction over disputes between a citizen of a province and his provincial government), with CONST. ARG. OF 1860 art. 100 (providing only for federal jurisdiction when dispute is between a province and a citizen of another province). In addition, while the Convention accepted the Buenos Aires Convention's proposal to free the Supreme Court from permanent installation in the federal capital so that its members might ride circuit, it also, without explanation, eliminated any reference to a set number of Supreme Court judges, following the U.S. practice of leaving this determination to the legislature. See Convention of 1860, *supra* note 364, at 1048.

368. See *id.* at 1049.

369. See CONST. ARG. OF 1853 art. 30 (providing that the Constitution could not be amended during its first ten years); see also Convention of 1860, *supra* note 364, at 1037-59 (making no reference of any kind to the issue).

370. See Sessions of the Examining Committee, *supra* note 325, at 968-69.

371. See SCOBIE, *supra* note 165, at 290 (noting that Mitre and Urquiza's forces were united at the Convention, somewhat to the exclusion of Derqui).

The unity of 1860 disintegrated rapidly in 1861. Buenos Aires was unwilling to give up its sovereignty to a national entity that its elite did not control. Buenos Aires' deputies were never incorporated into the National Congress because Buenos Aires insisted on holding its elections under a provincial electoral law that permitted its governor, Bartólome Mitre, to retain control, rather than a national electoral law as required by the Constitution.<sup>372</sup> Further, although President Derqui initially brought prominent Buenos Aires figures into his government to use as a counterweight to General Urquiza,<sup>373</sup> who remained the commander of the army and retained the support of many provincial governors,<sup>374</sup> the Buenos Aires elite continued to engage in conspiracies and develop alliances in the interior provinces to try to gradually win control of the country.<sup>375</sup> Ultimately, a battle for control of the Province of Córdoba ended Buenos Aires' integration into the Confederation,<sup>376</sup> and in June 1861, Buenos Aires stopped sending funds from its Customs House to the national government.<sup>377</sup> In September 1861, Buenos Aires forces under Mitre again met the Confederation army under Urquiza, but this time the battle was fought to a draw.<sup>378</sup> Urquiza then withdrew to his home province of Entre Ríos with those forces that were loyal directly to him, and reached an understanding with Mitre that he would respect Entre Ríos' provincial autonomy. In return, he then allowed the national government to fall into Mitre's hands.<sup>379</sup>

Mitre, after taking de facto control of the national government, re-established constitutional authority on the basis of the Constitutions of 1853 and 1860, and, in 1862 became the first president chosen on the basis of a national election including Buenos Aires. During Mitre's term of office and that of Sarmiento, his successor, governors/*caudillos* led significant revolts under the banner of federalism, but they always were overthrown by national government forces.<sup>380</sup> Moreover, although initially the City of Buenos Aires became the seat of the federal government but remained under the jurisdiction of the

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372. See *id.* at 318-19, 321-29.

373. See *id.* at 293, 302-03.

374. See BOSCH, *supra* note 80, at 508.

375. See 2 MAYER, *supra* note 97, at 779-81; SCOBIE, *supra* note 165, at 273, 295, 305-17.

376. See SCOBIE, *supra* note 165, at 333-34.

377. See *id.* at 336.

378. See *id.* at 354.

379. See *id.* at 356-76; BOSCH, *supra* note 80, at 563-77 (describing negotiations between Mitre and Urquiza that lead to Urquiza's semi-withdrawal from national politics).

380. See ROCK, *supra* note 12, at 126, 129; 2 FLORIA & GARCÍA BELSUNCE, *supra* note 58, at 103-04, 144-45.

Province of Buenos Aires,<sup>381</sup> ultimately even the Province of Buenos Aires was forced to submit to national authorities. After a short but bloody military confrontation in 1880, the Province ceded control of Buenos Aires to the federal government, and by constitutional amendment the City became a special federal district governed directly by national authorities.<sup>382</sup> Mitre's 1861 victory and the final establishment of Buenos Aires as the Federal Capital ushered in a remarkable era of stability compared to the chaos that reigned during the period following independence, and led to the entrenchment of a number of long-lived rules of mutual security.

#### IV. THE "REAL" ARGENTINE CONSTITUTION: CIVIL LIBERTIES WITHOUT POLITICAL RIGHTS

To find the real Argentine Constitution from 1862 until shortly before World War I, one needs to look to the Alberdian vision in addition to the constitutional text. Argentina in the late nineteenth and early twentieth centuries initially offered ample civil liberties combined with little political participation, as one would expect under the Alberdian vision. Assuming that an important part of constitutionalism involves the establishment of rules that provide sufficient security to all politically significant groups in society so that they join the system rather than engage in armed revolt, Argentine constitutionalism was only a partial success. The entrenchment of civil liberties and property rights, however, ultimately gave the elite the security it needed to expand political participation as well.

In 1910, Joaquín V. González, cabinet minister in two different (fraudulently elected) administrations and one of the country's leading legal scholars,<sup>383</sup> aptly described Argentina as possessing "two completely distinct ways of life,"<sup>384</sup> a liberal economic and social order, and a corrupt political order.<sup>385</sup> From Gonzalez's perspective, the country's success was due to its economic structure,<sup>386</sup> and its adoption of many progressive initiatives, including:

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381. See 2 FLORIA & GARCÍA BELSUNCE, *supra* note 58, at 106.

382. See ROCK, *supra* note 12, at 131.

383. From 1901 to 1904, during the second presidency of Roca, Joaquín V. González served as Minister of the Interior, Minister of Justice and Public Education, and Minister of Foreign Relations. For a time, he held more than one post simultaneously. From 1904 to 1906, he served as Minister of Justice and Public Education for President Manuel Quintana. See 5 CUTOLO, *supra* note 217, at 372. His chief constitutional law work was *MANUAL DE LA CONSTITUCION ARGENTINA* (1897).

384. JOAQUÍN V. GONZÁLEZ, *JUICIO DEL SIGLO O CIENTO AÑOS DE HISTORIA ARGENTINA* (1910), in 21 *OBRAS COMPLETAS DE JOAQUÍN V. GONZÁLEZ* 190 (1936).

385. See *id.* at 191-93.

386. See *id.* at 190-92.

relaxed immigration standards; legislation assuring protection in personal affairs and work; and protection of "the fundamental liberties which do not affect the political mechanism of the country."<sup>387</sup>

Economic liberty and social mobility lay at the heart of the liberal economic order. The phrase "the business of America is business"<sup>388</sup> could have been applied equally to Argentina. Foreign visitors described Argentina as "the United States of the Southern Hemisphere,"<sup>389</sup> a place where people came to work and became rich. Money, not bloodline, counted in the social order, and it was a place where many penniless immigrants made enormous fortunes.<sup>390</sup> Even the sharpest critics of the political elite who dominated the political life of the country admitted that it was an open caste.<sup>391</sup> Most commerce and industry was in the hands of foreign immigrants.<sup>392</sup> Although creole *estancieros* made fortunes from the rising value of their lands,<sup>393</sup> many immigrants joined them at the elite Jockey Club and at the *Sociedad Rural Argentina*, the organization that brought the largest landowners together.<sup>394</sup> Laissez-faire capitalism governed, and the corresponding constitutional provisions protecting property and commerce from state control were respected.<sup>395</sup>

This protection of civil liberties inevitably influenced the political process. For example, the Constitution barred the death penalty for political crimes and required due process of law for criminal defendants.<sup>396</sup> Within a few years of the Constitution's adoption, earlier practice, in which rebel leaders ended their careers with their heads displayed on stakes, was relegated to historical folklore. In 1863, Angel Vicente Peñaloza, a popular *caudillo* in La Rioja, was

387. *Id.* at 168.

388. ROBERT ANDREWS, *THE COLUMBIA DICTIONARY OF QUOTATIONS* 938 (1993) (quoting President Calvin Coolidge).

389. JAMES BRYCE, *SOUTH AMERICA, OBSERVATIONS AND IMPRESSIONS* 315 (MacMillan 2d ed. 1917).

390. See LEWIS, *supra* note 9, at 13, 16, 18-20, 58-65; LUCAS AYARRAGARAY, *SOCIALISMO ARGENTINO Y LEGISLACIÓN OBRERA* 12-22 (1912); A. STUART PENNINGTON, *THE ARGENTINE REPUBLIC* 323-24 (1910).

391. See MATIENZO, *supra* note 366, at 320.

392. See *id.* at 57.

393. The construction of railroads and ports increased opportunities for selling agricultural products and fueled land speculation in Argentina toward the end of the nineteenth century. See ROCK, *supra* note 12, at 139-40.

394. See LEWIS, *supra* note 9, at 20-22.

395. See GONZÁLEZ, *supra* note 384, at 171, 177-78; see also WAISMAN, *supra* note 7, at 44-45 (observing that foreign writers, influential Argentinian scholars, and others hailed social and economic progress of state).

396. See CONST. ARG. OF 1860 art. 18.

executed by an army officer without trial after leading a revolt that President Mitre had charged Sarmiento with putting down.<sup>397</sup> But the times had changed sufficiently so that Sarmiento found himself sharply criticized both for the severity with which he put down the revolt and for the execution, which he claimed not to have authorized.<sup>398</sup> No official execution for an act of political rebellion would occur from the 1860s until 1955.<sup>399</sup> The change in attitude toward executions is particularly striking given uprisings in the 1860s and 1870s of federalist *caudillos*, frequent provincial disturbances, and revolts with national political significance in 1874, 1880, 1890, 1893, and 1905. Although heated situations abounded, the government accepted the need for tolerance. In most instances rebels received an amnesty or pardon within a few years of their defeat and often returned to full participation in political life.<sup>400</sup> Even active military officers who revolted, who conceivably faced the death penalty under the Code of Military Justice, suffered lesser punishments and sometimes retained or later regained their ranks.<sup>401</sup> Limits on repression following an armed revolt became part of the political system.

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397. See DARDO DE LA VEGA DÍAZ, *MITRE Y EL CHACHO* 245-46, 317-23 (1939).

398. See BUNKLEY, *supra* note 161, at 410-11 (noting that Mitre's government censured Sarmiento for his counterrevolutionary measures); SHUMWAY, *supra* note 50, at 228-31 (recounting that intellectuals praised Peñaloza and denounced Sarmiento for his death); DE LA VEGA DÍAZ, *supra* note 397, at 330-31 (noting that Sarmiento denied responsibility for the execution and that President Mitre condemned the execution as illegal). Sarmiento subsequently wrote a book to justify the campaign against Peñaloza and his execution. See DOMINGO FAUSTINO SARMIENTO, *EL CHACHO* (circa 1864) [hereinafter SARMIENTO, *EL CHACHO*], in 7 OBRAS COMPLETAS DE SARMIENTO, *supra* note 148, at 285 (presenting text of book). He claimed that under U.S. practice, the execution was justified under martial law. See *id.* at 376-78.

399. See 2 ROBERT A. POTASH, *THE ARMY & POLITICS IN ARGENTINA 1945-1962*, at 232-33 (1980) (noting that no political executions occurred in the twentieth century until 1955). There are partial exceptions to this statement, however. In 1921, dozens of strikers in the Patagonia were executed illegally by Lieutenant Colonel Héctor Varela, see 2 OSVALDO BAYER, *LOS VENGADORES DE LA PATAGONIA TRÁGICA* 206-09 (1972), and in 1930 several anarchists were punished for common crimes and terrorist acts that they committed, but their executions also bore a political tinge. See generally OSVALDO BAYER, *ANARCHISM AND VIOLENCE: SEVERINO DI GIOVANNI IN ARGENTINA 1923-1931*, at 52-222 (Paul Sharkley, trans., Elephant ed. 1986) (recounting the crimes and trial of several violent anarchists of the period).

400. See Law No. 714, July 26, 1875, [1852-1880] A.D.L.A. 996; Law No. 843, June 29, 1877, [1852-1880] A.D.L.A. 1144; Law No. 2310, Sept. 1, 1888, [1881-1888] A.D.L.A. 438; Law No. 2713, Sept. 1, 1890, [1889-1919] A.D.L.A. 207; Law No. 3223, Jan. 25, 1895, [1889-1919] A.D.L.A. 336; Law No. 4939, June 13, 1906, [1889-1919] A.D.L.A. 703 (establishing general amnesties for political and military crimes related to prior uprisings, with slight variations).

401. A typical illustration is the case of Colonel Mariano Espina, who provoked the torpedo boat "Murature" to mutiny during the Radical revolt of 1893 and who subsequently was condemned to death by a court martial. The Press lobbied heavily for commutation of the penalty, which President Sáenz Peña commuted to twenty years in prison and loss of rank. In 1898, President Urriburu ordered his release and reincorporation into the army. See 2 CUTOLO, *supra* note 217, at 695.

There is little doubt that competition for political power was primitive and corrupt. "Representative" government in Argentina had two essential characteristics: (1) provincial governors controlled their provinces, not only controlling access to provincial government employment and exercising influence over the state legislature, but also choosing the membership of the legislature and determining electoral outcomes; and (2) the president controlled the governors. José Nicolás Matienzo in *El gobierno representativo federal en la República Argentina*, a classic political analysis first published in 1910, describes Argentine governors as exercising the "mando"—the power of command, over all political activity in their province, and as maintaining control through a Tammany Hall style combination of electoral fraud and patronage.<sup>402</sup> The governor controlled most elections in the province, both for provincial and national offices, through links that he in turn developed with local political bosses and officials.<sup>403</sup> Voters were rounded up and taken to the polls in groups for better control.<sup>404</sup> Electoral laws required voters to choose among closed lists of candidates, each list appearing on a separate voting ballot,<sup>405</sup> and the local political boss then would ensure that voters were given the "right" ballot before entering the polls.<sup>406</sup> If the governor enjoyed the loyalty of the local chief of police, the mayor, the tax collector, and the justice of the peace, then he could count on that district following his orders on election day.<sup>407</sup> Each of those officials, who usually owed their loyalties to the local political boss, could use the powers of their office to the detriment of recalcitrant voters or to the benefit of cooperative ones.<sup>408</sup> Voter rolls were a farce, excluding many eligible voters and including the names of nonexistent ones.<sup>409</sup> Double voting was common, as were payments for votes.<sup>410</sup> In the rare event that the opposition won a significant number of seats in the provincial legislature, staggered legislative terms, which were common in most provincial legislatures, permitted continuing legislators to vote to reject the credentials of incoming opposition members.<sup>411</sup> Though a pre-eminent figure in the political establishment, even Joaquín V. González admitted that "suffrage in

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402. See MATIENZO, *supra* note 366, at 196-99, 214, 221-38.

403. See *id.* at 221-22.

404. See BOTANA, *supra* note 125, at 180.

405. See *id.* at 178.

406. See *id.* at 180.

407. See MATIENZO, *supra* note 366, at 200.

408. See *id.* at 222-23.

409. See BOTANA, *supra* note 125, at 178-79, 181.

410. See *id.* at 181-82.

411. See MATIENZO, *supra* note 366, at 224-26; see also BOTANA, *supra* note 125, at 183-84.

the Republic has only been an ideal aspiration of the revolution of ideas, a written promise in the constitutional documents of the nation and provinces" but never a reality.<sup>412</sup>

However, Argentina was not a repressive place. A. Stuart Pennington, an Englishman who spent more than twenty years in Argentina,<sup>413</sup> described Argentina in 1910 as a place where, unlike England, a man was free to do what he wanted.

Another thing which soon reconciles a stranger to residence in Argentina is the freedom which is so conspicuous an element in everyday life there. . . . [U]nless a man be absolutely unreasonable, he finds that he can do pretty much what he likes without anyone interfering with him. . . . Where at home he has been expected to go to church regularly, or with something approaching regularity, he finds that, in Argentina, no one troubles as to what he does with his spare time, so long as he turns up to business at the right hour.<sup>414</sup>

This freedom to do what one wanted certainly included freedom of worship, freedom of the press, and freedom of association. The restrictions on religious freedom of the colonial period disappeared.<sup>415</sup> Furthermore, although the secularism of Argentina's presidents in the 1880s and early 1890s made relations between Church and State a tumultuous issue and led to rupture of diplomatic relations with the Vatican,<sup>416</sup> Georges Clemenceau, writing in 1911 after a visit to Argentina, commented that even the Church had accepted a situation close to separation of Church and State.<sup>417</sup> In examining freedom of the press, the contrast between Argentina before 1853 and Argentina after 1860 is equally dramatic. It is difficult to find a foreigner writing about Argentina during the late nineteenth and early twentieth century who does not comment on the variety, freedom, and power of the press.<sup>418</sup> *La Prensa* had an international network of journalists ideally placed for a country that

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412. GONZÁLEZ, *supra* note 384, at 13, 150.

413. See PENNINGTON, *supra* note 390, at 7.

414. *Id.* at 322.

415. See BRYCE, *supra* note 389, at 342-43.

416. See Armando Braun Menéndez, *Primera Presidencia de Roca (1880-1886)*, in 1 (1) ACADEMIA NACIONAL DE HISTORIA 269, 319-20 (1964); ROCK, *supra* note 12, at 55.

417. See GEORGES CLEMENCEAU, NOTAS DE VIAJE POR AMÉRICA DEL SUR (Hyspamérica 1986) (Miguel Ruiz trans., 1911); see also BRYCE, *supra* note 389, at 342.

418. See CLEMENCEAU, *supra* note 417, at 105, 114-18; see also BRYCE, *supra* note 389, at 344; WILLIAM H. KOEBEL, MODERN ARGENTINA, THE EL DORADO OF TO-DAY 78 (1907); PENNINGTON, *supra* note 390, at 281-89; ADOLFO POSADA, LA REPÚBLICA ARGENTINA: IMPRESIONES Y COMENTARIOS 46-48 (Hyspamérica 1987) (1912); THOMAS A. TURNER, ARGENTINA AND THE ARGENTINES 35-36, 240-41 (1892). See generally C. GALVÁN MORENO, EL PERIODISMO ARGENTINO 212-45, 297-353 (1944) (describing the variety of newspapers existing in Buenos Aires and rest of country, focusing mainly on second half of the nineteenth century).



considered itself closer to London, Paris, and New York than to the rest of Latin America. *La Nación*, a newspaper edited by former President Mitre, played a major role in encouraging the revolt of 1890, and along with the Socialist newspaper *La Vanguardia*, was almost always conspicuous in its opposition to the government in power.<sup>419</sup> Freedom of association was extensive. The Radical Party participated in rebellions against the government in 1890, 1893, and 1905, but never faced limits on its activities for very long once a rebellion was over. The Socialist Party—with newspapers, a deputy in Congress, and workers' co-ops—was well established by the early 1900s.<sup>420</sup> Although until 1912 the political system may have depended upon fraud, only anarchists were subject to serious political persecution.<sup>421</sup>

Furthermore, the government realized several constitutional objectives requiring government action rather than mere forbearance. Although it does not create a right to an education, the Argentine Constitution assigns responsibility for education to both the federal and provincial governments.<sup>422</sup> Education figured prominently in Alberdi's social objectives<sup>423</sup> and was vital to Sarmiento.<sup>424</sup> Due in part to enormous efforts by Sarmiento and U.S. school teachers that he imported into Argentina during his presidency (1868-1874),<sup>425</sup> Argentina developed an extensive network of primary and secondary schools that received favorable comment from foreign observers,<sup>426</sup> although primary education remained less than universal.<sup>427</sup>

419. See TURNER, *supra* note 418, at 35-36.

420. See JACINTO ODDONE, *HISTORIA DEL SOCIALISMO ARGENTINO* 24-41 (1983) (describing formation of Socialist Party), 18-23, 265-268 (describing Socialist press), 240-41 (describing election of Alfredo Palacios to Congress), 273-81 (describing organization of workers' co-operatives); ROCK, *supra* note 12, at 187-88.

421. See Law No. 7029, art. 7, June 30, 1910, [1889-1919] A.D.L.A. 787, 787-88 (barring associations and meetings of persons with object of spreading anarchist doctrine).

422. See CONST. ARG. OF 1860 art. 5 & art. 67, § 16.

423. See ALBERDI, *BASES*, *supra* note 95, at 416-20.

424. Sarmiento wrote extensively on education, his principal works being *EDUCACIÓN POPULAR* (1848), in 11 *OBRAS COMPLETAS DE SARMIENTO* (Editorial Luz del Día, 1950); *EDUCACIÓN COMÚN* (1855), in 12 *OBRAS COMPLETAS DE SARMIENTO* (Editorial Luz del Día, 1950); *LAS ESCUELAS: BASES DE LA PROSPERIDAD DE LA REPÚBLICA DE LOS ESTADOS UNIDOS* (1866), in 30 *OBRAS COMPLETAS DE SARMIENTO* (Editorial Luz del Día, 1950); see also BOTANA, *supra* note 125, at 320-23; Georgette Magassy Dorn, *Sarmiento, the United States, and Public Education*, in *SARMIENTO AND HIS ARGENTINA*, *supra* note 148, at 77.

425. See Leoncio Gianello, *La enseñanza primaria y secundaria*, in 3(2) *ACADEMIA NACIONAL DE LA HISTORIA* 115, 123-30 (1964). See generally Dorn, *supra* note 424, at 80-86 (describing Sarmiento's efforts, first as director of the Department of Education of the Province of Buenos Aires, and later as President).

426. See TURNER, *supra* note 418, at 39 (detailing how much better the Argentinian school system was compared to European schools); see also POSADA, *supra* note 418, at 120-23.

427. See JUAN CARLOS VEDOVA, *CÓMO FUE LA ENSEÑANZA POPULAR EN LA ARGENTINA* 61, 71, 121 (1973). See generally Gianello, *supra* note 425, at 115, 132-47 (offering history of public

Illiteracy dropped from 78% in 1869 to 35% in 1914 among individuals over the age of fourteen,<sup>428</sup> and after 1884, public education became strictly secular, with religious instruction permitted only after normal class hours.<sup>429</sup> The government also respected a constitutional requirement that it maintain healthy and clean prisons designed for security rather than for punishment.<sup>430</sup> In 1911, Georges Clemenceau commented that the federal penitentiary in Buenos Aires offered state-of-the-art facilities and the most advanced program for rehabilitation of prisoners anywhere in the world,<sup>431</sup> an observation shared by other foreign observers.<sup>432</sup> He also observed that the city's insane asylum put those of Paris to shame.<sup>433</sup>

It would be wrong to paint Argentina as a paradise in the protection of individual rights. Individual rights probably were not as well protected in some interior provinces as in the cities, and foreigners complained about lack of judicial protection from provincial judges beholden to local *caudillos*.<sup>434</sup> Further, anyone suspected of anarchist sympathies was subject to political persecution, particularly starting in 1910, after a bomb exploded in the Colón Theatre.<sup>435</sup> Women were seriously discriminated against in civil legislation,<sup>436</sup> and the combination of lack of opportunities for women and large numbers of single male immigrants led to the development of extensive prostitution and white slavery.<sup>437</sup> Workers' strikes were

education between 1882 and 1916).

428. See GINO GERMANI, *ESTRUCTURA SOCIAL DE LA ARGENTINA* 231 (1955).

429. See Law No. 1420, art. 8, July 8, 1884, [1881-1888] A.D.L.A. 126, 127.

430. See CONST. ARG. OF 1860 art. 18.

431. See CLEMENCEAU, *supra* note 417, at 81-86, esp. 84.

432. See JULES HURET, *LA ARGENTINA DE BUENOS AIRES AL GRAN CHACO* 131-36 (Gómez Carrillo trans., 1913) (1911); see also POSADA, *supra* note 418, at 113-16.

433. See CLEMENCEAU, *supra* note 417, at 77-81.

434. See PENNINGTON, *supra* note 390, at 64 (explaining how government often took control of small provinces); see also DOUGLAS W. RICHMOND, *CARLOS PELLEGRINI AND THE CRISIS OF THE ARGENTINE ELITES, 1880-1916*, at 104-05 (1989) (describing British government's frustration with mistreatment of a British citizen by government of the Province of Entre Ríos and with provincial courts); ROWE, *supra* note 72, at 12.

435. Two pieces of legislation provided legal authority for government repression of anarchists. See Law No. 4144, art. 1, Nov. 23, 1902, [1889-1919] A.D.L.A. 560, 560 (authorizing Executive to expel any foreigner whose conduct makes him a threat to national security or public order); Ley de Defensa Social, Law No. 7029, June 30, 1910, [1889-1919] A.D.L.A. 787 (barring anarchist meetings and propaganda, allowing expulsion of anarchists, and prohibiting possession of explosives and terrorist acts).

436. See Argentine Civil Code of 1869, Law No. 340, Sept. 29, 1869, [1852-1880] A.D.L.A. 496, art. 186 (husband administers all marital property in absence of prenuptial contract), art. 188 (husband's authorization required to bring law suit), art. 189 (husband's authorization required to enter into contract to buy or sell goods). This legislation was not liberalized substantially until Law No. 11,357, Sept. 23, 1926, [1920-1940] A.D.L.A. 199. See 1 EDUARDO A. ZANNONI, *DERECHO CIVIL* 343-44, § 269 (2d ed. 1989).

437. See generally DONNA J. GUY, *SEX AND DANGER IN BUENOS AIRES: PROSTITUTION, FAMILY AND NATION IN ARGENTINA* (1991) (providing an account of female prostitution and white slavery

frequently repressed,<sup>438</sup> and declarations of a state of siege often undercut rights. During the operation of a nationwide state of siege—approximately 4.5% of the time between 1870 and 1930<sup>439</sup>—the government censored and closed newspapers and detained rebellion-prone elements of the opposition. But even with the states of siege, which were concentrated largely in the early 1870s and early 1890s, the situation compared favorably with the United States and many Western European countries during the same period. Moreover, the states of siege, declared on twenty separate occasions between 1862 and 1930, rarely lasted more than two or three months and were directed at quelling some immediate disturbance.<sup>440</sup> Rights other than habeas corpus and freedom of the press were hardly affected, and even habeas corpus and the press often continued with little change when the individuals and newspapers involved were not connected to the disturbances motivating the state of siege.<sup>441</sup>

Not only did the government follow the Alberdian vision, but it produced the desired results. Argentina received more than 600,000 permanent immigrants from 1881 to 1890, and after a reduction during a depression in the 1890s, the flow reached over 1.1 million during the years from 1901 to 1910.<sup>442</sup> By 1895, foreign-born individuals represented 34% of the population of Argentina<sup>443</sup> and more than half the population of greater Buenos Aires.<sup>444</sup> In 1914, the percentage of the population born abroad peaked at 42.7%.<sup>445</sup> Total population doubled every twenty years, growing from 1.7 million in 1869 to almost 4 million in 1895 and nearly 7.9 million in 1914.<sup>446</sup> Although agriculture provided the engine of the econo-

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in Argentina).

438. See ODDONE, *supra* note 420, at 80-124 (offering description of clashes between labor and government between 1902 and 1910).

439. The 4.5% figure is calculated using the starting and ending dates for each state of siege, with the relevant laws and decrees provided by the Legislative Reference Office of the Argentine Congress. The data used was essentially the same as that provided in 3 REPÚBLICA ARGENTINA, COMISIÓN DE ESTUDIOS CONSTITUCIONALES, MATERIALES PARA LA REFORMA CONSTITUCIONAL 26a (1957). The calculation for total time between 1870 and 1930 spent under state of siege rises to slightly more than nine percent if one includes partial states of siege that included only a single province or a small group of provinces facing local disturbances.

440. See *id.* at 26.

441. See PENNINGTON, *supra* note 390, at 68 (explaining effect of declaration of state of siege).

442. See GERMANI, *supra* note 428, at 82.

443. See *id.* at 81.

444. See *id.* at 88.

445. See *id.* at 81.

446. See *id.* at 21.

my,<sup>447</sup> land was expensive and land colonization schemes were limited,<sup>448</sup> so most immigrants eventually settled in urban areas.<sup>449</sup> Argentina attracted enormous amounts of foreign investment, particularly from Great Britain,<sup>450</sup> and by 1914 had 31,000 kilometers of mainly British owned railroads to facilitate its agricultural exports.<sup>451</sup> As Carlos Waisman explains in his book, *Reversal of Development in Argentina*, comparisons between Argentina and other Latin American countries are less appropriate than comparison to other lands of recent settlement like the United States, Canada, and Australia.<sup>452</sup> However, it was the Alberdian vision, which the country's leadership followed enthusiastically starting in the 1860s, that created a political climate hospitable to development of Argentina's natural endowments. Argentina's elite chose the model of California as it grew under the United States rather than California as it stagnated under Mexico. Electoral fraud prevailed, and the president imposed his will on the provinces. However, free elections were never part of the Alberdian vision, and federalism was viewed more as a temporary political necessity than as a practice offering tangible benefits to the development process.<sup>453</sup> Perhaps to avoid military service, and perhaps because corrupt elections made citizenship less meaningful, fewer than five percent of immigrants became citizens between 1850 and 1930.<sup>454</sup> Nevertheless, citizenship was unnecessary for immigrants to achieve their principal aim of making money. The individual liberties protected under the vision attracted the needed immigrants, drew in foreign capital, and sparked the necessary domestic initiative for a long period of rapid growth.<sup>455</sup>

Although the Constitution of 1853/1860 was the product of liberal intellectuals, the Buenos Aires elite, and *caudillos* from the interior, the Constitution and the rules actually established by the Alberdian

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447. See generally DÍAZ ALEJANDRO, *supra* note 4, at 141-59 (detailing tremendous growth of rural production and land tenure characteristics).

448. See *id.* at 35-40.

449. See GERMANI, *supra* note 428, at 84 (describing the tendency of immigrants to settle in urban areas).

450. See DÍAZ ALEJANDRO, *supra* note 4, at 28 (explaining the connections between the Argentine capital market and world markets).

451. See *id.* at 2-3, 29-39; WINTHROP R. WRIGHT, *BRITISH OWNED RAILWAYS IN ARGENTINA: THEIR EFFECT ON ECONOMIC NATIONALISM* 87 (1974).

452. See WAISMAN, *supra* note 7, at 51-58.

453. See *supra* notes 125-30 and accompanying text.

454. ROCK, *supra* note 12, at 143.

455. See Roberto Cortés Conde, *Sarmiento and Economic Progress: From Facundo to the Presidency*, in SARMIENTO, *AUTHOR OF A NATION* 114, 121-22 (Tulio Halperin Donghi et al. eds., 1994) (maintaining that immigrants were attracted to Argentina because of individual liberties).

vision enjoyed wide acceptance among most active participants in Argentine politics until the 1930s. When the liberals in power passed effective electoral reform laws in 1911 and 1912,<sup>456</sup> and when they handed over the Presidency to Radical Party leader Hipólito Yrigoyen in 1916, they knew that their opponents accepted the constitutional rules underlying the economic system. The Radical Party's primary agenda was free suffrage, and its revolts in 1893 and 1905 invoked the Constitution as a means to support their claims for free suffrage. During both revolts, and in meetings held with President José Figueroa Alcorta in 1907 and 1908, the Radical Party questioned the legitimacy of the government, because it depended on electoral fraud in violation of the Constitution.<sup>457</sup> They did not, however, question the Constitution itself.<sup>458</sup> Not only did most of the Radical Party membership come from the middle class, which agreed with the Constitution's protection of property and commerce, but many of its leaders were landowners, sharing the same agricultural-export orientation as the elite who governed the country until 1916.<sup>459</sup> Moreover, the Radical Party leadership generally did not betray the elite's confidence that the Radicals would respect their economic interests. During the Radical Party's years in power, first under Hipólito Yrigoyen (1916-1922), then under Marcelo T. de Alvear (1922-1928), and again under Yrigoyen (1928-1930), the state became slightly more interventionist, but it never seriously threatened the elite.<sup>460</sup> Examining Argentina generally during the time from

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456. The electoral reforms, often referred to as the Sáenz Peña Law, consisted of two enactments: Law No. 8130, July 27, 1911, [1889-1919] A.D.L.A. 815 (creating a secure system of electoral registers based on military conscription rolls); and Law No. 8871, Feb. 13, 1912, [1889-1919] A.D.L.A. 844 (establishing nearly universal male suffrage for all citizens over age 18, mechanisms to eliminate fraud, and voting by lists of candidates, but awarding a portion of the seats to the party placing second).

457. See *Manifiesto de la junta revolucionaria de la unión cívica radical al pueblo* (1893), in 3(2) HIPÓLITO YRIGOYEN, PUEBLO Y GOBIERNO 290, 291 (2d ed. 1956) (giving the text of the declaration issued by rebels on July 30, 1893, in Santa Fe, after taking over the city); *Manifiesto de la Unión Cívica Radical al Pueblo de la República Argentina* (1905), in 3(2) PUEBLO Y GOBIERNO at 298, 300 (declaration issued at the start of 1905 revolt); *Informe elevado a la Convención Nacional de la Unión Cívica Radical* (Dec. 1909) in 3(2) PUEBLO Y GOBIERNO at 270, 274-75 (report by Yrigoyen on his two meetings with President Figueroa Alcorta in 1907 and 1908).

458. See *supra* note 457 and accompanying text; see also PETER SMITH, ARGENTINA AND THE FAILURE OF DEMOCRACY 91 (1974) (explaining that the problem the Radicals had with system was not with the Constitution or its protections, but rather with government violation of these protections).

459. See DAVID ROCK, POLITICS IN ARGENTINA, 1890-1930: THE RISE AND FALL OF RADICALISM 58, 60-61, 95 (1977); see also WAISMAN, *supra* note 7, at 83-84 (noting that all social and political forces in Argentina, with the exception of the anarchists, supported the basic characteristics of Argentine society).

460. See ROCK, *supra* note 459, at 271-72. To the elite's distress, the Radical Party may have shown greater sympathy toward striking workers than previous governments. See generally *id.* at 125-56. It also allowed the army to violently quash several strikes, most notably in January 1919,

Mitre's election to the Presidency in 1862 through the coup which displaced Hipólito Yrigoyen in 1930, Argentina generally lived in accordance with the Alberdian vision.

## V. THE ROLE OF THE TALISMAN

The Alberdian vision, although clearly summarizing the philosophy that guided the Argentine elite, was hardly ever cited for constitutional authority, perhaps because Alberdi spent most of the rest of his life as a political dissident in self-imposed exile in Europe after Mitre defeated the Confederation in 1861. Alberdi's work is generally only cited in Argentine Supreme Court decisions and legislative debates starting at the turn of the twentieth century.<sup>461</sup> By contrast, cites to U.S. court decisions, treatises and legislative practices formed the staple of constitutional debate. Writing to the U.S. Secretary of State in 1891, the U.S. Ambassador to Argentina commented that "[n]o leading lawyer here is without his complete set of our U.S. Supreme Court reports."<sup>462</sup> Even as late as 1900, Argentina published more translations and adaptations of works by U.S. authors writing on the U.S. Constitution than Argentine treatises on the Argentine Constitution.<sup>463</sup> Furthermore, usually only the U.S. works were cited by the

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in the City of Buenos Aires. See *id.* at 157-79.

461. The first time that Alberdi is cited by the Argentine Supreme Court is probably in *Hileret c/Provincia de Tucumán*, 98 Fallos 20, 48-49 (1903), a leading case on the protection of economic liberties from state regulation.

462. Letter from John Pitkin, U.S. Ambassador to Argentina, to U.S. Secretary of State (May 16, 1891) (on file with *The American University Law Review*).

463. There were only two books on Argentine constitutional law published in the nineteenth century that offered a treatise-like study, both written by professors at the University of Buenos Aires. Florentino González, the first person to hold the new Constitutional Law chair established in 1868, wrote *LECCIONES DE DERECHO CONSTITUCIONAL* to accompany his course, and by 1889 the book entered into its fourth edition. José Manuel Estrada was the second person to hold the chair, and his lectures were published as *CURSO DE DERECHO CONSTITUCIONAL FEDERAL Y ADMINISTRATIVO* (1895). Lucio López, the third person to hold the chair, published a less significant book, *CURSO DE DERECHO CONSTITUCIONAL* (1891), a short compilation of lectures. See generally HÉCTOR P. LANFRANCO, *La cátedra de historia y de derecho constitucional en la facultad de derecho de Buenos Aires y sus primeros maestros*, in 8 *REVISTA DEL INSTITUTO DE HISTORIA DEL DERECHO* 63 (1957); Hector José Tanzi, *La enseñanza del derecho constitucional en la Universidad de Buenos Aires*, 31 *Revista de Historia del Derecho* "Ricardo Levene" 91, 92-104 (1995) (both articles offering a history of the constitutional law chair of the University of Buenos Aires under González, Estrada, and López). Except for the above three books, only two other Argentine works offered some guidance on a limited number of substantive constitutional questions: JULIAN BARRAQUERO, *ESPÍRITU Y PRÁCTICA DE LA CONSTITUCIÓN ARGENTINA* (2d ed. 1889) (this book was originally a thesis and the original edition, published in 1879, was only a limited edition); and AMANCIO ALCORTA, *LAS GARANTÍAS CONSTITUCIONALES* (1881). By contrast, a search of the stacks of the Argentine Supreme Court Library yielded the following important U.S. works translated and published by Argentine authors (or foreigners living in Argentina): THOMAS M. COOLEY, *PRINCIPIOS GENERALES DE DERECHO CONSTITUCIONAL EN LOS ESTADOS UNIDOS DE AMÉRICA* (Julio Carrié trans., 2d ed. 1898); LUTHER STEARNS CUSHING, *ELEMENTOS DE LA LEY Y PRÁCTICA DE LAS ASAMBLEAS*

Supreme Court.<sup>464</sup> The Alberdian vision as expressed in *Bases* summed up what the Argentine elite wanted, but it was not a source of authority; the U.S. Constitution was.

The use of the U.S. Constitution as authority is illustrated in many nineteenth century legislative debates. For example, one of the toughest political issues in the 1860s and 1870s was the extent of the federal government's authority within the City of Buenos Aires. One of the sharpest debates arose regarding the construction of a new port for the City of Buenos Aires, by far its most important engineering project. Initially the federal government under President Sarmiento sought to undertake the entire project without any participation by the province, which raised a host of constitutional issues regarding which government entity possessed the authority to embark on the project and under what conditions. Former President Mitre, leading the Senate debate for those opposed to the project, sounded like Sarmiento in his invocation of the U.S. Constitution, arguing that because the Argentine Constitution is almost identical to that of the United States, it is inevitable that Argentina examine U.S. constitutional practice.<sup>465</sup> "Our written law is the Constitution, and our subsidiary law, where we must search to discover the true doctrine, is the case law of the Constitution which we took for a model."<sup>466</sup> While Mitre criticizes Vélez Sársfield, then Minister of the Interior, for

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LEGISLATIVAS EN LOS ESTADOS UNIDOS DE AMÉRICA, 3 vols., (Nicolás Antonio Calvo trans., 1886); ALEXANDER HAMILTON, JAMES MADISON AND JOHN JAY, *EL FEDERALISTA* (J. M. Cantilo trans., 1868); JAMES KENT, *DEL GOBIERNO Y JURISPRUDENCIA CONSTITUCIONAL DE LOS ESTADOS UNIDOS* (Alejandro Cartasco Albano trans., 1865); FRANCISCO LIEBER, *SOBRE LA LIBERTAD CIVIL Y EL PROPIO GOBIERNO* (Juana Manso trans., 1869); FRANCISCO LIEBER, *LA LIBERTAD CIVIL Y EL GOBIERNO PROPIO*, 2 vols., (Florentino González trans., 1872) (published in Paris, but while the translator was living in Buenos Aires); G.W. PASCHAL, *ANOTACIONES Á LA CONSTITUCIÓN DE ESTADOS UNIDOS*, 2 vols., (Nicolás Antonio Calvo trans., vol. 1 in 1888, vol. 2 in 1890) (includes annotations referring to the Argentine Constitution); JOSÉ STORY, *COMENTARIO SOBRE LA CONSTITUCIÓN FEDERAL DE LOS ESTADOS UNIDOS*, 2 vols., (Nicolás Antonio Calvo trans., 1888) (translating fourth edition of Story's treatise); JOEL TIFFANY, *GOBIERNO Y DERECHO CONSTITUCIONAL* (Clodomiro Quiroga trans., 1874); see also NICOLÁS ANTONIO CALVO, *DECISIONES CONSTITUCIONALES DE LOS TRIBUNALES FEDERALES DE ESTADOS UNIDOS DESDE 1789* (2d ed. 1886) (translating a digest of U.S. case law compiled by Orlando Bump); JORGE TICKNOR CURTIS, *HISTORIA DEL ORIGEN, LA FORMACIÓN Y ADOPCIÓN DE LA CONSTITUCIÓN DE LOS ESTADOS UNIDOS* (J.M. Cantilo trans., 1866) (providing a history of the origins of the U.S. Constitution). A substantial amount also was published in Argentina on the history of the adoption of the Argentine Constitution. See, e.g., ARISTÓBULO DEL VALLE, *NOCIONES DE DERECHO CONSTITUCIONAL* (1897); ADOLFO SALDÍAS, *ENSAYO SOBRE LA CONSTITUCIÓN ARGENTINA* (1878). However, these books rarely help resolve concrete cases.

464. One tendency of the Argentine Supreme Court which can be noted in all periods of the Court's history has been to avoid citation to living Argentine authors, probably to avoid giving the appearance that any national author enjoys special authority. This unwritten rule never has applied to foreign authors, however.

465. See Congreso Nacional, Cámara de Senadores, *Diario de sesiones de 1869*, Sess. of Sept. 11, 1869, at 691 (statement of Mitre).

466. *Id.*

showing a frivolous attitude toward U.S. precedent, discussion of U.S. authors and cases during three days of debate made up the bulk of the constitutional argument on both sides.<sup>467</sup> In the give-and-take of a legislative setting, it is difficult to evaluate the respective weight of principle and partisanship. There is no proof that invocation of the U.S. Constitution actually won votes. Nevertheless, most of the membership of the Senate listened to several hours of discussion of U.S. case law and practice on the exercise of eminent domain and on sovereignty over waterways before voting to return the government's bill to the committee for reconsideration.<sup>468</sup> U.S. practice was the intellectual currency of the debate.

The most powerful examples of U.S. influence appear in decisions of the Argentine Supreme Court, however, because in the case of the Supreme Court's decisions one can demonstrate not only that U.S. practice was an important source of authority, but that it was binding. Beginning in the late 1890s, the U.S. influence begins to decline, but from the 1870s through the mid 1890s, Sarmiento clearly was the winner in his debate with Alberdi on the binding nature of U.S. practice. For example, in 1877 the Supreme Court asserted:

The system of government which governs us is not of our own creation. We found it in action, tested by long years of experience, and we have appropriated it. And it has been correctly stated that one of the great advantages of this adoption has been to find a vast body of doctrine, practice and case law which illustrate and complete its fundamental principles, and which we can and should use in everything which we have not decided to change with specific constitutional provisions.<sup>469</sup>

Cynics may respond that this is nothing but "lip service," however, many situations exist in which U.S. practice seems to have been decisive in the Court's decisions. One of the best examples is the *de la Torre/Acevedo/Sojo* line of cases in the 1870s and 1880s, discussed below, in which Congress ordered the detention of various journalists.

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467. The debate occurred on September 11, 14, and 16, 1869. See *id.*, Sessions of Sept. 11, 14, & 16, 1869, at 668-755.

468. See *id.*, Sessions of Sept. 11 & 14, 1869, at 689-721 (discussing U.S. practices); *id.*, Session of Sept. 16, 1869, at 754-755 (voting to return government's bill to Committee to be analyzed along with a proposal from the Province of Buenos Aires). Ultimately construction of the port was authorized, but on the basis of an agreement with the Province. See Law No. 383, July 15, 1870, [1852-1880] A.D.L.A. 911 (authorizing Executive to engage in engineering studies jointly with the Province and to enter negotiations with Provincial government); Law No. 496, Oct. 14, 1871, [1852-1880] A.D.L.A. 940 (providing for joint participation in construction of the port); Law No. 585, art. 4, Nov. 5, 1872, [1852-1880] A.D.L.A. 964, 965 (authorizing construction on the basis of a bidding process established by the Province); Law No. 755, Oct. 11, 1875, [1852-1880] A.D.L.A. 1016 (revising some of the terms of construction).

469. See *de la Torre*, 19 Fallos 231, 236 (1877).



Because the results of these cases varied according to the Argentine Supreme Court's understanding of U.S. Constitutional law, and not according to the political situation, and because the result in *Sojo* simply makes no sense outside the United States, there cannot be much doubt about the authority of U.S. practice in this period.

A. de la Torre, Acevedo, and Sojo

*De la Torre*,<sup>470</sup> *Acevedo*,<sup>471</sup> and *Sojo*<sup>472</sup> all involved habeas corpus actions brought before the Supreme Court by journalists detained by order of the Senate or the House of Deputies. In *de la Torre*, the Supreme Court exercised jurisdiction but held against the journalist;<sup>473</sup> in *Acevedo* the Supreme Court required the release of the journalist;<sup>474</sup> and in *Sojo*, the Supreme Court held that it lacked jurisdiction to hear habeas corpus actions as a court of first instance.<sup>475</sup> *De la Torre* and *Sojo* both depend on U.S. constitutional practice, but *Sojo* exemplifies something further: a decision that makes sense only in the context of U.S. practice. *Sojo* can only be explained by the fact that the Argentine Court finally learned that the U.S. Supreme Court had decided that it could not exercise original jurisdiction in situations not expressly provided for in the Constitution. The rule denying the Supreme Court jurisdiction made little sense in the Argentine context, because it was adopted by the U.S. Supreme Court due to the unique political circumstances Chief Justice Marshall faced in *Marbury v. Madison*,<sup>476</sup> but apparently this did not matter. In *Sojo*, U.S. practice was followed solely because the Argentine Supreme Court considered itself bound by the U.S. model.

Institutionally during this period, the Argentine Supreme Court functioned much like the U.S. Supreme Court, but with greater stability. The constitutional and legislative provisions governing the jurisdiction of the Supreme Court and the lower federal courts were almost identical to those of the United States.<sup>477</sup> The Argentine

470. 19 Fallos 231 (1877).

471. 28 Fallos 406 (1885).

472. 32 Fallos 120 (1887).

473. See *Acevedo*, 19 Fallos 231, 241 (1877). A case was brought by de la Torre several weeks earlier, after the order for his detention but before he was detained, was dismissed by the Supreme Court on grounds that habeas corpus could be granted only to persons actually in detention. See *id.* at 191.

474. *Acevedo*, 28 Fallos at 408.

475. *Sojo*, 32 Fallos 120, 136 (1887).

476. 5 U.S. (1 Cranch) 137 (1803).

477. Compare CONST. ARG. of 1860, with U.S. CONST. art. III. With regard to Supreme Court and lower federal court jurisdiction, compare Law No. 48, Sept. 14, 1863, [1852-1880] A.D.L.A. 364, with U.S. Judiciary Act of 1789; 1 Néstor Pedro Sagüés, DERECHO PROCESAL CONSTITUCIONAL: RECURSO EXTRAORDINARIO 245, 256-57, 257 n.23 (3d ed. 1992).

Court consisted of five judges from 1863 through 1960,<sup>478</sup> and until 1947, its members enjoyed life tenure without political interference. (In 1947, President Perón had all but one member impeached and removed from office.)<sup>479</sup> Unlike U.S. practice, even the chief representative of the government before the Court was a lifetime appointee.<sup>480</sup> This individual, the Procurador General, was the head of all federal prosecutors and prepared opinions for the Court on most issues of public interest.<sup>481</sup> Members of the Court in the nineteenth and early twentieth century tended to come from the highest ranks of the political elite.<sup>482</sup> Moreover, the Court's authority to engage in judicial review of congressional and executive action was widely recognized even before the appointment of its first members.<sup>483</sup>

### 1. de la Torre

The three cases are best considered consecutively. In *de la Torre*, the House of Deputies ordered the imprisonment of Lino de la Torre, the editor of a small Buenos Aires newspaper, *El Porteño*, for revealing

478. See Law No. 27, art. 6, Oct. 16, 1862, [1852-1880] A.D.L.A. 354, 354 (establishing a Supreme Court of five judges and a Procurador General). This Court continued in force until Law No. 15,271, art. 1, Feb. 9, 1960, [XX-A] A.D.L.A. 9, 9-10, which increased the number of judges on the Supreme Court to seven.

479. See *Fueron destituidos los ministros de la Corte y el Procurador General*, LA NACIÓN, May 2, 1947, at 1.

480. See Law No. 27, art. 6, Oct. 16, 1862, [1852-1880] A.D.L.A. 354, 354 (treating the Procurador General as a member of Supreme Court, which implies the same life tenure). This practice eroded in 1989, when President Menéndez forced the resignation of the person then serving as Procurador General, insisting that regardless of prior practice, the Procurador General served at the discretion of the President.

481. See Law No. 2372, art. 116, Oct. 17, 1877, [1881-1888] A.D.L.A. 444, 451 (establishing Procurador General's role as supervisor of all federal prosecutors and as the government's representative before the Supreme Court in all cases of original jurisdiction and appeals by federal prosecutors). The other functions of the office never were spelled out in legislation. See 4 RAFAEL BIELSA, DERECHO ADMINISTRATIVO ¶ 991 (4th ed. 1947).

482. For example, in the late 1880s and early 1890s, the Court included Benjamín Victorica, who in addition to past experience as a jurist was a prominent general and had served as Secretary of War on three separate occasions, once during the Confederation, once under President Roca, and once after leaving the Court, under President Luis Sáenz Peña. See generally BEATRIZ BOSCH, BENJAMÍN VICTORICA, DOCTOR Y GENERAL, 1831-1913 (1994) (providing biography with detailed description of Victorica's varied political career). Luis Sáenz Peña, a former President of the House of Deputies, served on the Court between 1890 and 1892 and was elected President of the Nation while serving on the Court. His place on the Court was taken by Benjamín Paz, a former Governor and Senator from the province of Salta, who had served as President Roca's Minister of the Interior in 1882-83. See 5 CUTOLO, *supra* note 217, at 338; Menéndez, *supra* note 416, at 269, 279. From 1915 to 1931, the Court even included a former President, José Figueroa Alcorta.

483. See generally DARDO PÉREZ GUILLOU, PRIMER DEBATE SOBRE EL CONTROL JURISDICCIONAL DE CONSTITUCIONALIDAD (1857-1858); 10 REVISTA DE HISTORIA DEL DERECHO 147 (1982) (offering an analysis of the debate on judicial review that took place when the Argentine Confederation passed legislation to establish Supreme Court).

the proceedings of a secret session of the House of Deputies in July 1877. During the preceding years, the Chilean government had begun to settle scattered points in the Argentine Patagonia,<sup>484</sup> and the House of Deputies had called a secret session for the interpellation of Bernardo de Irigoyen, the Minister of Foreign Relations.<sup>485</sup> Despite the secrecy, however, *El Porteño*, a newspaper edited by Lino de la Torre, offered a general report on the session. It described Irigoyen as calling for diplomatic negotiations prior to any use of force, and indicated that Félix Frías, a former foreign minister and now President of the House of Deputies, replied with a passionate speech calling for expulsion of the Chileans.<sup>486</sup> The House of Deputies responded to *El Porteño's* article by having its Vice-President write a letter to each newspaper in the city to advise it that it would consider any future publication of its secret sessions an act of contempt against its authority.<sup>487</sup> *El Porteño*, however, although publishing the House's letter and stating that it would comply with the demand, in practice did not. Instead, it published the satirical headline, *Special Telegraph Despatch for El Porteño, A Secret Session in China, Brilliant Speeches by the Minister of Foreign Relations and Non-Nan Friaj*. The text that followed then described the second day of the secret sessions, but replaced references to Argentina and Chile with references to China and a fictitious neighbor.<sup>488</sup> The House of Deputies responded by ordering de la Torre's detention.

De la Torre's detention by the House of Deputies was not due to his political preferences. *El Porteño's* politics essentially favored the

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484. See MINISTERIO DE RELACIONES EXTERIORES, 3 MEMORIA DEL MINISTERIO DE RELACIONES EXTERIORES PRESENTADA AL HONORABLE CONGRESO NACIONAL EN EL AÑO 1877, at 1-12 (1877) (providing text of letter to the Chilean government by Bernardo de Irigoyen, Minister of Foreign Relations, complaining of the incursions). This entire volume of the Ministry of Justice's annual report to Congress is devoted to the question of Argentina's border with Chile. The disputes eventually were settled through negotiations. See generally MARIO BARROS, HISTORIA DIPLOMÁTICA DE CHILE, 1541-1938, at 295-325 (1970) (describing the dispute and subsequent negotiations from the Chilean perspective); Carlos Heras, *Presidencia de Avellaneda*, in 1(1) ACADEMIA NACIONAL DE HISTORIA, *supra* note 416, at 149, 225-29 (briefly describing the dispute and negotiations from an Argentine perspective).

485. See *La cuestión internacional*, LA PRENSA, July 19, 1877, at 1.

486. See *La sesión secreta de la Cámara de Diputados*, EL PORTEÑO, July 19, 1877, at 2. This newspaper is very difficult to locate, but the relevant pages may be found in the Case Dossier to de la Torre, Don Lino, stored in Legajo No. 237, División Archivo de la Corte Suprema, Archivo General del Poder Judicial [hereinafter *de la Torre Dossier*].

487. See *Desacatos de la Cámara de Diputados*, LA PRENSA, July 21, 1877, at 1; *Las sesiones secretas*, EL PORTEÑO, July 20, 1877, at 2, available in *de la Torre Dossier*, *supra* note 485.

488. See *Despacho telegráfico especial para El Porteño, Una sesión secreta en la China, Brillantes Discursos del Ministro de R.E. y de Non-nan Friaj*, EL PORTEÑO, July 20, 1877, at 2, available in *de la Torre Dossier*, *supra* note 486.

governing coalition of then President Nicolás Avellaneda.<sup>489</sup> The reports on the secret session, although satirical, avoided taking sides and complimented both Irigoyen and Frias for fine speeches.<sup>490</sup> De la Torre was detained solely because the House wanted to establish its authority, and the House ordered his release the day after the Supreme Court decided the case in its favor.<sup>491</sup>

The Argentine Supreme Court reached its decision on the basis of U.S. law.<sup>492</sup> In fact, the Supreme Court took advantage of the case to make the pronouncement quoted earlier that "[t]he system of government which governs us is not of our own creation" and therefore Argentina "can and should use" U.S. doctrine, practice, and case law "in everything which we have not decided to change with specific constitutional provisions."<sup>493</sup> Even without this statement, however, U.S. influence would have been clear. Unlike the political tradition of the United States or Great Britain, Argentina and Hispanic political tradition had no history of parliaments ordering detentions for contempt. Reliance on U.S. practice in this area meant acceptance of an innovation. The Argentine Court noted that in the U.S. case of *Anderson v. Dunn*,<sup>494</sup> decided in 1821, the U.S. Supreme Court held that Congress could imprison or fine an individual on the

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489. El Porteño appears to have supported the Autonomist Party of Adolfo Alsina. See *Club Libertad*, EL PORTEÑO, July 19, 1877, at 1, available in de la Torre Dossier, *supra* note 486 (trumpeting a meeting of Club Libertad, a political club led by Héctor Varela, an Autonomist). The Autonomist Party was one of the two main parties of Buenos Aires politics, and at the time supported the government. Adolfo Alsina, the Minister of War, and Bernardo de Irigoyen, the Minister of Foreign Relations, also were Autonomists.

490. See *supra* notes 486, 459 and accompanying text.

491. See Congreso Nacional, Cámara de Diputados, *Diario de sesiones de 1877*, Session of Aug. 22, 1877, at 566 (voting in favor of de la Torre's release).

Interestingly, de la Torre's arrest was incredibly clumsy. The Vice President of the House of Deputies gave the Buenos Aires Police Chief a controversial search warrant authorizing him to enter uninvited into any home anywhere in search of de la Torre. See *Los Porteños sin garantías*, EL PORTEÑO, July 23, 1877, at 1. In spite of this broad authorization, de la Torre managed to escape when twenty policemen burst into the house of a friend where he was hiding. See *Violación del domicilio y de la ley*, LA PRENSA, July 24, 1877, at 1. De la Torre's capture/surrender may well have been negotiated in order to have his case heard by the Supreme Court, because the Court refused to hear the case while he remained out of custody. See de la Torre, 19 Fallos 190 (1877). *La Prensa* makes no mention of de la Torre's capture.

492. See de la Torre, 19 Fallos at 231 (1877).

493. *Id.* at 236. This is not to say that all members of the Court understood U.S. case law as binding in exactly the same way. Benjamín Gorostiaga, in a dissent in *Dávila c/Valdes*, 23 Fallos 726 (1881), describes his dissent on a jurisdictional issue as looking at the letter and spirit of the jurisdictional statute, the legislative history, the Court's own precedents, U.S. Supreme Court precedents, and U.S. commentators and legislation. See *id.* at 739. Although he does not explicitly rank these sources of authority, because he offers these sources in a list, it certainly could be understood as a ranking. See VANOSI, *supra* note 207, at 89 (describing list as ranking of sources).

494. *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821).

basis of its contempt powers.<sup>495</sup> Furthermore, Kent's and Story's treatises on constitutional law both insisted that congressional contempt powers were necessary for Congress to maintain its authority, and that such powers existed for acts occurring both inside and outside the legislative chambers.<sup>496</sup> Naturally, if the U.S. Congress enjoyed contempt powers so did the Argentine Congress.<sup>497</sup> The situation, according to the Argentine Court, would have been different if Congress had sought to exercise ordinary criminal jurisdiction,<sup>498</sup> but the conduct here was not covered by a criminal statute.

The one dissent in *de la Torre*, by Judge Laspiur, only heightens the importance of the case as a landmark on the role of the U.S. Constitution. Judge Laspiur's dissent focuses on his disagreement with the binding nature of U.S. precedent.<sup>499</sup> Although he recognized that the U.S. Supreme Court favored Congress in *Anderson*,<sup>500</sup> Judge Laspiur argued that, because British practice here was superior, Argentina appropriately could follow the British practice instead.<sup>501</sup> Under British practice, a prior law was required identifying the circumstances under which an individual would be held in contempt of parliament,<sup>502</sup> thus avoiding arbitrary use of congressional power and improper punishment through an ex post facto legislative decision.<sup>503</sup> Most of the Court insisted on U.S. precedent, however, which meant creation of a new Argentine practice—detentions ordered by a House of Congress.

## 2. Acevedo

United States law also helped ensure that the new practice turned out to be very limited in scope, however. In 1885, the Argentine Supreme Court ruled in *Acevedo* that Congress could not hold a journalist in contempt for defaming a member of Congress, because such defamation was penalized under federal criminal law.<sup>504</sup> In *de la Torre*, the Court had specifically noted that it was not ruling in a situation where Congress sought to usurp ordinary criminal jurisdic-

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495. See *de la Torre*, 19 Fallos at 237, 238 (citing *Anderson*, 19 U.S. (6 Wheat.) at 204).

496. See *id.* at 237.

497. See *id.*

498. See *id.* at 239.

499. See *id.*

500. See *id.* at 246-47.

501. See *id.* at 247-49.

502. See *id.* at 244-48.

503. See *id.* at 249-51 (citing art. 18 of the 1860 Argentine Constitution, regarding ex post facto laws).

504. See *Acevedo*, 28 Fallos 406, 408 (1885).

tion, but in a case involving breach of congressional secrets where there was no statute on point and Congress had no other way to protect itself.<sup>505</sup> *Acevedo* involved this exception, and the Court held that the existence of a criminal statute penalizing defamation of a member of Congress meant that Congress had granted jurisdiction over defamation to the courts and could not reclaim it whenever it wished to exercise jurisdiction itself.<sup>506</sup>

Unlike the Court in *de la Torre*, the Court in *Acevedo* did not focus on U.S. practice. The Argentine Supreme Court, however, was aware that its opinion was at least generally consistent with recent trends in U.S. law that took a restrictive view of Congress' contempt power.<sup>507</sup> The Procurador General's opinion had favored *Acevedo*'s release, emphasizing that Congress did not need to use its implicit contempt powers when the conduct in which the individual was engaged was already penalized in criminal legislation. Moreover, the U.S. Supreme Court recently had declared a congressionally ordered detention unconstitutional in *Kilbourne v. Thompson*,<sup>508</sup> in a move that limited the scope of its earlier decision in *Anderson v. Dunn*.<sup>509</sup> *Kilbourne* involved the failure of a witness to appear at a congressional hearing and explicitly limited *Anderson*, stating that Congress could not use its contempt power when the matter at issue was outside its competence.<sup>510</sup> *Kilbourne*, a poorly written decision, never indicates the scope of congressional competence, nor fully explains why the investigation of a local real estate scandal is outside of Congress' competence. Nevertheless, the U.S. Supreme Court did emphasize that the matter at issue already was the subject of a judicial investigation, and in finding that Congress had exceeded its authority, it seems to have been influenced heavily by the fact that the judiciary already had intervened.<sup>511</sup> *Acevedo*—by stating that Congress' contempt power does not extend to cases subject to judicial jurisdiction—is more precise than *Kilbourne* and could almost be described as a refinement and elaboration of its underlying principles. Although only the Procurador General's brief analyzed *Kilbourne*, the Argentine Supreme Court at the very least was aware of the decision from the

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505. See *de la Torre*, 19 Fallos at 240-41.

506. See *Acevedo*, 28 Fallos at 408.

507. See *id.* at 472-73.

508. 103 U.S. 168 (1880).

509. See *Acevedo*, 28 Fallos at 472-73 (opinion of the Procurador General) (citing *Kilbourne v. Thompson*, 103 U.S. 168 (1880) and *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821)).

510. See *Kilbourne*, 103 U.S. at 196-97 (denying Congress power to fine or imprison a person merely by asserting that person's guilt or contempt).

511. See *id.* at 194-96 (questioning propriety of congressional interference with suit pending in court with proper jurisdiction).

Procurador General's brief, and in practice wrote an improved version of the *Kilbourne* holding.

### 3. Sojo and Marbury's shadow

The *Acevedo* decision is of interest primarily for the contrast it offers to the Court's 1887 decision in *Sojo*, only two years later. Both *Acevedo* and *Sojo* involved defamations that generated anger in Congress, decisions by Houses of Congress to detain the responsible journalist, and habeas corpus petitions filed directly with the Supreme Court.<sup>512</sup> In *Acevedo*, *El Debate*, a newspaper owned by Eliseo Acevedo, had accused a Senator of manipulating legislation for his own self interest, claiming that he sponsored a bill creating a reward for anyone introducing pink salmon into Argentine rivers in order to share in the reward himself.<sup>513</sup> In *Sojo*, the offense consisted of a political cartoon that defamed a Deputy.<sup>514</sup> If anything, *Sojo* presented the more attractive case for blocking Congress. The Deputy defamed in *Sojo* cut a particularly unsympathetic figure when he raised the issue of Sojo's cartoon on the House floor, coarsely calling Sojo a "fetid flea" and a "*galleguito*" (an offensive twist on the term "*gallego*," itself a moderately offensive term used to refer to Spanish immigrants).<sup>515</sup> Moreover, there is no difference in the political circumstances surrounding the two cases that would lead one to expect greater Supreme Court support for Congress in *Sojo* than in *Acevedo*.<sup>516</sup> Due to U.S. practice, however, *Sojo* resulted in dismissal for lack of subject matter jurisdiction.<sup>517</sup> Moreover, the issue was

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512. See *Sojo*, 32 Fallos 120, 121 (1887); *Acevedo*, 28 Fallos at 406-08.

513. See *Acevedo*, 28 Fallos at 407. The full text of the *El Debate* article may be found in Cámara de Diputados, *Diario de sesiones de 1885*, Session of July 14, 1885, at 73 (statement of Zapata).

514. See *Prisión del señor Sojo*, LA PRENSA, Sept. 6, 1887, at 5.

515. See Cámara de Diputados, *Diario de sesiones de 1887*, Session of Sept. 5, 1887, at 826-827 (statement of Mansilla). The Deputy's abusive remarks were criticized by the press, see *Prisión del señor Sojo*, LA PRENSA, Sept. 6, 1887, at 5.

516. While Lucio Mansilla, the Deputy defamed by Sojo, was an ally of the President, Carlos Juárez Célman and the leader of the pro-Juárez Célman majority in the House, Senator José Vicente Zapata, the Senator defamed by Acevedo two years earlier, was a rising star in Argentine politics. Only thirty-four years old at the time, Zapata already had served as President of the Supreme Court of Mendoza and in the House of Deputies. Before his death in 1897, at age forty-six, he would serve as Minister of the Interior under President Pellegrini and as Minister of Justice, Religion, and Public Instruction under President Luis Sáenz Peña. See 4 CUTOLO, *supra* note 217, at 374-78 (describing Mansilla's career); *id.* at 775-76 (describing Zapata's career). Nothing occurred politically between 1885 and 1887 that indicates that *Sojo* was decided under less favorable political circumstances for the Court than *Acevedo*.

517. See *Sojo*, 32 Fallos at 121.

not raised by the parties, but on the Supreme Court's own motion, and only then was it briefed by the Procurador General.<sup>518</sup>

Articles 100 and 101 of the Argentine Constitution of 1860 closely follow Article III, Section 2 of the U.S. Constitution,<sup>519</sup> and U.S. practice dating back to *Marbury v. Madison*<sup>520</sup> has long held that the list of situations in Article III under which the U.S. Supreme Court exercises original jurisdiction is comprehensive.<sup>521</sup> Under U.S. practice, the only instances in which the Supreme Court enjoys original jurisdiction are those where the case affected "Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party."<sup>522</sup> Otherwise the Supreme Court could hear cases only

518. Case Dossier to Sojo, Don Eduardo, interpone el recurso de hábeas corpus [hereinafter Sojo Dossier], stored in Legajo No. 327, División Archivo de la Corte Suprema, Archivo General del Poder Judicial (order by Benjamín Victorica, the President of the Court, instructing the Procurador General to brief the issue of jurisdiction).

519. The Argentine Constitution of 1860 provides:

Art. 100—The Supreme Court and the lower courts of the Nation shall hear and decide all cases that deal with points governed by the Constitution, and by the laws of the Nation, with the limitation established in part 11 of article 67 [for matters governed by the civil, commercial penal and mining codes], and by treaties with foreign nations, of cases concerning foreign ambassadors, ministers and consuls, of cases of admiralty and maritime jurisdiction, of the matters in which the Nation is a party, of cases that arise between two or more provinces, between a province and the residents of another, between residents of different provinces, and between a province or its residents against a foreign state or citizen.

Art. 101—In these [above] cases the Supreme Court will exercise appellate jurisdiction according to the rules and exceptions prescribed by Congress, but in matters concerning foreign ambassadors, ministers and consuls and those in which a province is a party it will exercise exclusive original jurisdiction.

CONST. ARG. OF 1860 arts. 100, 101.

The U.S. Constitution reads:

The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

U.S. CONST. art. III, § 2.

520. 5 U.S. (1 Cranch) 137, 173-75 (1803).

521. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173-75 (1803) (holding that the list of situations where Supreme Court has original jurisdiction in Constitution is exclusive and that Congress may not add to it).

522. U.S. CONST. art. III, § 2; *Marbury*, 5 U.S. (1 Cranch) at 173-75 (interpreting article III, section 2).



as an appellate tribunal.<sup>523</sup> As almost all U.S. law students today learn in their constitutional law courses, however, the reason for this interpretation has much more to do with the political events surrounding Chief Justice Marshall's opinion in *Marbury* in 1803 than with the constitutional text.

*Marbury* concerned a demand by William Marbury, appointed a justice of the peace for the District of Columbia during the closing days of the Adams Administration, that the Jefferson Administration deliver his commission and allow him to assume office.<sup>524</sup> President Jefferson opposed the principle of judicial review and regarded Chief Justice Marshall as a political opponent. When Marbury brought his case directly to the Supreme Court, Marshall realized that Jefferson was likely to ignore any writ of mandamus by the Court that ordered him to give Marbury his Commission. Marshall, however, wished to use *Marbury* to establish the principle of judicial review yet not leave the Court vulnerable to subsequent defiance by the President.<sup>525</sup>

Marshall's response was politically brilliant. Instead of issuing an order that could be defied, Marshall declared the Judiciary Act of 1789 unconstitutional when it authorized the Supreme Court to issue a writ of mandamus. He argued that writs of mandamus were a function of courts of first instance, and given the limited list of occasions of original jurisdiction listed in Article III of the Constitution, the Supreme Court lacked jurisdiction to issue the writ demanded.<sup>526</sup> Marshall's argument was questionable in its interpretation of both the Judiciary Act of 1789, as providing for original jurisdiction,<sup>527</sup> and of the Constitution, as not allowing Congress to expand the Supreme Court's original jurisdiction. However, the argument

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523. See *infra* note 531 and accompanying text.

524. See *Marbury*, 5 U.S. (1 Cranch) at 153-54.

525. See ROBERT G. McCLOSKEY, *THE AMERICAN SUPREME COURT* 25-27 (2d ed. 1994) (describing how Marshall established doctrine of judicial review while limiting the Court's clash with the Jefferson administration); see also ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 2 (Yale University Press 2d ed. 1962); George L. Haskins & Herbert A. Johnson, *Foundations of Power: John Marshall, 1801-15*, in *THE OLIVER WENDELL HOLMES DEVISE, 2 HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 203-04 (1981).

526. *Marbury*, 5 U.S. (1 Cranch) at 173-80.

527. It was not necessary for Marshall to read the provision on writs of mandamus as referring to situations other than those constitutionally within the Court's original jurisdiction. Section 13 of the Judiciary Act of 1789 actually uses much of the same language as article III, section 2 of the Constitution and only authorizes writs of mandamus "in cases warranted by the principles and usages of law." Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80-81. There is nothing in section 13 of the Judiciary Act to indicate that Congress intended the Supreme Court to exercise original jurisdiction in cases like *Marbury's*, where a citizen brings an action against an officer of the federal government. Likewise, the statute, by referring to the "principles and usages of law" hardly could be reasonably read as providing for the issuance of writs of mandamus when these were not warranted under the Supreme Court's jurisdiction. See *id.*

had the virtue of allowing the Supreme Court to declare a law unconstitutional under a circumstance in which the Court's authority could not be questioned.<sup>528</sup> Given that the Court's ruling involved a refusal to hear a case,<sup>529</sup> the Executive had no order that it might refuse to refuse to enforce.

One side effect of Justice Marshall's political brilliance in *Marbury* was to bind the U.S. Supreme Court to the rule that Congress could not expand the Supreme Court's original jurisdiction to allow it to hear habeas corpus actions as a court of first instance. The importance of *Marbury* as a precedent meant that the Court could never read Article III of the Constitution as allowing Congress to expand its original jurisdiction, even though the Article certainly may be read as allowing it.<sup>530</sup> The Court could have read Article III as providing a list of when original jurisdiction must be permitted, creating an irrevocable privilege for Ambassadors and States to litigate before the Supreme Court, but not barring Congress from adding other types of cases to the Court's original jurisdiction. Subsequent case law and commentary following *Marbury*, however, consistently maintained that the Supreme Court lacked original jurisdiction to hear habeas corpus petitions or any other kind of action not involving an ambassador or a state.<sup>531</sup> Regardless of the ambiguity of Article III of the Constitution, *Marbury*'s political importance made it too central a constitutional precedent to overturn.

What is remarkable, however, is that the Argentine Supreme Court was similarly bound to *Marbury*. The circumstances surrounding *Marbury* certainly had nothing in common with those in *Sojo* in 1887.<sup>532</sup> Considering that the defamed Deputy cut a very unsympa-

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528. See U.S. CONST. art. III, § 1 ("The judicial power of the United States, shall be vested in one Supreme Court.").

529. See *Marbury*, 5 U.S. (1 Cranch) at 173-76 (declaring *Marbury*'s claim as outside the competence of the Court).

530. See *supra* note 519 (providing text of Article III).

531. See *Ex Parte Virginia*, 100 U.S. 339, 341 (1879) (noting that writ of habeas corpus could not be granted if it were an exercise of original jurisdiction); *Ex Parte Vallandigham*, 68 U.S. (1 Wall.) 243, 252 (1863) (restating rule of construction that affirmative grant of original jurisdiction in the Constitution as to some cases must be construed as denial of original jurisdiction in all other cases); *In re Kaine*, 55 U.S. (14 How.) 103, 119 (1852) (Curtis, J., concurring) (stating that the Court may issue a writ of *habeas corpus* only as an exercise of its appellate, not original jurisdiction); see also *Ex Parte Milburn*, 34 U.S. (9 Pet.) 704, 705 (Marshall, C.J.) (requiring appellant to show that *habeas corpus* relief sought was being sought from the Supreme Court only in an appellate capacity provided in the Constitution). 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1697 (Fred B. Rothman & Co. 1991) (1833) (stating general rule that Congress cannot expand the Supreme Court's original jurisdiction beyond the list provided in Article III).

532. See *supra* notes 514-18 and accompanying text (providing factual background of *Sojo* case).

thetic figure both law and politics argued in favor of jurisdiction in *Sojo*, and unlike *Marbury*, there was no risk of non-compliance with any Court order. The police had complied with the Argentine Supreme Court's order immediately in *Acevedo* only two years before, and when *Sojo* subsequently refiled his *habeas corpus* petition before the federal district court, the district court judge ruled in his favor, and the police immediately released him.<sup>533</sup> In holding that it lacked jurisdiction to hear the case, the Argentine Supreme Court followed U.S. practice because it felt obliged to follow U.S. law, not because political convenience dictated avoiding jurisdiction.

In the absence of the U.S. precedent, the arguments in favor of jurisdiction in *Sojo* would have been overwhelming. Those arguments were developed fully by both the Procurador General and by Calixto de la Torre, one of two judges who dissented in *Sojo*.<sup>534</sup> First, Law 48 leaves no doubt that Congress intended the Supreme Court to exercise *habeas corpus* jurisdiction. Article 20 of Law 48 states that "[either] the Supreme Court or the district court judges will have the power, at the request of a prisoner or his friends or relatives, to investigate the origins of the imprisonment, and . . . to order that the prisoner immediately be placed at liberty."<sup>535</sup> Second, this law was drafted by jurists who presumably were acting consistently with the intent of the Constitutional Convention,<sup>536</sup> having been members of the first Supreme Court.<sup>537</sup> Third, there is no reason to read the text of the Constitution as limiting the original jurisdiction of the Supreme Court in the event that Congress decided to expand it. Article 101 of the Argentine Constitution (like Article III of the U.S. Constitution) creates a privilege for foreign diplomats and provincial governments to litigate before the Supreme Court.<sup>538</sup> It states that "in matters concerning foreign ambassadors, ministers and consuls and those in which a province is a party [the Supreme Court] will

533. See *Libertad del señor Sojo*, LA PRENSA, Sept. 28, 1887, at 5.

534. See *Sojo*, 32 Fallos at 120, 137 (Calixto de la Torre dissenting); see also *id.* at 123 (Procurador General's opinion) (taking as "a given" the fact that Law No. 48 seeks to provide the Supreme Court with original jurisdiction over *habeas corpus*).

535. Law No. 48, art. 20, Sept. 14, 1863, [1852-1880] A.D.L.A. 364, 369.

536. See *Sojo*, 32 Fallos at 138-39 (de la Torre, J., dissenting).

537. The Supreme Court itself wrote the original draft of the law governing federal jurisdiction, and the provisions on the Supreme Court's original jurisdiction do not appear to have been modified by Congress. See Congreso Nacional, Cámara de Senadores, *Diario de sesiones de 1863*, Session of June 27, 1863, at 203 (statement by Minister of Justice Eduardo Costa); Congreso Nacional, Cámara de Diputados, *Diario de sesiones de 1863*, Session of Aug. 3, 1863, at 321 (statement of Ruiz Moreno); CLODOMIRO ZAVALÍA, HISTORIA DE LA CORTE SUPREMA DE JUSTICIA DE LA REPÚBLICA ARGENTINA EN RELACIÓN CON SU MODELO AMERICANO 61-62, 78 (1920).

538. See CONST. ARG. OF 1860 art. 101.

exercise exclusive original jurisdiction."<sup>539</sup> It does not state that Congress cannot extend this privilege.<sup>540</sup> Fourth, as a general rule of constitutional interpretation, it was inappropriate for the Argentine Supreme Court to declare a law unconstitutional, in this case Article 20 of Law 48, unless Congress had clearly violated the Constitution. Reasonable congressional interpretations of the Constitution should be respected, and the congressional interpretation of Article 101 in passing Law 48 is at least as reasonable as that of the Supreme Court.<sup>541</sup> Fifth, the Supreme Court's precedents consistently had permitted jurisdiction. The Court already had heard *habeas corpus* actions as a court of first instance on five different occasions.<sup>542</sup> The Procurador General's opinion begins by listing the many *habeas corpus* cases that the Supreme Court already had decided under its original jurisdiction, and concludes with an almost sarcastic note that "now the doubt has arisen that we have all been mistaken all along."<sup>543</sup>

The Argentine Supreme Court's decision simply ignores these arguments by focusing on U.S. case law and commentary.<sup>544</sup> It discusses *Marbury* as the original source of the doctrine that Congress cannot expand the Supreme Court's original jurisdiction.<sup>545</sup> The Court did not ignore the Argentine constitutional text, but merely compared both constitutional texts and applied all the same arguments used by the U.S. Supreme Court.<sup>546</sup> Apparently, the Argentine Court felt that it now properly understood U.S. practice and, therefore, wished to correct its past errors.

Citation to U.S. case law was not limited to the majority opinion. In spite of the other arguments at their disposal, Sojo's attorney and the Procurador General both felt obliged to argue that U.S. law permitted jurisdiction.<sup>547</sup> Probably sensing the direction of the Court's inclination, both cited U.S. precedents that they claimed

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539. CONST. ARG. OF 1860 art. 101.

540. See *Sojo*, 32 Fallos at 139-40 (de la Torre, J., dissenting); *id.* at 124-125 (Procurador General's opinion).

541. See *id.* at 140-41 (de la Torre, J., dissenting); see also *id.* at 125 (Procurador General's opinion) (emphasizing that Congress has reasonably interpreted the Supreme Court's original jurisdiction as subject to expansion).

542. See *id.* at 123.

543. *Id.*

544. See *id.* at 130-34.

545. See *id.* at 132.

546. See *id.* at 126-29.

547. See Sojo's Brief on Jurisdiction, in Sojo Dossier, *supra* note 518, at 64-68; see also *Sojo*, 32 Fallos at 124 (Procurador General's opinion).

supported Supreme Court original jurisdiction in *habeas corpus* cases.<sup>548</sup> The Argentine Supreme Court examined their citations, however, and correctly noted that they all involved *habeas corpus* petitions against *judicially* ordered detentions, and therefore involved only appellate review.<sup>549</sup> Only Calixto de la Torre's dissent admitted that "[o]ne cannot in truth ignore the weight of authority that supports the [majority's position], having as it does as a basis various decisions of the North American courts."<sup>550</sup> He insisted, however, that merely because the U.S. Supreme Court found itself trapped by *stare decisis* did not mean that the Argentine Supreme Court had to be bound by its mistakes.<sup>551</sup>

The decisions in *de la Torre*, *Acevedo*, and *Sojo* not only illustrate the Argentine Court's willingness to follow U.S. case law, but also, in *Sojo*, to put its own precedents aside in order to follow U.S. law. Traditionally, both the Argentine Supreme Court and lower courts took the Argentine Supreme Court's precedents seriously. At least through the 1890s, Argentine Supreme Court precedents were regarded as binding on the lower courts.<sup>552</sup> There was some dispute as to whether they were legally binding<sup>553</sup> or only morally binding due to the Supreme Court's prestige and the desire to avoid unnecessary appeals;<sup>554</sup> but as a practical matter there is little difference between the two approaches.<sup>555</sup> Regarding the Supreme Court itself, the Court regularly cited its own precedents and sought to follow them,<sup>556</sup> and

548. See *Sojo* Dossier, *supra* note 518, at 64-68; see also *Sojo*, 32 Fallos at 124-45 (construing U.S. Supreme Court decisions in favor of finding original jurisdiction).

549. See *Sojo*, 32 Fallos at 129-30.

550. *Id.* at 141 (Calixto de la Torre dissenting).

551. See *id.*

552. For examples of lower court judges treating Argentine Supreme Court case law as binding, see *Watteau c/Serpa*, 81 Fallos 311, 314 (1899); *Videla c/García Aguilera*, 9 Fallos 53, 54 (1870); and *Balmaceda y Cía c/Fisco Nacional*, 6 Fallos 159, 160 (1868).

553. See *supra* note 552 and accompanying text.

554. See *Pastorino c/Ronillón, Marini y Cía*, 25 Fallos 364, 368 (1883).

555. See generally 1 Sagüés, *supra* note 477, §§ 81-82 (reviewing treatment of Supreme Court precedent during Court's early years); JUAN CARLOS HITTERS, *TÉCNICA DE LOS RECURSOS EXTRAORDINARIOS Y DE LA CASACIÓN* §§ 73-74 (1991) (same).

556. Dozens of examples of the Argentine Supreme Court following its own case law during the nineteenth and early twentieth century exist. One example is the Supreme Court's refusal to allow federal jurisdiction in defamation actions against the press, with the Supreme Court repeatedly citing its initial precedent of *Fiscal General de la Nación c/Argerich*, 1 Fallos 130 (1864), as authority. See, e.g., *Méndez c/Valdez*, 127 Fallos 429, 440 (1918); *Salva*, 114 Fallos 60, 68 (1910); *Procurador Fiscal c/Correa*, 85 Fallos 246, 251 (1900); *Procurador Fiscal c/Moreno*, 10 Fallos 361, 363 (1871); *Procurador Fiscal c/Laforest*, 3 Fallos 371, 372 (1866). But see *Procurador Fiscal c/Diario "La Provincia"*, 167 Fallos 121 (1932) (shifting the Court's case law to allow federal jurisdiction over press). A second example is the Court's insistence on permitting original jurisdiction when a province is sued by a non-resident. In *Mendoza y Hermano c/Provincia de San Luis*, 1 Fallos 485, 495-96 (1865), and *Avenzo c/Provincia de Buenos Aires*, 14 Fallos 425, 437-448 (1874), the Court reasoned that Argentina's Constitution did not include

the Procurador General's opinions often simply referred the Court to its own precedent.<sup>557</sup> There are many early examples of the Argentine Supreme Court carefully parsing its earlier precedents in much the same manner as a common law court might.<sup>558</sup> Remarkably, however, for three of the Court's five members, Argentine precedent was secondary when it conflicted with U.S. Supreme Court case law.

*Sojo* also is the first case in which the Argentine Supreme Court, at least implicitly, declared a federal law unconstitutional. The Court purported to read Law 48 consistently with the Constitution, and therefore interpreted it as not providing for jurisdiction.<sup>559</sup> Because the language of Law 48 explicitly provided for original jurisdiction in habeas corpus actions, the Court's interpretation of Law 48 really was just a way of saying that the law was unconstitutional. Unlike Justice Marshall in *Marbury*, however, the Argentine Supreme Court had no need to tread cautiously. Cases like *Acevedo*, decided only two years before, and many others, were at least as politically controversial as *Sojo*.<sup>560</sup> Moreover, unlike the U.S. Supreme Court during Justice Marshall's tenure, the principle of judicial review was never under attack. The first case in which the Court would explicitly declare a law unconstitutional already was pending and would be decided only seven months later.<sup>561</sup> In historical terms, what *Sojo* stands for is the

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the eleventh Amendment of the U.S. Constitution, and therefore the pre-eleventh Amendment case of *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), supplied the appropriate law. *Carrega c/Provincia de Buenos Aires*, 61 Fallos 409, 410 (1895), notes that the Court has maintained consistent case law on this issue.

557. See *César c/Guzmán y Compañía*, 51 Fallos 39, 42 (1893); *Municipalidad de la Capital c/Sociedad Laurak Bact*, 48 Fallos 71, 81 (1892); see also *Procurador Fiscal c/Correa*, 85 Fallos at 254-55 (showing the Procurador General obliged to recommend consistency with the Supreme Court's case law, but voicing his personal disagreement with it in the case at hand).

558. See *Municipalidad de la Capital c/Elortondo*, 33 Fallos 162, 196 (1888) (distinguishing prior case permitting expropriation from present case where more property than necessary for public undertaking would be expropriated); see also *Pastorino c/Ronillón, Marini y Cía*, 25 Fallos 364, 368-69 (1883) (examining and distinguishing a Supreme Court precedent in order to decide case at hand differently); *Acevedo*, 28 Fallos 406, 409 (1885). The Court in *Acevedo* emphasized that its decision was not inconsistent with the precedent of *de la Torre*, because unlike publication of secret session, as in *de la Torre*, *Acevedo* involved defamation, a codified criminal act within judicial jurisdiction. See *id.*

559. See *Sojo*, 32 Fallos 120, 126 (1887).

560. For example, in *Fiscal General de la Nación c/Argerich*, 1 Fallos 130 (1864), the Supreme Court blocked federal prosecution of the author of a letter in a newspaper attacking the Chief of Police of the City of Buenos Aires. The Court also handed down a series of decisions against the government in the aftermath of rebellions in Argentina's northwest provinces in the late 1860s. See, e.g., *Urruti*, 5 Fallos 384 (1968) (insisting on release of rebels on bail while their cases were pending); *Competencia entre el Juez Nacional de Salta y el General Jefe del Ejército del Norte*, 7 Fallos 205 (1869) (blocking military jurisdiction over rebel fighters); *Fiscal Nacional c/Varios comerciantes de Mendoza*, 5 Fallos 74 (1868) (holding that the national government could not require merchants to pay customs duties that they paid earlier to rebel authorities controlling Province).

561. See *Municipalidad de la Capital c/Elortondo*, 33 Fallos at 162.

binding power of U.S. constitutional law. U.S. constitutional practice provided more than just a source of ideas that influenced the Argentine framers, it was a source of authority in itself.

*B. The Gradual Decline of the United States as Authority (1897-1930)*

The Argentine Supreme Court never explicitly declared its independence from U.S. practice. Rather, the process involved gradual divergence. First, aspects of the Alberdian vision that varied from the U.S. model inevitably required Argentine solutions. Although the Alberdian vision behind the Constitution supported U.S.-style protection of individual rights to attract immigration and investment, as noted earlier, it had little concern for political rights or for federalism—beyond the degree of federalism necessary to keep local *caudillos* at peace with the central government.<sup>562</sup> These divergences from U.S. practice generally did not require variances from U.S. case law, as most questions that arose were nonjusticiable under the U.S. political question doctrine,<sup>563</sup> but some significant differences did arise. Second, there was a gradual decrease in the talismanic authority of U.S. practice as Argentina's growth gave it self-confidence and as nationalism increased. Third, the Argentine Supreme Court always also focused on the rational interpretation of the text of the Argentine Constitution. The introduction of a Civil Code in 1869<sup>564</sup> pushed Argentine legal education in the direction of continental rationalism.<sup>565</sup> In the nineteenth century, U.S. practice often was recognized as binding, as demonstrated by the 1887 opinion in *Sojo*.<sup>566</sup> By the turn of the century, U.S. authority was

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562. See *supra* notes 93-160 (discussing Alberdian vision); see also *infra* notes 575-85 and accompanying text (discussing development of Argentine federalism and its divergence from U.S. federalism).

563. See Cullen c/Llerena, 53 Fallos 420, 432 (1893) (citing *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849)).

564. See Law No. 340, Sept. 29, 1869, [1852-1880] A.D.L.A. 505.

565. See VÍCTOR TAU ANZOÁTEGUI, *LA CODIFICACIÓN EN LA ARGENTINA* 29-30 (1977); Bernardino Bravo Lira, *Arbitro judicial y legalismo. Juez y derecho en Europa Continental y en Iberoamérica antes y después de la Codificación*, 28 REVISTA DE HISTORIA DEL DERECHO "RICARDO LEVENE" 7, 14-17 (1991); 2 ABEL CHÁNETON, *HISTORIA DE VELEZ SANSFIELD*, 412-16, 418 (1937).

566. Perhaps most striking, aside from *Sojo*, 32 Fallos 120 (1887), and the Court's classic statement on the importance of U.S. practice in *de la Torre*, 19 Fallos 231 (1877), is the Court's repetition of its *de la Torre* statement on the binding nature of U.S. law in *Alem*, 54 Fallos 432, 459 (1893), one of the most politically delicate cases ever handled by the Court, in which the Court clearly needed to maximize its authority. In *Alem*, the Court held unconstitutional the detention by the Executive of a leading opposition figure who had led an unsuccessful rebellion. See *id.* Various Argentine decisions contain discussions that focus almost entirely on U.S. practice. See *Dávila c/Valdez*, 23 Fallos 726 (1880) (containing dispute between majority and dissent as to whether U.S. law allows federal diversity jurisdiction when jurisdiction would have existed between the original parties but subsequently was lost through assignment of the claim and then subsequently regained through a new assignment); *Banco Nacional c/Villanueva*, 18

cited with less frequency, but remained influential. U.S. practice continued to offer the Court important additional authority when it addressed difficult political issues, but it clearly was supplanted by rational authority as the primary source of authority of the Court.<sup>567</sup>

Only in 1897 did the Argentine Court openly recognize a major divergence from U.S. constitutional practice.<sup>568</sup> In *Ferrocarril Central Argentino c/Provincia de Santa Fé*,<sup>569</sup> the Argentine Court held that the General Welfare clause of the Argentine Constitution offered the federal government a general source of authority for legislation affecting the provinces. The Court recognized that the United States utilized the clause only as a source of authority for federal taxation and spending, not for general legislation, but recognized differences in the two constitutions. Unlike earlier cases discussing U.S. constitutional practice, in *Ferrocarril Central Argentino* the Alberdian vision dictated a constitutional interpretation at variance with U.S. legal standards.

The plaintiff in *Ferrocarril Central Argentino*, a railroad, protested the imposition of a provincial property tax in the Province of Santa Fé.<sup>570</sup> The railroad passed through several different provinces and had received a federal exemption from all federal and provincial taxes when it initially obtained its concession from the federal government in 1863.<sup>571</sup> Three decades later, however, the Province began to

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Fallos 162 (1876) (establishing the right of a Nacional Bank established by Congress to enjoy federal jurisdiction in all litigation).

567. The clearest statement of a rationalist approach in the Argentine Supreme Court's case law comes in *Hileret c/Provincia de Tucumán*, 98 Fallos 20 (1903), where the Court derides constitutional arguments that fail to focus on the text of the Constitution, the needs and desires of the Framers, and historical documents such as the debates at the conventions and writings by publicists like Alberdi. See *id.* at 47-48.

568. Although there were two occasions in the 1860s and 1870s when the Court held that it had no obligation to follow U.S. case law on issues for which the Argentine Constitution diverged from the U.S. Constitution, neither case involved significant deviations. In one case the Court held that a province could require a provincial bank to pay its depositors in gold instead of silver, a decision that it based on the lack of a clause in the Argentine Constitution on ex post facto civil legislation. See *Caffarena c/Banco Argentino del Rosario de Santa Fé*, 10 Fallos 427, 435 (1871). However, because the U.S. Constitution also has been interpreted to permit ex post facto civil legislation, see *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 389-90, 393 (1798) (Chase, J.), 396-97 (Patterson, J.), 399 (Iredell, J.); see also *Cummings v. State of Missouri*, 71 U.S. (4 Wall.) 277, 326-32 (1866) (treating a law with the effect of inflicting a civil penalty as an unconstitutional ex post facto law), this really was a case of misunderstanding U.S. practice and reaching the same conclusion anyway. The other case involved Supreme Court original jurisdiction in actions against a Province by non-residents and emphasized that the Argentine Constitution had adopted the pre-eleventh amendment version of the U.S. Constitution in establishing federal jurisdiction. See *Mendoza y Hermano c/Provincia de San Luis*, 1 Fallos 485, 495-96 (1865).

569. 68 Fallos 227, 227 (1897).

570. See *Ferrocarril Central Argentino c/Provincia de Santa Fé*, 68 Fallos 227, 228-29 (1897).

571. See *id.*



impose various taxes on the railroad's property. The Province countered the railroad's claim of tax exemption by arguing that the federal government had exceeded its constitutional powers by granting an exemption from provincial taxes.<sup>572</sup> The Supreme Court decided the case in favor of the railroad<sup>573</sup> and focused on Article 67, Section 13 of the Argentine Constitution, which authorizes Congress to:

Provide for that which is conducive for the prosperity of the country, to the advancement and welfare of all the provinces, and to the progress of enlightenment, providing curricula for general education and university instruction, and, promoting industry, immigration, *the construction of railroads* and navigable canals, the colonization of public lands, the introduction and establishment of new industries, the importation of foreign capital, and the exploration of the interior rivers, through laws directed towards those ends and through temporary concessions of privileges and bounties for initiative.<sup>574</sup>

Although delegates to the Constitutional Convention of 1853 emphasized U.S. federalism as a central feature of the U.S. model for Argentina to copy,<sup>575</sup> no delegate expressed concern about placing limits on the power of the federal government to legislate in the national interest.<sup>576</sup> Article 67, Section 13 was not taken from the U.S. Constitution, but from the draft Constitution that Alberdi included as an appendix to *Bases*.<sup>577</sup> To the extent that the U.S. Constitution offered a model for this clause, it is in the first paragraph of Article I, Section 1: "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States. . . ."<sup>578</sup> The U.S. Supreme Court and commentators consis-

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572. See *id.* at 229.

573. See *id.* at 238.

574. CONST. ARG. OF 1860 art. 67, § 13 (emphasis added).

575. See Constitutional Convention of 1853, Session of May 3, 1853, *supra* note 184, at 539 (statement of Zuviria); *id.*, Session of Apr. 20, 1853, at 468 (statement of Gorostiaga); *id.* at 479 (statement of Gutiérrez).

576. See Constitutional Convention of 1853, Session of Apr. 28, 1853, *supra* note 184, at 529-30 (debating Constitution of 1853, article 64—which becomes Constitution of 1860, article 67—and including no discussion of limits on congressional authority vis à vis the provinces, but rather discussion of whether certain activities, such as seeking the conversion of the Indians, should be encouraged specifically with a constitutional provision directed at Congress). Moreover, the 1860 reforms, although addressing what would be short-lived federalism concerns of the Province of Buenos Aires, likewise made no attempt to restrict the ability of the federal government to legislate for the general welfare. See *United States v. Butler*, 297 U.S. 1, 65-66 (1936).

577. ALBERDI, BASES, *supra* note 95, at 371 app. at 570 (Constitución de la Confederación Argentina art. 67, § 3 (1852)).

578. U.S. CONST. art. I, § 1.

tently have rejected this clause as a source of legislative authority for the federal government, however, reading it instead as referring to the power to "collect taxes, duties, imposts and excises" for the "general welfare of the United States."<sup>579</sup> The U.S. Supreme Court, hearing the same case under the U.S. Constitution, would have agreed with the province and declared that the federal government lacked authority to issue a blanket tax exemption. An examination of U.S. case law would have encountered precedents almost exactly on point.<sup>580</sup>

Had the Argentine Supreme Court wished to, it could have come up with an interpretation of the Argentine clause that, at least for the case at hand, minimized differences from U.S. practice. Article 67, Section 16 contains a specific reference to the development of railroads as a federal function that the Court could decide the case. Instead, the Court developed, in broad strokes, the general role of the federal government in drafting legislation and embarking on grand projects to promote the general welfare.<sup>581</sup> The Court insisted that unlike the U.S. Constitution, the Argentine Constitution "charges the federal government to promote everything that concerns . . . the advancement and general welfare of all the provinces,"<sup>582</sup> and that in doing so, it could enact any necessary legislative measure, such as an exemption from provincial taxation.<sup>583</sup> This was entirely consis-

579. James Madison argued that the General Welfare Clause allowed taxation and spending only in the situations specifically enumerated in the Constitution as within the authority of Congress. See *THE FEDERALIST* NO. 41 (James Madison). Alexander Hamilton, however, argued that the Clause generally authorized any type of taxation or spending for the general welfare. See *id.* No. 33 (Alexander Hamilton). See *Butler*, 297 U.S. at 65-67; C. Perry Patterson, *The General Welfare Clause*, 30 MINN. L. REV. 43, 48-51, 60-61 (1946). Hamilton never argued that the General Welfare Clause was a source of general legislative authority, however, but merely that it was the authority to tax and spend. As a practical matter, however, the U.S. Supreme Court has allowed Congress to use the General Welfare Clause to expand almost the same legislative possibilities for the U.S. federal government as the Argentine Supreme Court has in Argentina by allowing Congress to condition grants of funds to the states on their enactment of legislation and programs that otherwise might fall beyond congressional authority. See *South Dakota v. Dole*, 483 U.S. 203, 206-08 (1987).

580. In *Company v. Peniston*, 85 U.S. (18 Wall.) 5, 30-33 (1873), the U.S. Supreme Court held that federally chartered railroads could be subjected to state property taxes so long as those taxes did not hinder them in the exercise of their functions, even though the railroad was admitted to be agent of federal government. Congress had not explicitly granted an exemption from state taxes, but the Court found that the situation would have been no different if it had, holding that nothing in the Constitution contemplated abridgment by the federal government of the power of states to levy taxes, the only limitation being that the states may not levy taxes with the direct effect of hindering the exercise of powers belonging to the federal government. See *id.* at 30; see also *Thompson v. Union Pacific*, 76 U.S. (9 Wall.) 579, 590-91 (1867) (holding essentially the same as *Peniston*, but in a case in which the railroad, while granted a concession by the federal government, was organized under state law and not by an act of Congress).

581. *Ferrocarril Central Argentino c/Provincia de Santa Fé*, 68 Fallos 227, 235-36 (1897).

582. *Id.* at 236.

583. See *id.* at 237.

tent with Alberdi and the vision of the Argentine elite, which took a Hamiltonian view of the role of the federal government in attracting capital and promoting commerce and industry, during the 1850s, as well as the 1890s.<sup>584</sup> The Supreme Court's broad interpretation of the general welfare clause in *Ferrocarril Central Argentino* established a precedent eliminating any hint of restrictions on federal initiatives in the name of federalism and eliminated the need for Argentina to ever emulate the U.S. Supreme Court's gradual expansion of the Commerce Power as the vehicle for expansion of federal authority.<sup>585</sup>

Twentieth century Argentine constitutional scholars and political scientists clearly did not offer the unified front in support of the U.S. model that they had in the nineteenth century. Whereas in the nineteenth century it had been a matter of Constitutional dogma that the Argentine Constitution was modeled after the U.S. Constitution, in the twentieth century it became an issue of debate as many scholars

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584. See ALBERDI, *Bases*, *supra* note 95, at 478 (emphasizing that federal government is the central figure in achieving major national goals, from encouraging immigration to building public works).

585. See *Compañía Entrerriana de Teléfonos c/Provincia de Entre Ríos*, 189 Fallos 272, 282-83 (1941) (holding that Congress could exempt an interprovincial telephone company from provincial taxes on the basis of its general authority under Constitution of 1860, article 67, section 16 to legislate in the general interest, and offering an extensive citation to *Ferrocarril Central Argentino c/Provincia de Santa Fé* as authority); see also *Roca Hermanos y Cía. c/Provincia de Santa Fé*, 188 Fallos 247, 257 (1940) (holding that a radio station authorized by the federal government was exempt from provincial taxes and noting the general welfare clause as one of the sources of Congress' legislative authority); *Ferrocarril Central Argentino c/Municipalidad de La Banda*, 183 Fallos 181, 185-86 (blocking municipality from collecting taxes and fees from a railroad that the federal government had exempted from taxes, and offering extensive discussion of *Ferrocarril Central Argentino c/Provincia de Santa Fé* and the general welfare clause); *Ferrocarril del Sud c/Municipalidad de Juárez*, 183 Fallos 190, 193-197 (1939) (blocking municipality from collecting taxes and fees from a railroad that the federal government had exempted from taxes, and offering extensive discussion of *Ferrocarril Central Argentino c/Provincia de Santa Fé* and the general welfare clause); 3 FELIPE S. PÉREZ, *LA CONSTITUCIÓN NACIONAL Y LA CORTE SUPREMA* 80 (1962) (noting that article 67, section 16, has no parallel in U.S. Constitution, and that there are no limits on the legislative jurisdiction of the Argentine Congress unless a power is reserved specifically for the province, the only limit being that any concessions granted be temporary). The only occasions on which the Argentine Supreme Court ever has blocked an assertion of federal legislative authority on federalism grounds have been rare situations when a constitutional provision specifically protects a provincial institution under attack; see *Cía. Dock Sud de Buenos Aires Ltda.*, 204 Fallos 23 (1946) (declaring unconstitutional a measure that merged provincial national labor relations boards into a national body and gave it authority to resolve labor litigation); or where the Constitution specifically bars the federal government from a determined type of activity, an issue that arose in the context of federal attempts to assert jurisdiction unconstitutionally in defamation actions in spite of a bar on such jurisdiction; see Argentine Constitution of 1860, article 32; see also *supra* note 554 and accompanying text; *Banco de la Provincia de Buenos Aires c/Nación Argentina*, 201 Fallos 142, 149-150 (1945) (involving federal measures that attempted to tax the Bank of the Province of Buenos Aires in violation of 1859 pact that led to ratification by the Province of Buenos Aires of the Constitution); *Banco de la Provincia de Buenos Aires c/Nación Argentina*, 186 Fallos 170, 222-25 (1940).

sought to de-emphasize U.S. influence.<sup>586</sup> By the 1920s and 1930s Argentine intellectual circles were becoming increasingly nationalistic,<sup>587</sup> and even among liberals, the intellectual pendulum had swung away from Sarmiento and back to Alberdi. For example, in one of the period's leading works in political science, *La Constitución Argentina y sus principios de ética política*, Rodolfo Rivarola begins his book with a recap of the Alberdi-Sarmiento debate on the importance of U.S. case law.<sup>588</sup> For Rivarola, Alberdi is the clear winner in this controversy, and he invokes Alberdi to exhort against scholars still afflicted with the "North American fixation."<sup>589</sup>

The rejection of the U.S. model was only partial, however. At least one of the Ministers on the Court in the 1900s, Mauricio Daract (1901-1915), demonstrated his enthusiasm by procuring and reading the advance sheets of U.S. Court decisions.<sup>590</sup> Moreover, the Court frequently cited U.S. case law as the basis for declaring legislation unconstitutional. Such decisions, involving excessive taxation,<sup>591</sup> arbitrarily discriminatory taxation,<sup>592</sup> and property rights/freedom of contract issues,<sup>593</sup> are not surprising, since they are fully consis-

586. For discussions emphasizing the U.S. model, see PADILLA, *supra* note 185 (examining Argentine history and constitutional conventions to examine degree of U.S. influence); 1 JUAN A. GONZÁLEZ CALDERÓN, DERECHO CONSTITUCIONAL ARGENTINO 320-21 (1930) (citing Constitutional Convention of 1853 to support argument that the U.S. Constitution remained an important model for Argentina); ZAVALÍA, *supra* note 537 (offering history of Argentine Supreme Court with underlying theme of how its case law and authority has compared to that of U.S. Supreme Court). For discussions deemphasizing the U.S. model, see RODOLFO RIVAROLA, LA CONSTITUCIÓN ARGENTINA Y SUS PRINCIPIOS DE ÉTICA POLÍTICA xvi-xxvi (1944) (examining Alberdi-Sarmiento debate on authority of U.S. Constitution and criticizing attitude that Argentine Constitution is merely a copy of the U.S. Constitution and may be interpreted by looking at U.S. practices); DANIEL ANTOKOLETZ, ELEMENTOS DE DERECHO CONSTITUCIONAL Y ADMINISTRATIVO ARGENTINOS 16 (1926) (same); TOMÁS CULLEN, *Diferencias entre la Constitución argentina y la norteamericana*, in UNIVERSIDAD DE BUENOS AIRES, FACULTAD DE DERECHO Y CIENCIAS SOCIALES, 2 DISCURSOS ACADÉMICOS 939, 940-41 (1936) (same); RAIMUNDO WILMART, DIFERENCIAS DE ATRIBUCIONES ENTRE EL EJECUTIVO DE LOS ESTADOS UNIDOS Y EL NUESTRO, 2 Revista Argentina de Ciencias Políticas 314 (1911) (examining the many ways the Argentine Constitution varies from that of the United States in its establishment of authority and limitations of Executive).

587. See generally DAVID ROCK, AUTHORITARIAN ARGENTINA 55-124 (1993) (describing growth of extremist Argentine nationalism from World War I through 1930s).

588. See RIVAROLA, *supra* note 586, at xvi-xxvi.

589. *Id.* at xxvi.

590. ZAVALÍA, *supra* note 537, at 342.

591. See Melo de Cané, 115 Fallos 111 (1911) (citing U.S. case law and holding estate tax unconstitutional); see also Drysdale, 149 Fallos 417 (1927) (citing U.S. law and holding later Buenos Aires tax unconstitutional).

592. See Pereyra Iraola c/Provincia de Buenos Aires, 138 Fallos 161 (1923) (holding special tax on roadside properties unconstitutional when owners' benefits were disproportionate to payment and benefit enjoyed by entire populace); see also Viñedos y Bodegas Arizú c/Provincia de Mendoza, 157 Fallos 359 (1930) (citing U.S. law and finding unconstitutional provincial tax that targets specific high income groups and businesses to pay for pension system).

593. See Horta c/Harguindeguy, 137 Fallos 47 (1922) (finding that rent freeze could not constitutionally modify terms of an already executed lease); see also Bourdieu c/Municipalidad de la Capital, 145 Fallos 307 (1925) (holding that municipal ordinance designed to eliminate

tent with the emphasis on property rights of the Alberdian vision, but cites to U.S. cases presumably still added to their persuasiveness.

U.S. practice was most significant in the one pre-1930 case in which the Court varied significantly from the Alberdian vision. In *Ercolano c/Lanteri de Renshaw*,<sup>594</sup> the Court held constitutional a 1921 law temporarily freezing apartment and commercial rents nationwide. In this instance, the Argentine Court relied on *Block v. Hirsh*,<sup>595</sup> a U.S. Supreme Court decision handed down only a year before, which held a similar rent freeze in the District of Columbia constitutional.<sup>596</sup> The Argentine rent freeze, enacted in response to a housing shortage caused by materials shortages and an economic downturn during World War I, was one of the most controversial pieces of legislation passed during the first government of Hipólito Yrigoyen.<sup>597</sup> The law pitted the populism of the first Argentine President elected in clean elections against the economic elite's concern with protection of property. The U.S. decision clearly strengthened the President's hand. When *Jurisprudencia Argentina*, the leading legal journal, published the text of the legislation, it included the full text of *Block* in a long footnote,<sup>598</sup> so the Argentine Court's focus on the U.S. decision is hardly surprising.

Moreover, U.S. case law was significant once again in 1925, when the Supreme Court reconsidered the rent freeze and this time held

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all profits from sale of cemetery lots through 100% tax on profits unconstitutional).

594. 136 Fallos 161 (1922).

595. 256 U.S. 135 (1921).

596. *Ercolano c/Lanteri de Renshaw*, 136 Fallos 161, 178 (1922) (citing *Block v. Hirsh*, 256 U.S. 135 (1921)).

597. The rent freeze initially was enacted in Law No. 11.157, Sept. 19, 1921, [1920-1940] A.D.L.A. 79, to apply for a period of two years, was extended for one more year by Law No. 11.231, Oct. 4, 1923, [1920-1940] A.D.L.A. 115, and then extended for an additional year by Law No. 11.318, Dec. 5, 1924, [1920-1940] A.D.L.A. 193 after a two month gap. The positions of a number of Argentine constitutional law and civil law professors are noted in RAYMUNDO WILMART, *Las leyes nuevas sobre alquileres*, in 22 REVISTA ARGENTINA DE CIENCIAS POLÍTICAS 440, 440-42 (1921) (opposing rent freeze); see also *La ley de alquileres, el derecho de propiedad y la Constitución Nacional*, in 14 JURISPRUDENCIA ARGENTINA 25 (1924) (offering an interpretation of Constitution in support of rent freeze). The issue and the Supreme Court's decisions were reported on exhaustively in the Argentine press. See J.A. González Calderón, *Inconstitucionalidad de las leyes sobre alquileres*, LA PRENSA, Sept. 22, 1921, at 6 (containing lengthy explanation of why rent control law was unconstitutional); *La cuestión de los alquileres*, LA PRENSA, Apr. 29, 1922, at 9 (discussing *Ercolano* decision in detail); *Aplicación de la Ley sobre alquileres*, LA PRENSA, May 6, 1922, at 15 (discussing lower court decision that cited *Ercolano*); *Las leyes de alquileres*, LA PRENSA, Aug. 22, 1922, at 12 (discussing decision holding rent control law unconstitutional when applied retroactively to contracts already signed at higher prices); *La Suprema Corte declaró que es contraria a la Constitución y afecta el dominio la prórroga de la ley de alquileres*, LA PRENSA, Aug. 27, 1925, at 15 (providing extensive analysis of *Mango c/Traba*, 144 Fallos 219, 224-25 (1925), which declared the law unconstitutional); *La prórroga de los alquileres*, LA PRENSA, Aug. 28, 1925, at 9 (providing editorial supporting Supreme Court's position that rent control law is unconstitutional).

598. See 7 *Jurisprudencia Argentina*, Sección Legislación 1 (1921).

it unconstitutional on grounds that too much time had passed to continue to consider it a temporary, emergency measure, and that the emergency had ceased to exist.<sup>599</sup> The Argentine Court's decision once again relied on a U.S. Supreme Court ruling, *Chastleton Corp. v. Sinclair*,<sup>600</sup> decided three years after *Block* and holding the same District of Columbia rent freeze unconstitutional because it had gone on too long.<sup>601</sup> The Argentine Court followed the approach taken by the U.S. Supreme Court a year later. There is no indication in the two Argentine cases that the Argentine Court regarded U.S. case law as binding. Those days were far behind. But U.S. case law provided a source of authority in a politically delicate situation. The situation would repeat itself in 1934, when the Court needed authority to permit the government to suspend mortgage payments during the Depression.<sup>602</sup> Although the days of magical faith in U.S. practice had long ended, even its lingering effects underline its earlier vitality.<sup>603</sup>

### CONCLUSION

In insisting that "it is absolutely essential that the constitution should not be regarded as something made," but rather as "divine," "constant," and "exalted above the sphere of things that are made,"<sup>604</sup> Hegel makes a good point about the weakness of rationalism. He fails, however to recognize two factors that are particularly important in the modern world: (1) the demonstration effect of

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599. See *Mango*, 144 Fallos at 224-25.

600. 264 U.S. 543 (1924).

601. See *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 543 (1924). In *Chastleton*, Justice Holmes reversed the District of Columbia Court of Appeals in a decision allowing the continuation of a rent freeze instituted during a housing shortage in the District during World War I. Holmes indicated that the District Court should analyze whether the emergency conditions originally justifying the rent freeze continued to exist, to determine whether the freeze should continue. See *id.* at 547-49.

602. See *Avico*, 172 Fallos 21 (1934) (citing U.S. law extensively and holding constitutional legislation suspending mortgage payments and evictions).

603. The Argentine Supreme Court continues to cite U.S. law today, but since the late 1940s, unlike in the 1920s and 1930s, little intellectual integrity has accompanied its use. The Court cited U.S. case law in the 1920s and 1930s in order to change Argentinian practice, but its use of U.S. law was accurate, and in cases with similar factual scenarios. In the late 1940s, however, the court began to interpret U.S. law out of context in order to reach a desired result. See *S.A. Merk Química Argentina c/Nación Argentina*, 211 Fallos 162, 198-209 (1948) (using extensive citations to U.S. practice to justify seizure of German property based on executive war powers, despite seizure of property occurring after German World War II surrender); *Rodríguez*, 254 Fallos 116, 134-37 (1962) (using extensive citations to U.S. authors to justify presidential emergency powers that incorporated striking railroad workers into Army and subjected them to military discipline); *Peralta c/Nación Argentina*, 313 Fallos 1513, 1547-49 (1990) (citing U.S. case law on economic emergencies to justify constitutionality of presidential decree that turned ordinary bank accounts into long-term government bonds).

604. HEGEL, *supra* note 14, at 178, ¶ 273.

foreign practices; and (2) the possible talismanic authority of a foreign model.

Today's world is full of models moving from one country to another. Today, most non-Western countries strive to emulate the Western model of industrial production, a model that requires dramatic changes in lifestyles and attitudes. These changes include: (1) regular work hours; (2) participation in a monetary economy; and (3) division of labor in societies formerly based on subsistence agriculture. But many countries have adopted Western economic models with success. Hegel's statements, carried to an extreme, would imply that one nation's constitutional structure can never influence that of another, a position that should have been apparent as false even in Hegel's day. Cultures inevitably interact.

Identifying foreign talismans may prove more difficult in the late twentieth century than in the nineteenth, but even today such talismans exist. Argentina, for example, recently has granted ten international human rights instruments constitutional hierarchy by wholly incorporating them into its Constitution.<sup>605</sup> Most delegates to its 1994 Constitutional Convention probably were hardly aware of the specific content of these ten declarations and treaties, but their inclusion involves yet another Argentine attempt to cure its institutional defects with a foreign symbol—this time the symbol of international law.<sup>606</sup> In the Eastern European context, George Fletcher has described a 1990 Hungarian constitutional decision banning capital punishment as a "yearning to join the 'European House,'" where the death penalty has been eliminated.<sup>607</sup> Although

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605. See CONST. ARG. art. 75, § 22.

606. It is striking that in recent years Argentina probably has given more deference to the Inter-American Commission on Human Rights than any other major country in the Americas. Argentina is the only country to have reached friendly settlements with petitioners before the Inter-American Commission, and it did so on two different occasions. See Report No. 1/93, Inter-American Commission on Human Rights, Organization of American States, *Annual Report: 1992-1993* 35 (1993) (settling claims for compensation for detentions, physical injuries and murders by military government in power from 1976-1983); Report No 22/94, Inter-American Commission on Human Rights, Organization of American States, *Annual Report: 1994* 35 (1993) (eliminating special criminal provisions on defamation of a public official from the criminal code).

607. See GEORGE P. FLETCHER, CONSTITUTIONAL IDENTITY IN CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY: THEORETICAL PERSPECTIVES 223, 225 (Michel Rosenfeld ed., 1994) (citing Judgment of Oct. 24, 1990, ALKOTMÁNYBÍRÓSÁG, 1990 Magyar Közlöny *Hungarian Gazette* 107 (describing Hungarian Constitutional Court decision as lacking convincing argument, and based on a need to adopt values now dominant in Western Europe)); see also A.E. Dick Howard, *The Indeterminacy of Constitutions*, 31 WAKE FOREST L. REV. 383, 386-87 (1996) (offering similar observation, noting that international human rights instruments were influential in drafting of new constitutions of Central and Eastern Europe). Howard, however, attributes the tendency to borrow to a desire to achieve international acceptance, without noting the possibility that borrowing also helps achieve internal acceptance because of the authority of the source. See *id.*

difficult to perceive from the United States, which long has enjoyed sufficient stability to reduce the need for foreign models, the banner of international human rights may offer a modern talisman for countries in transition from dictatorship that need an extra source of authority for establishing new rules of behavior. Like the imported constitutions of the nineteenth century, international human rights instruments seek to establish rights with only limited local roots, but like the U.S. Constitution in Argentina in the nineteenth century, they also are free of local critique.<sup>608</sup>

One possible critique of this Article could be that the Argentine experience does not describe cultural interaction, but rather the cultural submission of a small elite to the expectations of British imperialist interests.<sup>609</sup> Parts of what happened in Argentina may certainly be described in the context of imperialism and the world trading relationships of the late nineteenth and early twentieth century. Although Argentina never was a colony of Great Britain, the enormous amount of British investment in Argentina created an economic relationship of great import to the British Empire, one that far overshadowed investments from other countries.<sup>610</sup> Short of accepting Queen Victoria as its sovereign, adopting the U.S. Constitution as its model probably was the best thing that Argentina could do to reassure British investors that their property would be protected.

Describing Argentine constitutionalism as imperialist dependency ignores both Argentine realities and present day tendencies throughout the world, however. First, any British participation in nineteenth century Argentine constitutionalism was minimal. The British never told Alberdi and Sarmiento what to write, and their rare attempts to intervene politically in Argentina ended poorly.<sup>611</sup> The Argentine elite determined its model without foreign interference. Second, the

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at 386-87.

608. Cf. Brian Z. Tamanaha, *The Lessons of Law-and-Development Studies*, 89 AM. J. INT'L L. 482, 484-85 (1995) (noting similarity between transplant of international human rights and elements of western legal culture and pointing out that individuals who critique shifts of western legal models as ethnocentric rarely make similar charge regarding international human rights transfers).

609. Dependency theory—a leftist critique of development economics that was especially popular in the 1970s—describes social and economic development in Latin America as a product of the domination of the economically advanced nations, and views economic and social developments in Argentina, as in other Latin American countries, in terms of the needs and opportunities offered by foreign capitalism. See FERNANDO HENRIQUE CARDOSO & ENZO FALETTO, *DEPENDENCY AND DEVELOPMENT IN LATIN AMERICA* 35, 82-84, 88 (Marjory Mattingly Urquidí trans., Univ. California Press 1979) (1971).

610. H.S. FERNS, *BRITAIN AND ARGENTINA IN THE NINETEENTH CENTURY* 1-2 (1960) (discussing trends of British investment in Argentina during late nineteenth and early twentieth century).

611. See *id.* at 487-89.



economic elites of many of today's emerging democracies probably would love to copy the Argentine constitutional experience of the nineteenth century if they similarly could comfort potential investors. The emerging democracies of Eastern Europe seek economic integration into the European Union in much the same manner that Argentina once incorporated itself into the trading and investment flows of the British Empire. Eastern European countries also face the same issues of establishing investor confidence. What is noteworthy about the Argentine experience is that its elite was so successful in its goal of attracting immigrants and investors.

When Argentine constitutionalism began to break down in the 1930s, it had little to do with its focus in earlier periods on the United States as a model. Argentina's coups of 1930 and 1943 and the rise of Perón in the wake of the 1943 military government involved issues of political participation. The coup of 1930 was provoked in part by conservative distrust of forces brought to power by popular elections. Reluctance by the military to continue upholding the electoral fraud of the conservatives<sup>612</sup> provided one motivation for the 1943 coup. Perón emerged in the 1940s in part due to the mobilization of the working class as a political force.<sup>613</sup> One can argue that part of the failure of post-1930 Argentina stemmed from an inability to modify the nation's rules of mutual security in light of seventy years of social and political change since 1860. Such an analysis requires an article in itself.<sup>614</sup> But these issues, although showing a lack of adaptability in the political system, do not undercut the utility that the U.S. model initially offered to attain political stability in the nineteenth century. Sixty-eight years of unbroken constitutional government, from 1862 to 1930, is a good record in comparison with most of the world during the same time period.

To the extent that one views the Argentine Constitution of 1853 and 1860 as successful, and little doubt exists in terms of their establishment of basic rules of mutual security, one also must concede that Argentina benefitted from its "faith" in U.S. constitutionalism. For although Argentine constitutionalism contained its distinctive elements, the talisman of U.S. practice so inspired the elite's concept of constitutionalism that Argentine constitutionalism simply cannot be understood in isolation from its U.S. influences. Certain characteristics probably aided Argentina in its use of the United States as a

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612. See ROBERT A. POTASH, *THE ARMY & POLITICS IN ARGENTINA, 1928-1945*, at 183 (1969).

613. See generally ROCK, *supra* note 12, at 214-61 (summarizing political forces at work from 1930-1946).

614. The author of this Article is presently engaged in research in this area.

model. First, Argentina was fortunate to have an endowment of resources capable of luring foreign immigrants and capital, and hence could keep most politically relevant groups satisfied with its model. Success breeds support. Second, because the group of individuals who were politically relevant was small, with the mass of Argentina's largely rural population simply outside the political process, generating support for the model was easier than if a multitude of disparate groups had to be satisfied. But neither of these observations change the fact that the consolidation of the Constitution ended the chaos and bloodshed of the past.

Obviously the key for the success of an emerging democracy is not to copy the constitutional practice of a selected foreign state blindly. Even Argentina's practice consciously varied from parts of the U.S. model. But political leaders and constitutional scholars must realize that they may require more than rational acceptance and interpretation of a text to attain political stability. If the jurisdiction is unaccustomed to reducing political disputes to legal arguments, rational interpretation of a constitution may not provide legal rules or sufficient authority to maintain stability. Rational authority often needs a crutch, and under the right circumstances, the talisman of a foreign model may lend authority to a rule of law that it otherwise would lack. Hegel was correct in noting the inherent vulnerability of a visionary constitution that seeks to establish new rules of political conduct, but he failed to note the possibility of sources of authority outside of a country's own political traditions. Countries emerging from long periods of dictatorship have no choice but to adopt visionary constitutions. The life of the law in such a country often is not "logic" or "experience,"<sup>615</sup> but faith.

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615. See OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (Boston, Little, Brown & Co. 1881) (stating that "the life of the law has not been logic: it has been experience").