

## **Explaining Constitutional Copying as an Ideology: Argentina's "Yankee-mania" Under President Domingo Sarmiento (1868–1874)**

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### **Abstract**

Foreign constitutional models can transform a country thanks to the power of ideology. The comparative constitutional literature maintains that successful constitutionalism requires credible commitments to essential rules by all major political actors so that those out of power can avoid persecution that will drive them into rebellion, and those in power can feel assured that if they relinquish power, the opposition will respect their core interests. The literature also assumes that the process of reaching credible commitments is a slow one, but that over time civil society, courts and government bureaucracies will strengthen the commitments and act against unconstitutional power grabs. Foreign legal transplants are not seen as a tool toward credible

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commitments. Much scholarship on the transplant of legal rules assumes that rules allocating political power will be especially resistant to transplantation, and no scholarship theorizes how such transplants might take root—though the transplants clearly exist.

This article explains how a constitutional transplant may sometimes establish the credible commitments necessary for stable constitutionalism. Rapid adoption of a constitutional transplant becomes plausible if its adoption is understood as an ideology—the use of ideas for social domination. The chance to become known as a leading constitutional exponent or lead a political movement creates incentives for ideological entrepreneurs to invoke attractive foreign models, especially when existing ideologies don't align with economic opportunities or social reality. These entrepreneurs do not necessarily promote a text; instead, they market a package of ideas, values and approaches, which combined with the foreign text get embodied as legal rules. Indeed, if the entrepreneurs are successful, constitutional debates may sometimes become unanchored from the recipient country's text if its existing text does not fully match the model. Credible commitments emerge from the model, not the text. But most important, if the ideologist obtains power, then a self-reinforcing constitutional commitment may result. The ideological entrepreneur in power cannot easily escape the rights and institutions created by their own ideology and must protect the rights of their political opponents accordingly.

Argentina in the 1860s shows how elites may harness a foreign constitutional model to realize effective credible commitments. Sometimes dubbed “yankee-mania,” an ideology took root insisting that Argentina needed to treat the U.S. constitutional model as binding. Domingo Sarmiento, who served as President from 1868-1874, built much of his political career as the best-known ideological entrepreneur boosting the U.S. model, sometimes going to farcical extremes. By the time Sarmiento became President, the U.S. model already dominated Argentine constitutional debate, and on the question of emergency Presidential powers during civil unrest, Argentina's constitutional text, which actually came from Chile's on this issue, simply got ignored. But while Sarmiento constantly invoked the model, it also constrained

him in the suppression of rebellions, particularly when the Supreme Court ruled against him, and under the U.S. model he needed to accept its decision. Every ideology has its limits, and sometimes Sarmiento overreached in his invocation of the U.S., as when he turned to a departing (and intellectually unimpressive) U.S. ambassador to explain the martial law powers of Lincoln. But the ideology of yankee-mania worked to establish credible commitments. Argentina's adoption of the U.S. model is important not just for Argentine historiography and for how Argentina attained the stability for late 19th century economic growth, but for understanding constitutional transplants broadly, particularly for countries at moments that demand institutional change.

## I. INTRODUCTION

Legal transplants sometimes wield enormous ideological power that produces effective constitutional commitments by political elites. Mid-19th century Argentina illustrates the process.

On June 9, 1870, the Buenos Aires newspaper *La Prensa*, only eight months old and seeking to make its mark, published an editorial headlined: *Yankee-mania*.<sup>1</sup> Referring in part but not exclusively to President Domingo Faustino Sarmiento (1811–1888), the newspaper complains:

There are no speeches without citations to the United States. There are no articles without references to the State of New York or the Constitution of Pennsylvania. There are no Government proclamations, scientific works, books, lessons, etc. etc. that do not speak of the great people of the North, of their institutions, their system of education, and finally, of Miss Mann . . . [Referring to the Massachusetts educational pioneer Mary Mann.]<sup>2</sup>

Our legislators don't dare to prepare a law without turning to the practices and laws of the United States. They do not build a school without having at hand the plans of schools in the United States. They do not write an article without opening at the very least Story, Kent and *The Federalist*. They do not offer

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1. *Yankee-mania*, LA PRENSA, June 9, 1870, at 3.

2. Mary Mann was a close friend of President Sarmiento. BARRY L. VELLEMAN, "MY DEAR SIR": MARY MANN'S LETTERS TO SARMIENTO (1865–1881) 1, 5 (2001).

a speech without flowering yankee rhetoric and without at least twenty citations to this great people that little by little is absorbing us like a sponge does water . . . .

It is a true *yankee mania* that invades us, surrounds us and chokes us—yankee books, yankee schools, yankee teachers, yankee speeches, yankee constitutions . . . .

For our part, we have always thought that in the United States there are many good things that are appropriate to imitate. It is without a doubt that a great part of the institutions of this people constitute the most beautiful creation of human genius; but our *yankee mania* does not have limits . . .

Several days ago we heard a [Provincial] Constitutional Convention delegate cite practices in the United States at least ten times on the stupid question of whether the resignation of some convention delegates should be communicated to the legislature or to the Executive Branch . . . .

Not long ago we even heard one of our public men express himself in a way that hardly did him honor.

He said that Argentines relate to the United States in the same manner that a Catholic relates to the seat of the Roman Catholic Church . . . .

[T]he newspapers *El Nacional* and *La Tribuna* don't do anything other than cite American books in order to know the number of committees that a Constitutional Convention requires.

We are covered with the fear that we will be condemned as heretics because of this article. How can we dare to speak of the United States with such little respect? . . . .

It is known that laws develop, it can be said, from the customs, needs and antecedents of a people. To usurp in one swipe the institutions of another with a different origin, different customs and greater development is to wish to dress a pygmy in the clothes of a giant . . . .

In practice, in the area of institutions we have to turn to the States of North America with preference over other parts of

the world, for the equality in our forms of government and because we have copied our laws from there; but that necessity should not be permitted to create a general defect that already borders *mania* or what is the same thing, craziness . . . .

We have concluded, and there will not fail to be someone who will make the sign of the cross and will tell us:

*Vade retro Satanás.*<sup>3</sup>

*La Prensa* does not exaggerate when it notes that the two Buenos Aires newspapers closest to the Government at the time, *El Nacional* and *La Tribuna*, filled their columns with references to the United States, especially on legal issues,<sup>4</sup> as did *La Nación Argentina*, which was in political opposition but also represented Buenos Aires elites.<sup>5</sup> And while mocking, *La Prensa's* editorial admits the “necessity” of copying U.S. governmental institutions.<sup>6</sup> Even the political sector furthest from the government was caught up in “yankee-mania.” The year before, *La Republica*, a Buenos Aires newspaper that catered to the political interests of the interior of the country, explicitly called for “yankee-mania,” invoking the term as the path to establish free institutions.<sup>7</sup> Instead of questioning yankee-mania as an excess of

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3. *Yankee-mania*, *supra* note 1. The term “Miss Mann” is used in the Spanish original, but would not have implied that Mary Mann, the widow of the educator Horace Mann, was unmarried. *La Prensa* explicitly links Sarmiento to the “yankee mania” of the quoted article in a separate article on the same page, *El Gobierno Nacional en un buen camino*, *LA PRENSA*, June 9, 1870, at 3 (all italics are in the original) (translation by the author).

4. See, e.g., *El discurso del Senador Mitre*, *LA TRIBUNA*, June 20, 1869, at 2 (criticizing then Senator Bartolomé Mitre for improperly failing to follow U.S. practice in a Senate argument); *Discurso sobre el poder del veto*, *EL NACIONAL*, Oct. 13, 1868, at 1 (on the veto power in the U.S. Constitution); *Jurisprudencia de Sangre*, *EL NACIONAL*, Apr. 15, 1869, at 2 (on U.S. martial law).

5. *La Nacion Argentina's* editorials often preview or match positions that then Senator Mitre takes in Congress invoking the U.S. as authority and claiming that President Sarmiento has strayed from the model. See, e.g., *Ley marcial en San Juan*, *LA NACION ARGENTINA*, May 15, 1869, at 2, which also begins with a homage to George Washington to then contrast him to Sarmiento and his failings. The paper supported Mitre's politics from its founding in 1862, and in 1870 Mitre purchased the paper and renamed it *La Nacion*. See OSCAR R. BELTRÁN, *HISTORIA DEL PERIODISMO ARGENTINO* 252–53 (Editorial Sopena Argentina 1943); CARLOS ULANOVSKY, *PAREN LAS ROTATIVAS, 1800–1969* 11 (Emecé Editores 2005).

6. *Yankee-mania*, *supra* note 1.

7. *La yankee-mania y la europeo-mania*, *LA REPUBLICA*, Oct. 2, 1869, at 1. Sarmiento would describe the newspaper as under the political ownership of Nicasio Oroño, the Senator from the Province of Santa Fe. Letter from President Domingo Sarmiento to Manuel Garcia, Argentine Ambassador to the United States (Oct. 13, 1870), in *CARTAS*

other political sectors, *La Republica* challenged President Sarmiento, Argentina's yankee-maniac-in-chief, for passing laws "that certainly were not in accord with the spirit of yankee politics," which is what is required "to become really and truly republican."<sup>8</sup> While Juan Bautista Alberdi (1810–1884), the most influential architect behind Argentina's 1853 Constitution, was most certainly not a yankee-maniac, he was in exile in Europe throughout almost all the 1860s and 70s.<sup>9</sup> All major political forces in Argentina in 1870 accepted the ideology of U.S. constitutionalism as authoritative.

Scholars have often noted and debated Argentina's copying of U.S. constitutionalism during the middle and late 19th century<sup>10</sup> as well as the general turn of the Spanish American republics to the U.S. constitutional model in the 19th century.<sup>11</sup> But the deeper one digs into the history, moving beyond mere comparisons of texts, the more one uncovers the ideological power that a model can wield. The

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CONFIDENCIALES DE SARMIENTO A M.R. GARCÍA (1866–1872) 60, 60 (Manuel R. García-Mansilla ed., 1917).

8. *Id.* *La yankee-mania y la europeo-mania*, *supra* note 7.

9. Alberdi only returned to Argentina in September 1879. From when Mitre took control of the country after the battle of Pavón in September 1861 at least through the mid-1870s, Alberdi apparently feared that Mitre, Sarmiento or their allies would find a way to imprison him or worse should he return to Argentina. See JORGE M. MAYER, 2 ALBERDI Y SU TIEMPO, 931–32, 937, 941, 973–74, 980, 987, 996–997 (describing the many occasions when Alberdi considered and abandoned plans to return), 1046–47 (noting the changes in attitudes by 1877–1878, culminating in Alberdi's election as a Deputy from the Province of Tucumán while still in Europe [hereinafter MAYER, ALBERDI Y SU TIEMPO]).

10. See MARTA MARÍA MAGDALENA HUERTAS, EL MODELO CONSTITUCIONAL NORTEAMERICANO EN LOS FALLOS DE LA CORTE SUPREMA DE JUSTICIA DE LA NACIÓN (1863–1903) 27–31 (2001) (reviewing the most important Argentine literature); see generally, e.g., ALBERTO PADILLA, LA CONSTITUCIÓN DE ESTADOS UNIDOS COMO PRECEDENTE ARGENTINO (Jesús Menéndez ed., Buenos Aires, 1921) (emphasizing the U.S. model); MANUEL JOSÉ GARCÍA-MANSILLA & RICARDO RAMÍREZ CALVO, LAS FUENTES DE LA CONSTITUCIÓN NACIONAL (2006) (emphasizing the U.S. model and the ideological implications in modern times of doing so); Jonathan M. Miller, *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*, 46 AM. U. L. REV. 1483 (1997) (emphasizing the Argentine elite's fascination with the U.S. model) [hereinafter Miller, *The Authority of a Foreign Talisman*]; see also SANTOS P. AMADEO, ARGENTINE CONSTITUTIONAL LAW (1943) (offering a comparative analysis of U.S. and Argentine constitutional provisions and case law generally emphasizing the degree to which the U.S. initially and in many subsequent situations continued to act as a model); Alberto F. Garay, *Federalism, the Judiciary, and Constitutional Adjudication in Argentina: A Comparison with the U.S. Constitutional Model*, 22 U. MIAMI INTER-AM. L. REV. 161 (1991) (emphasizing the U.S. model, but not for all aspects of the Argentine Constitution).

11. See, e.g., GEORGE ATHAN BILLIAS, AMERICAN CONSTITUTIONALISM HEARD ROUND THE WORLD, 1776–1989: A GLOBAL PERSPECTIVE 105, 106–12, 120, 125–33 (2009); José Antonio Cheibub et al., *Latin American Presidentialism in Comparative and Historical Perspective*, 89 TEX. L. REV. 1707, 1709–10 (2010); David Bushnell, *Los usos del modelo: La Generación de la Independencia y la Imagen de Norteamérica*, 82 REVISTA DE HISTORIA DE AMÉRICA 7, 7, 26–27 (1976).

literature on legal transplants is immense,<sup>12</sup> and much of that literature emerged from the work of Alan Watson, a legal historian with particular expertise in Roman law.<sup>13</sup> Yet, while anthropological and sociological work has considered the forces motivating and effectuating legal transplants,<sup>14</sup> historical work on transplants has tended to be more restricted in its focus.<sup>15</sup> The failure is unfortunate, since even U.S. history has displayed the ideological influence of foreign models, as with the early U.S. fascination with the Roman Republic and George Washington modeling himself after Cincinnatus—influencing Washington’s decision to step down as commander of the Army and his resolve to only serve two terms as President.<sup>16</sup> In fact, many of the observations of the U.S. historian Carl Richard on the influence of the Classics on Revolutionary America apply to Argentina’s use of the U.S. model—that myths/models help people deal with new realities, that employing classical knowledge (or that of the model) provides status, and that “a common set of symbols, knowledge and ideas” facilitates discourse.<sup>17</sup> Though in Argentina’s context, during several decades, the impact went much further.

If one considers the ideological aspect of legal transplants, then legal transplants have the potential to resolve a basic question at the heart of constitutional institutions—how political actors can obtain credible commitments from opponents that those actors’ basic interests will remain protected when they find themselves out of

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12. For an overview of the literature, see Michele Graziadei, *Comparative Law, Transplants, and Receptions*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 442, 443–45, 452–73 (Mathias Reiman & Reinhard Zimmermann eds., 2d ed. 2019); Frances H. Foster, *American Trust Law in a Chinese Mirror*, 94 MINN. L. REV. 602, 610–20 (2010).

13. ALAN WATSON, *Legal Transplants: An Approach to Comparative Law*, in SOCIETY AND LEGAL CHANGE (2d ed. 2001); Gary Francione, *Alan Watson’s Controversial Contribution to Legal Scholarship*, 31 GA. J. INT’L & COMPAR. L. 59 (2002); John W. Cairns, *Watson, Walton, and the History of Legal Transplants*, 41 GA. J. INT’L & COMPAR. L. 637 (2013).

14. See, e.g., YVES DEZALAY & BRYANT G. GARTH, THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES (2002); YVES DEZALAY & BRYANT G. GARTH, ASIAN LEGAL REVIVALS: LAWYERS IN THE SHADOW OF EMPIRE (2010); Assaf Likhovski, *Argonauts of the Eastern Mediterranean: Legal Transplants and Signaling*, 10 THEORETICAL INQUIRIES L. 619 (2009); Jonathan M. Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process*, 51 AM. J. COMPAR. L. 839 (2003).

15. See David Nelken, *Towards a Sociology of Legal Adaptation*, in ADAPTING LEGAL CULTURES 7, 8–11 (David Nelken & Johannes Feest eds., 2001), who describes the very restrictive approaches taken by legal historians and some comparativists, with Alan Watson using the existence of legal transplants “as an attack on the very possibility of sociology of law.” *Id.* at 8.

16. See CARL J. RICHARD, THE FOUNDERS AND THE CLASSICS: GREECE, ROME, AND THE AMERICAN ENLIGHTENMENT 71–72 (1994); GARRY WILLS, CINCINNATUS: GEORGE WASHINGTON AND THE ENLIGHTENMENT 162 (1984).

17. RICHARD, *supra* note 16, at 9–10.

power. As the next section will discuss, political scientists and economists have generally assumed that the enforceable commitments and institutions that are necessary for such protection can only develop slowly over time.<sup>18</sup> In particular, the New Institutional Economics (“NIE”) movement, made up of scholars focused on the role of law and social norms in economic development, has emphasized that the complexity of organizations in developed, democratic societies ensures the credibility of commitments. According to NIE proponents, this is because the enormous variety and depth of civil society and government bureaucracies will act against unconstitutional power grabs.<sup>19</sup> However, NIE scholarship has also insisted that establishing a system where political and social costs deter rule violations requires a gradual process to sufficiently root the rules and the institutions protecting them in a nation’s political culture.<sup>20</sup> That assumption is clearly wrong in Argentina’s context, thanks to the ideological nature of constitutional transplants. It is likely wrong in many situations—for example, as with the fascination of some Eastern European countries with Western European models after the breakdown of the Soviet bloc.<sup>21</sup>

Understanding the process of constitutional commitments requires an in-depth examination of legal history and constitutional ethnology, and Argentina’s 19th century boom period offers a rich case study. The era involved extraordinary incentives for Argentina’s elite to trade with Europe,<sup>22</sup> which created opportunities for an especially influential ideological entrepreneur in Domingo Sarmiento, President from 1868 to 1874. Sarmiento’s fervent promotion of U.S. constitutionalism began in the late 1840s, and while he was never alone, by the 1860s he was joined by most of Argentina’s political elite and jurists, who often exceeded him in the sophistication of their analysis. The use of the U.S. model declined significantly by the late 1890s, but Argentine constitutionalism substantially based on the U.S. was strikingly successful at meeting the aims of its framers in protecting individual and economic rights until the Depression of

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18. Mary M. Shirley, *Institutions and Development*, in HANDBOOK OF NEW INSTITUTIONAL ECONOMICS 611, 625 (Claude Ménard & Mary M. Shirley eds., 2008).

19. See *infra* notes 63–64 and accompanying text.

20. *Id.*

21. See David Nelken, *Using the Concept of Legal Culture*, 29 AUSTL. J. LEGAL PHIL. 1, 4 (2004); see also CATHERINE DUPRÉ, IMPORTING THE LAW IN POST-COMMUNIST TRANSITIONS 9–11, 18–19, 55–62, 87–89, 157–160 (2003) (describing Eastern Europeans as seeing law from the West as having both an inherent correctness and as consistent with their aim of becoming like the West and joining the European Union).

22. See *infra* notes 141–143 and accompanying text.



1930 and a military coup.<sup>23</sup>

Digging deeply into Argentina's constitutional "yankee-mania" illustrates how credible constitutional commitments can occur through a legal transplant ideology and has three important facets. First, perhaps most important for understanding how a society achieves credible commitments, the yankee-mania can be traced to ideological entrepreneurs who benefitted politically as exponents of the ideology. As was certainly true of Domingo Sarmiento, and to some degree of his predecessor as President, Bartolomé Mitre, close identification of an individual with the ideas for guiding the country can translate into political power. This inevitably creates incentives for politicians to promote their ideology's broad acceptance. An expert ideological entrepreneur makes use of existing trends, economic incentives, and the prestige and robustness of foreign models, for both ideological and personal advantage. The ideologist using a foreign model may also benefit from foreign resources and prestigious relationships even when the country offering the model is disinterested.

Second, and closely related, ideology creates costs for politicians expounding the ideology if they vary from their ideological commitment once in office. Sarmiento would clearly both benefit from yankee-mania and find himself constrained by its requirements—most visibly in the need to respect judicial decisions. Ideology, especially when linked to a fully formed constitutional model, both clarifies the constitutional commitment and increases the cost of violating those commitments, especially for the system's most visible entrepreneurs.

Third, while the ideology of following a prestigious foreign model may involve textual legal arguments, ideology and the legal tools that implement it may not perfectly match. Ideology, which will be more fully defined in the next section, offers ideas about how society should operate, and those ideas in Argentina's context included ideas about law and legal institutions. That is not the same thing as the law itself. Debates could completely eclipse Argentina's constitutional text, which often followed the U.S. Constitution, but sometimes did not. Sarmiento was a journalist, not a lawyer, but used his success as an ideological entrepreneur to project himself as a constitutional expert. Moreover, he would often enjoy greater political success on constitutional issues than his adversary, Alberdi, who was a talented lawyer. This article will show that on the crucial question of states of siege (emergency powers to suspend individual rights), both sides of

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23. Miller, *The Authority of a Foreign Talisman*, *supra* note 10, at 1534–44.

the debate ignored Argentina's constitutional text and its origins to instead invoke U.S. practice. While the yankee-mania ideology often led to specific textual adoptions, law is only one expression of the construction of ideas. Sometimes the yankee-mania ideology could become very legal in nature. The Argentine Supreme Court would come to treat U.S. constitutionalism and U.S. Supreme Court case law as binding and would act accordingly;<sup>24</sup> but the source for that approach came not from the Supreme Court, but from the already well-established ideology within political elites of U.S. constitutionalism as binding. Argentina's courts benefitted from the emphasis the U.S. model places on courts reviewing the legality of the actions of other branches of government and often engaged in quite precise use of U.S. case law, but their techniques were merely one consequence of the idea of following U.S. constitutionalism. Further, debates in Congress and in the Press show that the ideals that the U.S. represented were as significant as specific legal rules when legislators sought to support a position. An ideology will often lead to legal rules, and in Argentina the ideology also called for respect for a particular foreign model's legal rules. But given that shared ideas that confer legitimacy are distinct from the legal rules themselves, ideological change will usually predate legal change even though legislators and judges may also have roles as ideological entrepreneurs.

Finally, as one would expect from effective, credible commitments, an ideology espousing the need to follow a foreign model has concrete implications for domestic politics and the politically possible. The existing work on legal transplants in Latin America has rarely taken the step to examine the interplay between the transplant and domestic politics.<sup>25</sup> The most important trend in Latin American legal history in recent decades has been a focus on

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24. See, e.g., "D. Lino de la Torre sobre recurso de habeas corpus," [CSJN] 21/08/1877, Fallos 19:231, 232 (1877) (Arg.) offers the Argentine Supreme Court's strongest statement of the need to follow the U.S. model absent a deliberate decision by Argentina's framers to vary from the U.S. model, but similar statements appear in some of the Court's earliest decisions, "Seste y Seguich c/ Gobierno Nacional," [CSJN] 29/09/1864, Fallos 1:317, 319 (1864) (Arg.); "Gomez c/ la Nacion," [CSJN] 01/06/1865, Fallos 1:36, 44-45 (1865) (Arg.); see also HUERTAS, *supra* note 10, at 208-14, 242-53 (analyzing the U.S. as a model in these three cases though arguing that *de la Torre* has been over-emphasized and that *Seste* and *Gomez* actually offer stronger statements of following the U.S. model).

25. But see Laura Cucchi & Ana L. Romero, *Tensions Between Congress and the Executive in Nineteenth Century Argentina: Federal Intervention and Separation of Powers*, 37 PARLIAMENTS, ESTATES & REPRESENTATION 193, 198-99 (2017) (while not focused on legal transplants, emphasizes the importance of doctrine in the resolution of political disputes in Argentina and considers some of the debates during the Sarmiento Administration discussed in this article).

subalterns,<sup>26</sup> usefully making up for an earlier over-emphasis on political and economic elites, yet irrelevant here given that Argentina's subalterns were practically irrelevant to the constitutional bargains struck. Argentina's mid-19th century constitutionalism primarily reflected the needs of elites who wished to reap the benefits of increased trade with Europe, particularly with Britain.<sup>27</sup> However, elites needed to strike important constitutional bargains, and those bargains in Argentina, especially starting in the 1860s, almost always occurred using U.S. constitutionalism as the source for answers when readily available, and as the framework for debate when U.S. doctrine left a margin for discussion.<sup>28</sup> One cannot understand mid-19th century Argentine constitutionalism and the range of what political actors considered permitted without the legal history of Argentina's adoption of a U.S. transplant. The approach of this article has important implications for Argentine historiography, and perhaps for that of other countries.

In short, while recounting legal history, this article will offer a case study of the process by which ideological entrepreneurs can seize on a foreign model so that effective constitutional commitments result. Ideologists achieve political gains from the transplant process yet find themselves limited by their own ideology once in power, while society establishes an ideational web of restraints, some legal, some

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26. See Robert J. Cottrol, *Normative Nominalism: The Paradox of Egalitarian Law in Inegalitarian Cultures—Some Lessons from Recent Latin American Historiography*, 81 TUL. L. REV. 889, 889–92 (2007). In the Argentine context the leading work on subalterns in legal history is by Ricardo Salvatore. See RICARDO D. SALVATORE, *WANDERING PAYSANOS: STATE ORDER AND SUBALTERN EXPERIENCE DURING THE ROSAS ERA* (2003); RICARDO D. SALVATORE, *SUBALTERNOS, DERECHOS Y JUSTICIA PENAL: ENSAYOS DE HISTORIA SOCIAL Y CULTURAL ARGENTINA 1829–1940* (2010).

27. While not a focus of this article, Argentina's 19th century constitutionalism is part of a global ordering with post-colonial elements in which the constitutional system became part of a regulatory structure that facilitated trade with the British. See *infra* notes 120–21 and accompanying text; see generally LAURA BENTON, *LAW AND COLONIAL CULTURES: LEGAL REGIMES IN WORLD HISTORY, 1400–1900* (2002) (describing colonialism and post-colonialism's pluralist legal regimes as also creating an institutional ordering for the benefit of the metropolitan relationship with the colony).

28. See generally Laura Cucchi & Ana L. Romero, *El "modelo" norteamericano en la reglamentación de las intervenciones federales en la Argentina decimonónica. Debates en el Congreso Nacional (1869 y 1894)*, 74 ANUARIO DE ESTUDIOS AMERICANOS 615 (2017) (offering a comparison of use of the U.S. model in debates over federal interventions in 1869 and 1894); Miller, *supra* note 11; ABELARDO LEVAGGI, *DOS ESTUDIOS SOBRE VÉLEZ SANSFIELD* 29 (Instituto de Investigaciones Jurídicas y Sociales "Ambrosio L. Gioja," U.B.A., 1988); Héctor José Tanzi, *La enseñanza de Derecho Constitucional en la Facultad de Derecho de Buenos Aires*, 17 ACADEMIA. REVISTA SOBRE ENSEÑANZA DEL DERECHO 85 (2011); Eduardo Zimmermann, *Translations of the "American Model" in Nineteenth Century Argentina*, in *ENTANGLEMENTS IN LEGAL HISTORY: CONCEPTUAL APPROACHES* 385 (Thomas Duve ed., 2014).

perceptual, that dictate the politically possible.

The central historical portion of this article will focus on debates on the President's emergency powers that occurred in the Argentine Press and Congress during the first two years of Domingo Sarmiento's Presidency. Sarmiento took office in October 1868, as the War of the Triple Alliance (Argentina, Brazil, and Uruguay against Paraguay) was moving toward a successful ending for the allies and the decimation of Paraguay.<sup>29</sup> Argentina's western and northern provinces produced frequent revolts in this period due to oppression by soldiers of the national army, sympathies for Paraguay, and a feeling that the national government was dominated by Buenos Aires elites.<sup>30</sup> Sarmiento, a liberal from the western Province of San Juan, who was closely tied to Buenos Aires liberals, waged a successful campaign for President while Ambassador to the United States, and was the country's most visible exponent of the U.S. model. Yankee-mania dominated constitutional debate both before and after Sarmiento's six-year Presidency, but the early years of his Presidency represent the coming to power of the U.S. model's most prominent ideological entrepreneur, with corresponding political implications.

From the 1860s through the late 20th century, the two most contentious issues in Argentine constitutionalism were Presidential emergency powers under a "state of siege"<sup>31</sup> and the authority of the

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29. See generally THOMAS WHIGHAM, *THE PARAGUAYAN WAR: CAUSES AND EARLY CONDUCT* (2018); THOMAS WHIGHAM, *THE ROAD TO ARMAGEDDON: PARAGUAY VERSUS THE TRIPLE ALLIANCE 1866–1870* (2017); FRANCISCO DORATIOTO, *MALDITA GUERRA: NUEVA HISTORIA DE LA GUERRA DEL PARAGUAY*, (John Ferguson trans., Emecé Editores, Buenos Aires, 2004); JOSÉ MARÍA ROSA, *LA GUERRA DEL PARAGUAY Y LAS MONOTONERAS ARGENTINAS* (A. Peña Lillo Editor, 3d ed., 1968); F.J. McLynn, *Consequences for Argentina of the War of the Triple Alliance 1865–1870*, 41 *THE AMERICAS* 81 (1984).

30. ARIEL DE LA FUENTE, *CHILDREN OF FACUNDO* 169–76 (2000); David Rock, *Argentina Under Mitre: Porteño Liberalism in the 1860s*, 56 *THE AMERICAS* 50–51 (1999); Rosa, *supra* note 29, at 80–85, 255–78.

31. See generally ALFREDO VÍTOLO, *EMERGENCIAS CONSTITUCIONALES I: ESTADO DE SITIO* 89–305 (2004) (offering short descriptions of each state of siege declared between 1853 and 2001 and related debates and court decisions); Felipe Seisdedos, *La Corte Suprema de Justicia y el control de razonabilidad durante el estado de sitio*, in *EL PODER JUDICIAL* 351 (Instituto Argentino de Estudios Constitucionales y Políticos ed., 1989) (offering a review of major Argentine Supreme Court decisions on state of siege through the late 1980s); Laura Cucchi, *El estado de sitio en el debate público argentino, 1862–1880: Entre el orden político y el gobierno limitado*, 36 *ANUARIO IEHS (INSTITUTO DE ESTUDIOS HISTÓRICO-SOCIALES)* 21 (2021) (analyzing the substance and politics of 19th century state of siege debates); Estela B. Sacristán, *Control judicial del Estado de Sitio y la intervención federal*, in *Universidad Austral, CUESTIONES DE CONTROL DE LA ADMINISTRACIÓN PÚBLICA* 689, 697–702 (Universidad Austral ed., 2010) (reviewing the Supreme Court's state of siege case law); GABRIEL L. NEGRETTO, *EL PROBLEMA DE LA EMERGENCIA EN EL SISTEMA CONSTITUCIONAL* 110–20 (1994) (offering an overview of case law on both state of siege and other emergency declarations).

Federal Government to “intervene” in a Province to temporarily replace one or more of the branches of a provincial government.<sup>32</sup> The Constitution’s state of siege provisions allow the suspension of most Constitutional rights,<sup>33</sup> while federal interventions in the provinces, constitutionally designed to protect the “Republican Form of Government,”<sup>34</sup> became a device for Presidents to ensure support from Provincial governments and the election of their favored candidates, particularly during the often fraudulent or manipulated elections that occurred until World War I.<sup>35</sup> Declarations of states of siege often went hand-in-hand with a federal intervention, since a need to put down an assault on public authority, whether real or manufactured, would justify the intervention. But in the 1860s, the Constitution was new—initially drafted in 1853, with significant amendments in 1860—and the initial exercise of emergency powers was viewed at the time as setting the stage for future constitutional practice.

As will be seen, the debates around Presidential state of siege powers and federal interventions were completely atextual in the case of state of siege and substantially atextual for federal interventions. Central in both cases was the ability to authoritatively invoke the U.S. model, and the constraints that the model placed on those who invoked it. At certain points Sarmiento went too far in the debate, producing a legal memorandum by a departing U.S. Ambassador who was clearly not a jurist, and enunciating unlimited Presidential powers that clashed too sharply both with the elite’s image of the U.S. as a civilized place and with the interests of the opposition. Ideologies

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32. See generally JUAN RAFAEL, *EL FEDERALISMO Y LAS INTERVENCIONES NACIONALES* (1982) (recounting the most noteworthy federal interventions from the 1850s through the 1950s); Leonardo Limanski, *La intervención federal*, in *COMENTARIOS DE LA CONSTITUCIÓN DE LA NACIÓN ARGENTINA* 289–302 (Roberto Gargarella & Sebastian Guidi eds., 2016) (focusing primarily on federal interventions since the return of democracy in 1983); Sacristán, *supra* note 31, at 703–13 (reviewing the Supreme Court’s case law on federal intervention); LUIS H. SOMMARIVA, *HISTORIA DE LAS INTERVENCIONES FEDERALES EN LAS PROVINCIAS* (detailing the history of federal interventions from 1853 through 1911).

33. Constitución Nacional as amended in 1994, art. 23 (Arg.). This provision originates in the Constitución Nacional of 1853, art. 23, and continues unchanged today.

34. Constitución Nacional as amended in Aug. 23, 1994, art. 66 (Arg.). The present text continues unchanged from the Constitución Nacional as amended in 1860, art. 6 and which incorporates the language of U.S. Const. art. IV, §4 to “guarantee . . . a Republican Form of Government.”

35. JOSÉ NICOLÁS MATIENZO, *EL GOBIERNO REPRESENTATIVO FEDERAL EN LA REPÚBLICA ARGENTINA 199–200* (2d ed. 1917). Leo Rowe offers an outstanding outsider’s description of the use of federal intervention to reduce the provinces to political subordination. See LEO S. ROWE, *THE FEDERAL SYSTEM OF THE ARGENTINE REPUBLIC* 75–88 (1921).

usually have their limits. What is remarkable is how far both sides in the debates accepted the ideology as binding. In analyzing the many translations of U.S. authors by Argentines, Argentine historian Eduardo Zimmermann concludes that the U.S. model became a central part of the terms of what was and was not politically possible during the second half of the 19th century.<sup>36</sup> In Sarmiento's case, the constraints of the U.S. model meant having to accept defeats in Congress and even more clearly, in the Argentine Supreme Court, since the Argentine elite saw judicial review of Executive action as central to U.S. constitutionalism. In the case of Sarmiento's opponents, the strength of the model required engaging with Sarmiento on the content of U.S. constitutional practice even when the terrain was unfavorable and even though Sarmiento's long history as the most visible proponent of yankee institutions meant that he enjoyed stature as their interpreter.

This article will proceed in three stages. First, it will offer a brief theoretical explanation of how a focus on legal transplants can fill a gap in the literature on how credible constitutional commitments come about. Second, it will set the stage for the Sarmiento Administration's state of siege and federal intervention debates by offering some background on the emergence of the U.S. Constitution as Argentina's model and Sarmiento's role as its most important ideological entrepreneur. Then third, it will examine the role the U.S. model played during the debates on state of siege and federal interventions, initially during the presidency of Sarmiento's predecessor, Bartolomé Mitre, and then at the start of Sarmiento's presidency. Those debates are especially striking because of the use of U.S. constitutionalism by all sides in the debate, by the constraints that the U.S. model placed on the participants, and if only for its bizarreness, for the odd memorandum written for Sarmiento by the departing U.S. Ambassador, Henry Gaither Worthington—the real, live American lawyer with embarrassingly little expertise. Finally, it is worth appreciating that as exaggerated as Sarmiento may sometimes appear to an academic reader of this article, and even though Argentina has largely left behind his celebration of the U.S. constitutional model, Sarmiento, more than any other Argentine leader of his generation, still enjoys recognition as a national hero. School children sing the “Himno a Sarmiento” (Hymn to Sarmiento) at school assemblies for patriotic holidays and on the Día del Maestro (Teacher's Day), recognizing him as the “Padre del aula” (the Father of the Classroom) for his role in establishing public education.<sup>37</sup> None

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36. Zimmermann, *supra* note 28, at 412.

37. See LEOPOLDO CORRETTJER, HIMNO A SARMIENTO (1904). “Padre del aula” is one of

of Sarmiento's political contemporaries—Alberdi, Mitre, or Urquiza—receive such adoration in widely performed hymns or have the same continuing public presence or continuing scholarship on their works.<sup>38</sup>

## II. LEGAL TRANSPLANTS AS AN IDEOLOGICAL BASIS FOR CREDIBLE COMMITMENTS

Constitutionalism depends on credible commitments to essential institutional rules and protections by a sufficient number of political actors so that the political system protects the vital interests of all politically significant forces. As will be seen, prestigious foreign models can provide an ideology that greatly shortens and facilitates the process of achieving commitments.

A central debate surrounding legal transplants, and particularly transplants of constitutional structures, has been the degree to which law can have an impact independently of social and economic forces. One school of thought, which includes social scientists going back at least to Montesquieu, has emphasized that law is the product of forces external to the law itself, whether economic and social power relationships in society, the needs of the market, cultural history or political ideology.<sup>39</sup> Field studies and empirical research have often emphasized the failure of legal transplants to achieve the aims of their

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the lines of the hymn. *Id.* See also Ministerio de Cultura de la Nación, *HIMNO A SARMIENTO—Coro Polifónico Nacional*, YOUTUBE (Sep 16, 2020), <https://www.youtube.com/watch?v=m462gjThKhI>; see also Res. 638, 2008, Mar. 26, 2008, Ministerio de Educación, Ciudad Autónoma de Buenos Aires [Ministry of Educ. of the City of Buenos Aires], B.O. CABA 26/03/2008 (Arg.), <https://boletinoficial.buenosaires.gob.ar/normativaba/norma/115085> (requiring the playing of the Himno a Sarmiento at all formal school assemblies in the City of Buenos Aires); Consejo Nacional de Educación [Nat'l Council of Educ.], Nov. 14, 1934, Exp. 24312/1/934, art. 3 (Arg.), in *EL MONITOR DE LA EDUCACIÓN COMÚN—ÓRGANO DEL CONSEJO NACIONAL DE EDUCACIÓN*, vol. 54, No. 743, Nov. 1934, at 131 (fixing the hymn as one of six to be learned by all primary and secondary school students) <http://www.bnm.me.gov.ar/giga1/monitor/monitor/743.pdf>.

38. Comparatively recent books include: SARMIENTO (Adriana Amante ed., 2012); SARMIENTO AND HIS ARGENTINA (Joseph T. Criscenti ed., 1993); MIGUEL ÁNGEL DE MARCO, SARMIENTO: MAESTRO DE AMÉRICA, CONSTRUCTOR DE LA NACIÓN (2016); SARMIENTO: AUTHOR OF A NATION (Tulio Halperín Donghi et al. eds., 1994).

There is also a Museo Histórico Sarmiento dedicated to Sarmiento's life and work, <https://museosarmiento.cultura.gob.ar/>, and three streets in the City of Buenos Aires in his honor, the Avenida Sarmiento, the Calle Sarmiento and the Calle 11 de septiembre de 1888, which commemorates the date of Sarmiento's death.

39. Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1, 6 (1974); William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 AM. J. COMPAR. L. 489, 490 (1995).

proponents because they fail to match the social and economic context of the receiving state.<sup>40</sup> In a similar vein, leading comparative law scholars have insisted on examining the relationship of a legal rule with the power structure of a foreign state and have argued that rules allocating political power will be especially resistant to transplantation.<sup>41</sup> To the extent that constitutional borrowing ever succeeds, it is argued that borrowed rules merely reinforce a country's already established constitutional commitments, simply reinforcing principles already established in a nation's identity.<sup>42</sup>

However, there is also a body of work that tells a very different story. While writing primarily in the private law context, Alan Watson has insisted that a transplanted legal rule may operate independently of social and economic forces. According to Watson, legal elites will often adopt the laws of another country simply because they seek a source of authority, and with no examination of local conditions.<sup>43</sup> In examining the ex-communist countries of Eastern Europe, David Nelken, an anthropologist, has noted their tendency to copy laws out of a desire to become like a particular successful market society they wish to emulate.<sup>44</sup> He observes that "[i]n what is almost a species of sympathetic magic, borrowed law is deemed capable of bringing about the same conditions of a flourishing economy or healthful civil society that are found in the social context from which the borrowed law has been taken."<sup>45</sup> Watson and Nelken's observations may seem odd, but are consistent with Argentine history and its treatment of U.S. constitutionalism as a source of authority.

While none of the legal transplants literature does so, legal transplants as a source of authority can be connected to a fundamental

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40. *E.g.*, Daniel Berkowitz et al., *The Transplant Effect*, 51 AM. J. COMPAR. L. 163, 167-68, 170-71, 178-79 (2003); Mark Goodale, *The Globalization of Sympathetic Law and Its Consequences*, 27 L. & SOC. INQUIRY 595, 596 (2002); Laura Nader and Elisabetta Grande, *Current Illusions and Delusions About Conflict Management*, 27 L. & SOC. INQUIRY 573, 574, 579-80 (2002).

41. *E.g.*, Kahn-Freund, *supra* note 39, at 17; Jacques deLisle, *Lex Americana?: United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond*, 20 UNIV. PA. J. INT'L ECON. L. 179, 289 (1999).

42. GARY JEFFREY JACOBSON, CONSTITUTIONAL IDENTITY 206-07 (2010).

43. ALAN WATSON, THE EVOLUTION OF LAW 117-18 (1985); see also Ewald, *supra* note 39, at 499 (describing Alan Watson's positions).

44. Nelken, *Using the Concept of Legal Culture*, *supra* note 21, at 4.

45. *Id.* Many scholars have noted the closely related importance of the prestige of the foreign model as a factor motivating its reception. See, e.g. Gianmaria Ajani, *By Chance and Prestige: Legal Transplants in Russia and Eastern Europe*, 43 AM. J. COMPAR. L. 93, 110-13 (1995); deLisle, *supra* note 41, at 280-82, 302; DUPRÉ, *supra* note 21, at 88-89; Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)*, 39 AM. J. COMPAR. L. 343, 398-99 (1991).



problem in the social science literature—the great difficulty for a political system to achieve credible commitments for the protection of basic interests. Those out of power need to know that constitutional principles will in fact be followed once those in power have incentives to violate them, and at the same time, those in power need assurance that future governments will not violate their basic interests should they surrender power.<sup>46</sup> Work in NIE argues that once credible commitments are widely accepted, modern society is sufficiently bureaucratically complex and pluralistic, with multiple power centers, so that the high cost of violating commitments will protect against their violation and keep commitments credible.<sup>47</sup> The very variety and strength of businesses, associations and governmental entities with a stake in the constitutional system makes it self-reinforcing, protecting it from serious encroachments.<sup>48</sup> However, NIE has also emphasized that the process of achieving a sufficiently complex web of organizations and shared commitments is a slow one. Leading figures argue that institutional transplants from societies with complex organizational structures to societies without them will fail,<sup>49</sup> and that while courts are especially useful for creating a self-reinforcing system, it is especially hard to achieve an independent judiciary.<sup>50</sup> Nevertheless, at least in Argentina's context, Argentine society showed itself far more adaptable than NIE indicates should occur, especially in adopting transplanted institutions.

Perhaps because of its economic focus, NIE has not undertaken the detailed work of tracing processes of ideological change and the ability of ideological change to quickly create new institutions. Ideology is a key tool for achieving a credible commitment to a

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46. TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 28–33 (2003) (discussing judicial review in democracies as a signal of commitment to and form of insurance for enacted constitutions); Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 660–62, 697–98 (2011); see also Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J. ECON. HIST. 803, 803–04 (1989) (discussing commitments to protect property rights).

47. DARON ACEMOGLU & JAMES ROBINSON, ECONOMIC ORIGINS OF DICTATORSHIP AND DEMOCRACY, 23–30 (2005) (discussing the role of political institutions in making credible commitments in democracies); DOUGLASS C. NORTH ET AL., VIOLENCE AND SOCIAL ORDERS 16–23 (2009).

48. Barry R. Weingast, *Why Developing Countries Prove So Resistant to the Rule of Law*, in GLOBAL PERSPECTIVES ON THE RULE OF LAW 28, 48–50 (James J. Heckman et al. eds., 2010).

49. See generally NORTH ET AL., *supra* note 47, (examining the complicated process of moving from a “natural state” to a complex one); see also Shirley, *supra* note 18, at 624–25; Weingast, *supra* note 48, at 28, 50.

50. Weingast, *supra* note 48, at 44.

Constitution, and especially if the relevant ideology anticipates the establishment of an independent judiciary and judicial review, the ideology may further enjoy the support of the judiciary as an organization for maintaining ideological consistency and limiting rule violation.

The term ideology has no single definition and an especially confused relationship to law.<sup>51</sup> This article will use an understanding of ideology often applied by sociologists, as the use of ideas to achieve social domination,<sup>52</sup> or to borrow the language of John B. Thompson, “meaning in the service of power.”<sup>53</sup> That view of ideology has its roots in Karl Marx, who mocked 19th century German political philosophy as no more than a creature of economic relationships—essentially “the dominant material relations grasped as ideas.”<sup>54</sup> For Marx, those ideas, which are merely a product of the social forces that manage to dominate, then get reflected in institutions. For example, to explain the doctrine of separation of powers he writes that “in an age and in a country where royal power, aristocracy and bourgeoisie are contending for domination and where, therefore, domination is shared, the doctrine of the separation of powers proves to be the dominant idea and is expressed as an ‘eternal law.’”<sup>55</sup> Ideas, whether religious or political, serve as a scaffolding for the dominant social and economic relationships, and legal rules emanate from those ideas to give effect to the prevailing socioeconomic structure.<sup>56</sup> Law and institutions are really an afterthought for Marx, however, compared to simply identifying power dynamics.<sup>57</sup>

Marx does not focus on the dynamic nature of ideology. In fact, with the limited exception of NIE, theoretical explanations for the process of ideological change are relatively underdeveloped. While mid-20th century sociologists developed a sociology of ideas to describe the principles that institutions depend upon for legitimacy,

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51. For some of the many definitions of ideology, see, for example, Jon Hanson, *Ideology, Psychology, and Law*, in IDEOLOGY, PSYCHOLOGY, AND LAW 3, 3–6 (Jon Hanson ed., 2012); John Gerring, *Ideology: A Definitional Analysis*, 50 POL. RSCH. Q. 957 (1997).

52. Susan Silbey, *Ideology*, in CAMBRIDGE DICTIONARY OF SOCIOLOGY 278, 278–79 (Bryan S. Turner ed., 2006).

53. JOHN B. THOMPSON, IDEOLOGY AND MODERN CULTURE 7 (1990).

54. Karl Marx, *Critique of Modern German Philosophy According to its Representatives Feuerbach, B. Bauer and Stirner*, in KARL MARX & FREDRICH ENGELS, THE GERMAN IDEOLOGY 27, 67 (1932).

55. *Id.*

56. See *id.* at 67–68; Hermann Klenner, *Ideology, Law and*, in 2 ENCYCLOPEDIA OF LAW AND SOCIETY: AMERICAN AND GLOBAL PERSPECTIVES 725, 726 (David S. Clark ed., 2007).

57. Klenner, *supra* note 56.

they did not develop the dynamics through which principles change.<sup>58</sup> Ideology offers a tool for social domination, and even psychological research has recognized that disadvantaged individuals will often “think ideologically” and not protest economic, social, or personal disadvantage;<sup>59</sup> however, the mechanism by which ideology changes and through which credible commitments to legal rules and institutions may occur remains understudied and under-theorized.

Douglas North and the NIE scholarship built upon his work deal with the problem of constitutional commitment as part of the “rules of the game” they see as central to economic growth.<sup>60</sup> These are the rules, both formal and informal, within which individuals conduct their economic, political and social relationships, and are often described by North as institutions.<sup>61</sup> North and others offer many examples of how a system of rules that limits interference with property rights and enforces contractual obligations has facilitated economic growth—whether one examines the Netherlands and Great Britain during the 16th to 18th centuries compared with their European competitors,<sup>62</sup> Mediterranean traders during the middle ages,<sup>63</sup> or countries at different levels of economic development today.<sup>64</sup> However, the culture that underlies any system of rules of the

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58. See generally, e.g., PETER L. BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE* (1966) (discussing the sociology of knowledge in society and illustrating the relation of institutions to “the sociological understanding of contemporary society”); Joseph S. Roucek, *A History of the Concept of Ideology*, 5 J. HIST. IDEAS 479 (1944) (discussing contemporary interpreters of ideology and their approaches).

59. Curtis D. Hardin et al., *Interpersonal Foundations of Ideological Thinking*, in *IDEOLOGY, PSYCHOLOGY, AND LAW* 132, 132 (Jon Hanson ed., 2012).

60. See DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* 3 (1990); Claude Ménard and Mary M. Shirley, *Introduction*, in *HANDBOOK OF NEW INSTITUTIONAL ECONOMICS* 1, 1 (Claude Ménard & Mary M. Shirley eds., 2005).

61. On the definition of “institutions” as rules of the game, see NORTH, *supra* note 60; Ménard & Shirley, *supra* note 60; see also Masahiko Aoki, *Endogenizing Institutions and Institutional Change*, 3 J. INSTITUTIONAL ECON. 1, 5 (2007) (investigating how the rules are constructed); Avner Greif & Christopher Kingston, *Institutions: Rules or Equilibria?*, in *POLITICAL ECONOMY OF INSTITUTIONS, DEMOCRACY AND VOTING* 13, 15 (Norman Schofield & Gonzalo Caballero eds., 2011) (focusing on the similar question of the expectations of actors as to what other actors will do based on a society’s formal and informal rules).

62. See generally DOUGLASS C. NORTH & ROBERT PAUL THOMAS, *THE RISE OF THE WESTERN WORLD: A NEW ECONOMIC HISTORY* (1973) (comparing the success of the Netherlands and England’s economic growth to France and Spain).

63. See generally Avner Greif, *Contract Enforceability and Economic Institutions in Early Trade: The Maghrabi Traders’ Coalition*, 83 AM. ECON. REV. 525 (1993) (examining 11th century Mediterranean traders and their relations to institutions).

64. The World Bank has ongoing studies considering the rule of law along with a variety of governance-related indicators: Daniel Kaufmann & Aart Kraay, *Worldwide Governance Indicators*, WORLD BANK <https://info.worldbank.org/governance/wgi/>

game, as well as the rooted nature of beliefs and path dependence, are all said to conspire against profound normative change,<sup>65</sup> and likewise block the ability of societies to borrow institutions from each other to achieve economic growth.<sup>66</sup>

North's caution related to change is rooted in a model of how changes in the rules of the game occur.<sup>67</sup> According to North, changes in the rules are primarily stimulated by changes in relative prices that modify the bargaining power of groups in society.<sup>68</sup> Political entrepreneurs will then promote small changes in both the formal and informal rules so that there is a gradual evolution of the society's institutions.<sup>69</sup> The change, however, must operate through pre-existing mental constructs, which therefore requires that any change be incremental.<sup>70</sup> The existence of systems of beliefs and of networks of organizations that have learned a particular way of doing things means that there is a great deal of path dependence.<sup>71</sup> Choices, once made, influence later choices as individuals become expert at existing practices and as beliefs develop regarding the appropriateness of the existing practice.<sup>72</sup> Oliver Williamson, a leader of the New Economic Institutionalism movement, has described the process of modifying the customs, mores, and traditions that most fundamentally underlie the formal rules of the game as requiring centuries or millennia.<sup>73</sup>

Ideology, however, and the legitimacy that flows to those

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(last visited Nov. 11, 2024). *See also* Douglass C. North et al., *Order, Disorder and Economic Change: Latin America vs. North America*, in GOVERNING FOR PROSPERITY 30 (Bruce Bueno de Mesquita & Hilton L. Root eds. 2000) (describing the different growth paths of the United States and Latin America in terms of the lack 19th century credible commitments in Latin America given its colonial history and independence process compared to the U.S., which meant that it did not have the consensual political order needed for growth).

65. *See* NORTH, *supra* note 60, at 6, 98; Douglass C. North, *Institutions and the Performance of Economies Over Time*, in HANDBOOK OF NEW INSTITUTIONAL ECONOMICS 21, 24 (Claude Ménard & Mary M. Shirley eds., 2005); Mary M. Shirley, *Institutions and Development*, in HANDBOOK OF NEW INSTITUTIONAL ECONOMICS 611, 624–25 (Claude Ménard & Mary M. Shirley eds., 2005). *But see* Douglass C. North, *The Historical Evolution of Politics*, 14 INT'L REV. L. & ECON. 381, 385 (1994) (recognizing the theoretical possibility of abrupt changes in a society's rules of the game when a society is shocked by events inconsistent with its belief system).

66. *See* NORTH, *supra* note 60, at 103; Greif & Kingston, *supra* note 61, at 34–35.

67. NORTH, *supra* note 60, at 83–88.

68. *Id.* at 84.

69. *Id.* at 86–87.

70. *Id.* at 89.

71. *Id.* at 94.

72. *Id.* at 96.

73. Oliver E. Williamson, *The New Institutional Economics: Taking Stock, Looking Ahead*, 38 J. ECON. LITERATURE 595, 596 (2000).

invoking it, can provide the glue that makes commitments credible. Ideological change is likely a necessary factor to accompany important institutional change. While individuals follow some rules because rule compliance confers immediate gains superior to rule violation (for example, everyone enjoys immediate gains by driving on the correct side of the street), and people follow other rules much of the time because of fear of sanctions, no system of rules can survive without voluntary compliance that goes beyond immediate self-interest.<sup>74</sup> Rule compliance that goes beyond self-interest is a product of the legitimacy of the system.<sup>75</sup> This is recognized by North, who usefully inserts legitimacy into a rule-compliance function.<sup>76</sup> First, legitimacy, according to North, is “[t]he premium that an individual places above his opportunity cost before engaging in an illegal act.”<sup>77</sup> Second, an individual’s sense of injustice and alienation is described as “the net cost an individual incurs in attempting to force change” beyond the benefits to the individual of achieving the change.<sup>78</sup> In both cases, what North calls ideological considerations lead to conduct contrary to what a cost-benefit analysis would ordinarily predict.<sup>79</sup> Individuals’ sense of the justice in a particular norm being followed, or of the injustice of an existing state of affairs, is central to their willingness to obey the law, to engage in the effort necessary to hold others accountable for violation of the law, and to undergo personal risk and sacrifice to achieve a change in the law.<sup>80</sup> All societies recognize the importance of ideology by inculcating ideology as well as skills-training in their educational systems.<sup>81</sup>

North’s understanding of legitimacy as flowing from ideological considerations is consistent with approaches taken in both sociology and psychology. While North uses an economist’s function of legitimacy and sense of injustice as the premium that individuals place above opportunity cost in rule compliance, enforcement, and change,<sup>82</sup> Max Weber’s sociological approach is little different. Weber describes legitimacy as a product of ideology, involving the ability of an

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74. Greif & Kingston, *supra* note 64, at 14–15, 25–26.

75. DOUGLASS C. NORTH, *STRUCTURE AND CHANGE IN ECONOMIC HISTORY* 11–12 (1981).

76. *Id.*

77. *Id.* at 11.

78. *Id.* at 12.

79. *Id.* at 12.

80. *See id.* at 11–12 (discussing how ideology explains individual sacrifices), 21, 31 (discussing how ideology creates a sense of justice or injustice), 37 (discussing how behavior is shaped by perceptions of fairness).

81. *Id.* at 54; Douglass C. North, *Structure and Performance: The Task of Economic History*, 16 *J. ECON. LITERATURE* 963, 975 (1978).

82. *See* NORTH, *supra* note 75.

institution, person, or practice to command obedience without resorting to coercion or rewards because of society's belief that the exercise of authority is by right.<sup>83</sup> Psychologists, and to some extent Marx, have also gone further and emphasized an irrational side to ideology stemming from affective responses going beyond reason.<sup>84</sup> The process through which ideologies achieve dominance need not depend on rational calculation. Benedict Anderson, for example, has described how ideologies of national identity can emerge both from chance events—such as mapmaking by a colonial administrator—as well as from deliberate actions by entrepreneurs and foreign models that produce “an imagined political community.”<sup>85</sup> The key is the sense of imagined shared commitment—and of course millions have sacrificed themselves for nationalist ideologies, with no concern for themselves, though perhaps with long-term hopes for their families and descendants. Invocation of an ideology need not be logical or factually accurate; it must merely be sufficient to motivate the audience.

The concepts of legitimacy and injustice can be harnessed to understand why participants in a constitution-making process may feel confident in a credible commitment of other elites that goes beyond their short-term advantage. It is only a small step beyond North to argue that credible commitments to a new constitutional system among political competitors can only take place when there is substantial ideological agreement among all significant competitors, with legitimacy flowing from conduct that respects the ideological cohesion. While North and Weingast, in their classic article on credible commitments, describe a balance of political forces in England after the Revolution of 1688 that was able to create an independent judiciary that could check lawless seizures of property by the King,<sup>86</sup> any balance of power still assumes individuals willing to put themselves at risk to protect the bargain enjoyed by all, an act that goes against any individual's cost-benefit analysis if they can successfully shirk that role. Enforcement of bargained-for rules requires an ideologized underpinning; otherwise the problem returns of those out of power having to fear that those in power will ignore the rules and act for their

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83. Susan Silbey, *Legitimacy*, in CAMBRIDGE DICTIONARY OF SOCIOLOGY 332, 332 (Brian S. Turner ed., 2006); MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 212–13 (Guenther Roth & Claus Wittich eds., 1978).

84. Hanson, *supra* note 51, at 6 (on psychology and irrational elements to ideology); John T. Jost, *The End of the End of Ideology*, in *IDEOLOGY, PSYCHOLOGY, AND LAW* 32, 34 (Jon Hanson ed., 2012).

85. BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 6 (rev. ed. 2006).

86. North & Weingast, *supra* note 46, at 816–17 (1989).

personal benefit. Ideological consensus among all those with significant political power, where the consensus has the ability to confer legitimacy on the system of governance, would seem to be a precondition for credible commitment by elites to a constitutional system. Putting aside the specific political compromises reached, one can hardly imagine the U.S. Constitution as emerging in 1789 without shared ideologies of rule of law, innate individual rights (at least for White males), and republican government. And if ideological consensus is necessary for a credible commitment to constitutional rules, the next question is naturally one of how to achieve that agreement. According to North, much of economic history revolves around how changes in economic opportunity and the needs of the State produce changes in ideology through the work of ideological entrepreneurs;<sup>87</sup> however, he never explains the process.

While North recognizes the existence of an ideological entrepreneur, he does not offer either a theoretical explanation or an historical example of how that entrepreneur operates. As noted in the introduction of this article, three simple theoretical explanations can be offered that get illustrated by Argentina's legal history. First, the chance to become known as a leading constitutional exponent or even the head of a political movement creates important incentives for ideological entrepreneurs, and if the ideological entrepreneur can invoke a foreign model, they can both harness and magnify the prestige of the model and enjoy a fully formed product that they can market. Of course, for the product to be attractive there must be dissatisfaction with the existing situation, and the entrepreneur must be able to describe sufficient benefits. If one examines Argentina in NIE terms, the trading opportunities with Great Britain in the mid-eighteenth century created pressure for new rules of the game and institutions. But a foreign constitutional model may also offer the perfect product for marketing purposes. While the copied model may move in a path different from its original, a successful ideology may nevertheless create entirely new institutions that vary significantly from a country's past constitutional culture.

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87. See NORTH, *supra* note 78, at 51 (describing "intellectual entrepreneurs of ideology"), 66–67 (discussing how economic history revolving around changes in economic opportunities and State needs produced changes in ideology); Virgil Henry Storr, *North's Underdeveloped Ideological Entrepreneur*, in THE ANNUAL PROCEEDINGS OF THE WEALTH AND WELL-BEING OF NATIONS 99, 111–13 (Emily Chamlee-Wright ed., 2009) (using the history of the Bahamas to show how entrepreneurs can change the dominant ideology and in turn obtain political power); see also Paul Ingram & Karen Clay, *The Choice-Within-Constraints New Institutionalism and Implications for Sociology*, 26 ANN. REV. SOCIO. 525, 541, 543 (2000) (noting the lack of an explanation for the mechanism through which ideologies change yet confer legitimacy).

Second, the success of the ideological entrepreneur creates a self-reinforcing constitutional commitment. Successful entrepreneurs cannot easily escape their own ideology. Sarmiento faced that constraint during his Presidency, as did his predecessor, Mitre<sup>88</sup> Even Sarmiento's successor, Nicolás Avellaneda, would have faced constraints due to his success as an entrepreneur, since as Sarmiento's Minister of Justice and Public Instruction he implemented the Administration's policies on the two most central aspects of U.S. models in Argentina, constitutionalism/justice and education. (While not the focus of this article, Sarmiento was equally known for his educational ideology and for importing U.S. schoolteachers and educational practices.<sup>89</sup>)

Third, the ideological entrepreneur is an entrepreneur of ideas, which is different from being the entrepreneur for a legal rule. People will sacrifice themselves for a vision of freedom or nationalism. These ideals may be translated into legal rules but are not the legal rules themselves. A constitutional transplant has the idea at its heart of conforming to its foreign model, and this idea of wanting to conform inevitably includes using the original's legal rules; however, more than rules, the transplant consists of the package of ideas that the foreign system is thought to involve, including its values. This becomes constantly apparent in Argentina's debates about state of siege and federal intervention.

The dominant U.S. ideology would be challenged—the emergence of competing entrepreneurs is to be expected, and even the most total ideological adoption has its limits; but the ideology of following the U.S. constitutional model produced unmistakable constitutional commitments.

Now for the supporting history.

### III. SARMIENTO AND THE ARGENTINE CONSTITUTION OF 1853/1860

As will be seen, Argentina's mid-nineteenth century constitutionalism resulted from the deliberate efforts of a small group of intellectuals and political leaders, all of whom admired U.S. constitutionalism. Motivated by economic opportunity, those individuals consciously sought a forward-looking model to change their society, with many new institutions. The constitutional design they developed initially depended substantially, but clearly not

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88. See *infra* notes 141–145 and accompanying text.

89. *Infra* notes 141–145 and accompanying text.



completely, on the U.S. model; but then the dependence snowballed, somewhat to the dismay of Juan Bautista Alberdi, the most important ideologue behind the 1853 Constitutional Convention. In 1852 Alberdi offered a vision of Argentina as a future California, attracting immigration, trade, and investment through protection of property and civil liberties.<sup>90</sup> Nevertheless, he was not addicted to the U.S. political system. His basic vision endured through the early 20th century,<sup>91</sup> however his avoidance of unqualified copying of U.S. doctrine was drowned out by future President Domingo F. Sarmiento, a promoter of absolute adherence to the U.S. constitutional model as a prescription for Argentine success.<sup>92</sup> Alberdi, while a brilliant lawyer and political scientist, had virtually no political influence after 1861 and would spend most of the final decades of his life in self-imposed exile.<sup>93</sup>

A. ALBERDI AND SARMIENTO AS COMPETING IDEOLOGICAL  
ENTREPRENEURS

Argentina entered the 1850s aware of the intellectual currents of the Atlantic world, but with no antecedents for successful constitutionalism.<sup>94</sup> After a long war for independence from Spain that effectively lasted from 1810 through 1820, Argentina entered a period of civil wars and largely authoritarian local governments.<sup>95</sup> In

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90. See *infra* notes 116 and 117 and accompanying text.

91. See *infra* notes 106–113.

92. See *infra* notes 128–197 and accompanying text. Portions of this section on the debates between Alberdi and Sarmiento and the triumph of Sarmiento's approach in 1860 have been previously developed by the author in Miller, *The Authority of a Foreign Talisman*, *supra* note 10, but not from the perspective of Sarmiento as an ideological entrepreneur; see also ROBERTO GARGARELLA, *LATIN AMERICAN CONSTITUTIONALISM, 1810–2010: THE ENGINE ROOM OF THE CONSTITUTION* 63–66 (2013) (setting the debate in terms of local trial and error versus use of foreign models); M.C. MIROW, *LATIN AMERICAN CONSTITUTIONS: THE CONSTITUTION OF CÁDIZ AND ITS LEGACY IN SPANISH AMERICA* 158–63 (2015) (analyzing the Alberdi-Sarmiento debates, though not noting that Alberdi loses much of his political force and constitutional relevance in the 1860s).

93. See Mayer, 2 *ALBERDI Y SU TIEMPO*, *supra* note 9 and accompanying citations.

94. See JEREMY ADELMAN, *REPUBLIC OF CAPITAL: BUENOS AIRES AND THE LEGAL TRANSFORMATION OF THE ATLANTIC WORLD* 5–6 (1999) (describing Buenos Aires within the currents of the Atlantic world); see also M.C. Mirow, *Age of Constitutions in the Americas*, 32 *LAW & HIST. REV.* 229, 229–30 (2014) (describing Latin American constitutionalism broadly in terms of the Atlantic world); Linda Colley, *Empires of Writing: Britain, America and Constitutions, 1776–1848*, 32 *LAW & HIST. REV.* 237, 250–51, 263 (2014) (examining British and U.S. constitutionalism together as a package that influenced Latin American constitutionalism in the early 19th century, with many Latin American revolutionaries passing through London).

95. See DAVID ROCK, *ARGENTINA 1516–1987: FROM SPANISH COLONIALIZATION TO*

the dominant Province of Buenos Aires, during most of the period from 1829 until 1852, the *caudillo*<sup>96</sup> Juan Manuel de Rosas governed the Province with a formal grant from the provincial legislature of “the entire sum of public power.”<sup>97</sup> This gave him the absolute authority to order thousands of confiscations, completely muzzle the press, and operate a terror squad, known as the *Mazorca*, that cut the throats of adversaries and left their bodies in the street.<sup>98</sup> The U.S. chargé d’affaires would describe the situation under Rosas as “the most simple and rigorous despotism in the civilized world.”<sup>99</sup> Rosas raised armies and governed based on his charisma, keeping the loyalty of the lower classes throughout his reign.<sup>100</sup> Although the 1840s were a time of sharp increases in ranching exports,<sup>101</sup> Rosas’ use of tariffs in the face of economic opportunities from trade with Great Britain may have eroded his standing among the large ranchers who offered his upper-class support.<sup>102</sup> In February 1852 his regime was defeated by the *caudillo* of the neighboring province of Entre Ríos, General Justo José de Urquiza, who attracted allies from other provinces, Buenos Aires exiles, and Brazil and Uruguay, with promises to end the monopoly of the Buenos Aires customs house over trade moving up the River Plate and to give the country a national constitution.<sup>103</sup>

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ALFONSÍN 79–80, 93 (rev. ed. 1987).

96. By *caudillo* this article means an individual who rules as a popular and often authoritarian figure whose power stems from their ability to mobilize a rural militia thanks to the force of their character and personal connections.

97. JOHN LYNCH, ARGENTINE DICTATOR: JUAN MANUEL DE ROSAS, 1829–1852, 162–63 (1981); see also JOSÉ LUÍS BUSANICHE, ROSAS VISTO POR SUS CONTEMPORÁNEOS 55–57 (2d ed. 1973) (noting that the 1835 conferral of absolute power involved a referendum on the question that Rosas won 9,320 to 9,000).

98. See generally LYNCH, *supra* note 97, at 56–60, 158, 209–46. Even revisionist historians who emphasize Rosas’ accomplishment of maintaining Argentina intact during a period of civil wars and foreign interference do not deny the persecutions, murders, and lack of interest on his part in a national constitution. See, e.g., PACHO O’DONNELL, JUAN MANUEL DE ROSAS: EL “MALDITO” DE LA HISTORIA OFICIAL 17–18 (2013).

99. Despatch No. 1 from John Pendleton, U.S. Chargé d’Affairs in Buenos Aires, to the U.S. Secretary of State (Sept. 22, 1851), *microformed on* Despatches from the United States Ministers to Argentina, 1817–1906, microcopy No. 69, reel 9 (Nat’l Archives Microfilm Publ’ns).

100. See LYNCH, *supra* note 97, at 305; NICOLAS SHUMWAY, THE INVENTION OF ARGENTINA 117–19 (1991); VIVIAN TRÍAS, JUAN MANUEL DE ROSAS 249 (Siglo Veintiuno, 2d ed. 1974).

101. See SAMUEL AMARAL, THE RISE OF CAPITALISM ON THE PAMPAS 272 (Simon Collier ed., 1998); JONATHAN C. BROWN, A SOCIOECONOMIC HISTORY OF ARGENTINA, 1776–1860, at 66, 75 (1979) (noting the enormous increase in wool exports and increases in shipping); Roberto Cortés Conde, *The Growth of the Argentine Economy, c. 1870–1914, in ARGENTINA SINCE INDEPENDENCE* 47, 48–49 (Leslie Bethell ed. 1993).

102. TRÍAS, *supra* note 100, at 250–55.

103. BEATRIZ BOSCH, URQUIZA Y SU TIEMPO 167–69 (1971).

Both Alberdi and Sarmiento belonged to a literary circle formed in Buenos Aires in 1837, commonly called the “Generation of ‘37,” though Sarmiento’s initial connection was limited since he lived in the western province of San Juan.<sup>104</sup> Most of the group fled once their literary magazine was shut down in 1838, but they formed the nucleus of a group of liberal Argentine exiles in Chile and Uruguay.<sup>105</sup> After Urquiza’s victory over Rosas, Alberdi published a book from Chile that distilled the exiles’ political vision.<sup>106</sup> *Bases y puntos de partida para la organización política de la República Argentina* (Bases and Points of Departure for the Political Organization of the Argentine Republic)<sup>107</sup> describes Argentina as a vast expanse with only a million inhabitants, little agriculture, and Buenos Aires as its only vibrant city.<sup>108</sup> Alberdi’s vision was to attract European immigrants and foreign investment by providing individual rights that would guarantee the immigrants’ ability to practice their religions, enjoy property rights, and invest, work, and broadly engage in commerce with the protection of an efficient judicial system.<sup>109</sup> He offered the State of California and its sharp growth after its seizure from Mexico as his model,<sup>110</sup> complimented Chile’s strong Executive,<sup>111</sup> and included a draft constitution as an appendix to the book’s second edition.<sup>112</sup> Much of Alberdi’s draft was certainly inspired by the U.S. Constitution, with a two-house legislature, a system of separation of powers similar to the U.S., and a federal system of government, but with a stronger Executive, a stronger federal government, and rights that are similar to the U.S. Bill of Rights but with a greater emphasis on economic

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104. SHUMWAY, *supra* note 100, at 112, 122, 130.

105. *Id.* at 129.

106. *Id.*

107. Juan Bautista Alberdi, BASES Y PUNTOS DE PARTIDA PARA LA ORGANIZACIÓN POLÍTICA DE LA REPÚBLICA ARGENTINA (1852), *reprinted in* 3 OBRAS COMPLETAS DE JUAN BAUTISTA ALBERDI 371 (La Tribuna Nacional 1886).

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

109. *See id.* at 409, 426, 431, 434, 438. The slogan that emerges from the book is “to govern is to populate.” *Id.* at 527.

110. *See id.* at 403, 411–13, 453, 457.

111. *See id.* at 396, 415.

112. *See id.* at 558.

liberty.<sup>113</sup> *Bases* was immediately applauded by Urquiza<sup>114</sup> and ordered to be reprinted in Argentina;<sup>115</sup> Sarmiento wrote to Alberdi to praise it as the future “Argentine decalogue.”<sup>116</sup>

The Constitutional Convention that followed, which established the Argentine Confederation, ran from November 1852 to May 1, 1853, but lacked the Province of Buenos Aires. Sarmiento and many of the exiled liberals who accompanied Urquiza against Rosas accused Urquiza of a *caudillo* style too similar to the *caudillo* he replaced, and particularly objected to his aim of federalizing the City of Buenos Aires and placing its customs revenues in the hands of the national government. Nevertheless, in broad terms, the Convention matched the liberals’ thinking. Alberdi missed the Constitutional Convention, serving as Urquiza’s Ambassador to Chile, but the two key members of the Drafting Committee, Juan María Gutiérrez, a close friend and fellow member of the Generation of ‘37 circle,<sup>117</sup> and José Benjamín Gorostiaga, a young, liberal lawyer, presented a draft largely consistent with Alberdi’s text.<sup>118</sup>

However, unlike Alberdi, Gutierrez and Gorostiaga both directly invoked the U.S. for authority, referring to their Committee’s draft as “cast in the mold of the Constitution of the United States, the only model of a true federation which exists in the world,”<sup>119</sup> and other

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113. See generally *id.* (comparing to the U.S. system of government); MIROW, *supra* note 93, at 159–163 (emphasizing Alberdi’s insistence on practical solutions adapted to Argentina’s needs); GABRIEL L. NEGRETTO, *Repensando el Republicanismo liberal en América Latina: Alberdi y la Constitución Argentina de 1853*, in EL REPUBLICANISMO EN HISPANOAMÉRICA: ENSAYOS DE HISTORIA INTELECTUAL Y POLÍTICA 210, 233–58 (José Antonio Aguilar & Rafael Rojas eds., 2002); Mitchell Gordon, *Don’t Copy Me, Argentina: Constitutional Borrowing and Rhetorical Type*, 8 WASH. UNIV. GLOB. STUD. L. REV. 487, 499–500 (2009) (describing how Alberdi varied from the U.S. model).

114. BOSCH, *supra* note 103, at 259; MAYER, 1ALBERDI Y SU TIEMPO, *supra* note 9, at 531.

115. MAYER, 1ALBERDI Y SU TIEMPO, *supra* note 9, at 541.

116. *Id.* at 552; Letter from Domingo Faustino Sarmiento to Juan Bautista Alberdi (Sept. 16, 1852), in 4 OBRAS COMPLETAS DE J.B. ALBERDI 135 (1886) (giving the full text of the letter).

117. See generally JUAN BAUTISTA ALBERDI, CARTAS INÉDITAS A JUAN MARÍA GUTIERREZ Y A FELIX FRÍAS 49–51 (Jorge M. Mayer & Ernesto A. Martínez eds., Editorial Luz del Día 1953) (giving the text of many of Alberdi’s letters to Gutierrez).

118. It is impossible to conclude exactly how much Gorostiaga and Gutierrez borrowed from Alberdi’s draft because Alberdi himself borrowed extensively from the U.S. Constitution and earlier Argentine Constitutions. See JOSÉ ARMANDO SECO VILLALBA, FUENTES DE LA CONSTITUCIÓN ARGENTINA 110–18 (Depalma 1943).

119. CONGRESO GENERAL CONSTITUYENTE DE LA CONFEDERACIÓN ARGENTINA, *reprinted* in 4 ASAMBLEAS CONSTITUYENTES ARGENTINAS, 1813–1893, at 468 (Emilio Ravignani ed. 1937) [hereinafter 4 ASAMBLEAS CONSTITUYENTES ARGENTINAS] (statement of José Benjamin Gorostiaga); see also *id.* at 479 (offering a nearly identical statement).

members similarly invoked the U.S.<sup>120</sup> Gutierrez and Gorostiaga may have made use of Alberdi's draft, but he was not a source of authority.<sup>121</sup> Moreover, the U.S. represented a virtuous vision as much as a textual model. When the Constitutional Convention sent the completed Constitution to Urquiza, it wrote, "The Congress confers upon you the glory of Washington. You can aspire to no other."<sup>122</sup> Urquiza sent his eldest son to become Argentina's ambassador to the U.S.<sup>123</sup> and even Alberdi would come to flatter Urquiza with comparisons to Washington in their correspondence.<sup>124</sup> The U.S. Chargé d'Affairs claimed that Urquiza gave him privileged treatment compared to other diplomatic representatives because of his eagerness to approximate the U.S. model of government.<sup>125</sup> Moreover, the U.S. modeling occurred in the complete absence of foreign pressure—though unquestionably in the presence of what Argentine elites saw as enticing foreign trade opportunities. Great Britain, the country with the greatest economic and military reach in the region,

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120. *E.g.*, 4 ASAMBLEAS CONSTITUYENTES ARGENTINAS, *supra* note 119, at 520 (showing a statement of Salustiano Zavalía); *see generally* PADILLA, *supra* note 10, at 103–107 (referencing the U.S. Constitution at the 1853 Convention).

121. *See* PADILLA, *supra* note 10, at 127 (citing 4 ASAMBLEAS CONSTITUYENTES ARGENTINAS, *supra* note 119, at 503–04); *see also* BEATRIZ BOSCH, EN LA CONFEDERACIÓN ARGENTINA 15 (1998) (noting five very minor references to Alberdi and insisting that his influence on the text has been severely exaggerated).

122. Constitutional Convention of 1853, in 4 ASAMBLEAS CONSTITUYENTES ARGENTINAS, *supra* note 119, at 549.

123. John Pendleton, Despatch No. 13 to the Secretary of State, *microformed on* Despatches from the United States Ministers to Argentina, 1817–1906 (1952) (Nat'l Archives Microfilm Publ'ns).

124. *See* Letter from Juan B. Alberdi to Justo José de Urquiza, (Paris, Feb. 7, 1859) in RAMÓN J. CARCANO, URQUIZA Y ALBERDI: INTIMIDADES DE UNA POLÍTICA 480, 485 (1938) (referring to the "Washingtoniano" example of Urquiza as someone devoted to the national interest as opposed to the interests of a faction); Letter from Juan B. Alberdi to Justo José de Urquiza (Paris, May 6, 1859) in RAMÓN J. CARCANO, URQUIZA Y ALBERDI: INTIMIDADES DE UNA POLÍTICA 522, 532 (telling Urquiza that newspapers in the United States are comparing him to Washington). Urquiza had Washington's portrait hung in his living room and was often compared to Washington in correspondence that sought to flatter him. BOSCH, URQUIZA Y SU TIEMPO, *supra* note 103, at 463, 205, 246, 254, 367, 438, 673. In fact, even Mitre would flatter Urquiza with a reference to Washington in a letter seeking his support at the Constitutional Convention of 1860. Letter from Buenos Aires Governor and Brigadier General Bartolomé Mitre to Capitán General Justo José de Urquiza, Governor of Entre Ríos (Buenos Aires, August 11, 1860) in MUSEO MITRE, CORRESPONDENCIA MITRE-URQUIZA, 1860–1868, at 19–21 (1980). Urquiza acknowledges the flattering honor in his response. *Id.* at 20. Governor-General Justo José de Urquiza to Governor-General Bartolomé Mitre (San José, August 24, 1860), in MUSEO MITRE, CORRESPONDENCIA MITRE-URQUIZA, 1860–1868, at 20.

125. 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 (1952) (Nat'l Archives Microfilm Publ'ns).

cared only about immigration, trade and protection of property<sup>126</sup>—the essence of the Alberdian vision. It had little need to exercise influence because Urquiza and his allies spontaneously sought to do more to encourage trade than British officials had previously thought possible.<sup>127</sup>

References to the U.S. model in 1853 were only the beginning, with Sarmiento as the model's best-known ideological entrepreneur. Sarmiento, unlike Alberdi, built-up his public image as a polemical exponent of U.S. constitutionalism. Alberdi saw successful constitutionalism as adaptation of foreign experiences to Argentina's existing political features, and he could work with a progressive *caudillo* like Urquiza; Sarmiento saw everything about Rosas and the political order of *caudillos* as barbaric and in need of replacement with the paragons of constitutionalism and public education he encountered in the United States. Sarmiento's best-known literary work, which gave him significant international recognition, was *Civilización i barbarie. Vida de Juan Facundo Quiroga* (Civilization and Barbarism. The Life of Juan Facundo Quiroga) (1845), known as *Facundo*.<sup>128</sup> The book describes the Rosas regime as the triumph of a barbaric countryside over the civilized city, and focuses on the bloody

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126. See Despatch No. 32, from Santa Fé, by Charles Hotham, Minister Plenipotentiary, to the Earl of Malmesbury (James Harris), Foreign Secretary (Sept. 13, 1852), in The National Archives of the UK, FO 118-74, at 68 (describing Hotham's arrival at Santa Fé for the Constitutional Convention with full salutes received, and his plan together with the French representative M. de St. Georges to lobby delegates for an enactment opening Argentina's rivers to international commerce); Despatch No. 90, from Buenos Aires, by Robert Gore, Chargé d' Affairs, to the Earl of Malmesbury (James Harris), Foreign Secretary (August 1, 1852), in The National Archives of the UK, F06/169 Buenos Aires from Mr. Gore, Aug.- Sept. 1852, at 1 (describing Urquiza's program of moderation and liberal commercial measures, his desire to give the country a liberal constitution, and the potential benefits for the interests of foreign nations like the UK).

127. In reports to the British Foreign Secretary, Charles Hotham, the British Minister Plenipotentiary, describes the Argentina's Foreign Minister and Urquiza as fundamentally focused on turning the country toward commerce. Despatch No. 26, from Buenos Aires, by Charles Hotham, Minister Plenipotentiary, to the Earl of Malmesbury (James Harris), Foreign Secretary (August 26, 1852), in The National Archives of the UK, FO 118-74 Special Mission of Charles Hotham (as Minister Plenipotentiary), at 32. When writing on August 26, he thought Urquiza could not possibly open up the Paraná and Uruguay rivers to foreign commerce before late November. *Id.* But Urquiza in fact did so two days later. Despatch No. 25, from Buenos Aires, by Charles Hotham to the Earl of Malmesbury (James Harris), Foreign Secretary (Aug. 31, 1852), in The National Archives of the UK, FO 118-74, at 36 (describing Urquiza as issuing a decree opening up the Paraná and Uruguay rivers to foreign commerce). The decree appears as Decree of Aug. 28, 1852, art. 4, in 3 REGISTRO OFICIAL DE LA REPÚBLICA ARGENTINA 37, 38 (Index #3019).

128. Domingo Faustino Sarmiento, *CIVILIZACIÓN I BARBARIE. VIDA DE JUAN FACUNDO QUIROGA* (1845), in 7 OBRAS COMPLETAS 11 (2001).

exploits and animal magnetism of Facundo Quiroga, a leading *caudillo* and ally of Rosas from the Argentine Northwest who was murdered in 1835.

But *Facundo's* diagnosis of the unsalvageable present was soon complemented by a vision of the U.S. as the model to replace it. Shortly after publishing *Facundo* in Chile, Sarmiento left on a trip to Europe, North Africa, and the United States, paid for by the Chilean government, to write a report on public education.<sup>129</sup> That trip produced *Viajes por Europa, Africa y América* (1849) (Travels Through Europe, Africa and America), describing his trip through France, Spain, North Africa, Italy, Switzerland, Prussia, and finally the United States, where he only had enough funds left to stay for six weeks. Europe, however, is a huge disappointment from the moment he arrives: “a sad mixture of greatness and abjection”<sup>130</sup> with nothing to teach. He finds French politics governed by the distribution of favors and by figures afraid of progress after years of lurching from the guillotine of the revolution, to dictatorship, to Bourbon restoration to constitutional monarchy.<sup>131</sup>

In contrast to Europe, Sarmiento leaves the United States in a state of “excitation,” with the United States showing him that the republic that he dreamed of truly could exist.<sup>132</sup> In 1852 he would write to the Chilean intellectual José Victorino Lastarria that the political history of Europe has failed him, but “[n]ow and for several years, I have turned to another sun that never eclipses and that no cloud can hide: the United States.”<sup>133</sup> In *Viajes* he gushes over U.S. progress, its canals, steamboats, telegraphs, trains, the almost

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129. See Javier Fernández, *Introducción del coordinador*, in DOMINGO FAUSTINO SARMIENTO, *VIAJES xxii-xxiii* (Javier Fernández ed., 2d ed. 1996) [hereinafter *VIAJES*, Fernández ed.].

130. DOMINGO FAUSTINO SARMIENTO, *VIAJES POR EUROPA, ÁFRICA Y AMÉRICA* (1849), reprinted in *5 OBRAS COMPLETAS* 82 (2001).

131. *Id.* at 90–91, 106–08.

132. *Id.* at 257; see also William H. Katra, *Sarmiento en los Estados Unidos*, in *VIAJES*, Fernández ed., *supra* note 129, at 853, 863; Jaime O. Pellicer, *Los Estados Unidos en Sarmiento*, in *Viajes*, Fernández ed. *supra* note 129, at 913, 919, 923–24 (2001) (both noting the sharp and apparently sincere change that the trip to the United States produced in Sarmiento's thinking). *But see* MICHAEL AARON ROCKLAND, *SARMIENTO'S TRAVELS IN THE UNITED STATES IN 1847* 11–12 (1970) (arguing that reading James Fenimore Cooper had already influenced Sarmiento's work and created an interest in the United States).

133. Letter from Domingo Faustino Sarmiento, Santiago, Chile, to Victorino Lastarria (Jan. 16, 1852), in MARÍA LUISA DEL PINO DE CARBONE, *CORRESPONDENCIA ENTRE SARMIENTO Y LASTARRIA, 1844–1888*, at 35, 37–38; Pérez Guilhou, *Ideas y sistemas políticos en los Viajes de Sarmiento*, in *VIAJES*, Fernández ed., *supra* note 129, at 1033, 1051

overnight growth of industrial cities like Pittsburgh,<sup>134</sup> and above all its liberty. While “the European is a minor under the protecting tutelage of the State” the “yankee takes care of himself.”<sup>135</sup> Sometimes he would play up Americans’ rustic style for his readers, but always mixing in admiration for its liberty and progress. After describing the size and convenience of a hotel he writes: “[N]ow I believe in the republic, I believe in democracy, I believe in everything; I pardon the Puritans, even the one who ate uncooked tomato sauce with the point of his knife before his soup.”<sup>136</sup> He largely excludes the South from the nation he admires, distinguishing the “yankee” States of the North from the slavery-afflicted South,<sup>137</sup> and claims that New England sets the social and moral tone for the West.<sup>138</sup> Boston is sometimes called the “Athens” of North America<sup>139</sup> and at other times the “Memphis” of “Yankee civilization.”<sup>140</sup>

The combined elevation of U.S. constitutionalism and U.S. education would become Sarmiento’s trademark. His trip climaxed with two days spent with Horace Mann at his home in Boston,<sup>141</sup> and he would develop an enduring friendship with his widow, Mary Mann, when he returned to the United States as ambassador in 1865. Mary Mann would translate and publish *Facundo* in the United States and assist him both during and after his Presidency with bringing dozens of U.S. school teachers to Argentina to found public schools and teacher training institutes.<sup>142</sup> Sarmiento’s report for the Chilean Government, *De la educación popular*<sup>143</sup> (On Popular Education) would focus primarily on the United States, and when he returned to the United States as ambassador—the natural appointment for him,

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134. SARMIENTO, *supra* note 129, at 261–65.

135. *Id.* at 278.

136. *Id.* at 270.

137. *See id.* at 58, 300, 370.

138. *Id.* at 303; *see also* Jaime Pellicer, *Los Estados Unidos en Sarmiento*, in VIAJES, Fernández ed., *supra* note 129, at 943.

139. Sarmiento, *supra* note 134, at 306.

140. *Id.* at 336.

141. *See id.* at 338.

142. Georgette Magassy Dorn, *Sarmiento, the United States, and Public Education*, in SARMIENTO AND HIS ARGENTINA 80–86 (Joseph T. Criscenti ed. 1993); *see also* VELLEMAN, *supra* note 2, at 6–13 (on importing teachers), 19–23 (on translating of *Facundo*); *see generally* LAURA RAMOS, LAS SEÑORITAS: HISTORIA DE LAS MAESTRAS ESTADOUNIDENSES QUE SARMIENTO TRAJÓ A LA ARGENTINA EN EL SIGLO XIX (2021) (recounting the personal stories of many of the U.S. school teachers that Sarmiento brought to Argentina).

143. Domingo F. Sarmiento, DE LA EDUCACIÓN POPULAR (1849), *reprinted in* 11 OBRAS COMPLETAS 9 (2001).



as he would note to Mary Mann<sup>144</sup>—he would publish *Las escuelas: base de la prosperidad i de la República de los Estados Unidos*<sup>145</sup> (The Schools: Basis of the Prosperity and the Republic in the United States) and *Vida de Lincoln* (Life of Lincoln).<sup>146</sup>

Sarmiento, while giving Alberdi his due for writing a masterpiece,<sup>147</sup> viewed *Bases* as the product of shared liberal thought, calling it the result of the “escuela de Chile”—the “school” of the Argentine exiles in Chile—in a letter to Bartolomé Mitre.<sup>148</sup> In fact, in 1850, two years before *Bases*, Sarmiento published *Argirópolis*, a book far less rigorous than *Bases*, but that shared Alberdi’s vision of free immigration and economic liberalism, with California’s success showing what liberal approaches could achieve.<sup>149</sup> Both before and after the 1853 Convention, Alberdi and Sarmiento would harshly attack each other in dueling articles in the Press—largely over Alberdi’s support for Urquiza and Sarmiento’s alliance with Buenos Aires provincial forces that sought to dominate the country through control over the City’s port.<sup>150</sup> Sarmiento came to be seen as the principal foil of Buenos Aires liberals against Alberdi’s attacks.<sup>151</sup> However, Sarmiento expressed support for the final product of the Convention, in a book completely in line with his place as chief ideologue of U.S. constitutionalism, and completely at odds with

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144. Letter from Domingo Sarmiento to Mary Mann (May 12, 1866), in ACADEMIA ARGENTINA DE LETRAS, CARTAS DE SARMIENTO A LA SEÑORA MARÍA MANN 11, 13 (Imprenta de la Universidad 1936).

145. DOMINGO FAUSTINO SARMIENTO, LAS ESCUELAS: BASE DE LA PROSPERIDAD I [SIC] DE LA REPÚBLICA DE LOS ESTADOS UNIDOS (1866), reprinted in 30 OBRAS COMPLETAS 9 (2001).

146. DOMINGO FAUSTINO SARMIENTO, VIDA DE LINCOLN (1866), reprinted in 27 OBRAS COMPLETAS 9 (2001).

147. MAYER, 1 ALBERDI Y SU TIEMPO, *supra* note 9, at 552; see also Letter from Domingo Sarmiento to Juan Bautista Alberdi (Sept. 16, 1852), in 4 OBRAS COMPLETAS DE J.B. ALBERDI 135 (1886).

148. Letter from Domingo Sarmiento to Bartolomé Mitre (July 9, 1852), in MUSEO MITRE, SARMIENTO-MITRE; CORRESPONDENCIA 1846–1868, at 21 (1911).

149. DOMINGO FAUSTINO SARMIENTO, ARGIRÓPOLIS (1850), reprinted in 13 OBRAS COMPLETAS 9 (2001).

150. See generally Gordon, *supra* note 113, at 502–07 (recounting much of the Sarmiento-Alberdi debate).

151. See *Sarmiento y Alberdi*, EL NACIONAL, Mar. 8, 1860, at 2. Sniping between Sarmiento and Alberdi began in 1852 when Sarmiento rejected Urquiza as too much of a *caudillo* like Rosas and describes his “escape” from an Urquiza-dominated Buenos Aires in DOMINGO FAUSTINO SARMIENTO, CAMPAÑA EN EL EJÉRCITO GRANDE, reprinted in 14 OBRAS COMPLETAS 200 (2001). Alberdi then responded with a series of letters that he published, popularly called CARTAS QUILLOTANAS after the town of Quillota in Chile where he wrote them, CARTAS SOBRE LA PRENSA Y LA POLÍTICA MILITANTE EN LA REPÚBLICA ARGENTINA, reprinted in 4 OBRAS COMPLETAS DE J.B. ALBERDI 5 (1886). Sarmiento’s responses appear in LAS CIENTO Y UNA, reprinted in 15 OBRAS COMPLETAS 15 (2001); see also NATALIO R. BOTANA, LA TRADICIÓN REPUBLICANA 278 (2013).

Alberdi's view of the Constitution as an adaptation for Argentina's needs.<sup>152</sup>

Sarmiento's book, *Comentarios de la Constitución de la Confederación Argentina* (*Commentaries on the Constitution of the Argentine Confederation*, hereinafter *Comentarios*) (1853) begins with the far-fetched premise that because the Constitution passed by the Convention has a Preamble that tracks the Preamble of the U.S. Constitution, seeking to "form a more perfect Union, establish Justice, insure domestic Tranquility"<sup>153</sup> etc., Argentina has also decided to adopt all of U.S. constitutional practice.<sup>154</sup> Filled with cites to *The Federalist* and Joseph Story's *Commentary on the Constitution of the United States*, he insists that the Constitutional Convention intended that U.S. constitutional practice be treated as binding in Argentina—with no focus at all on Argentine reality.<sup>155</sup> Instead, "North American constitutional law, the doctrine of its statesmen, the declaration of its tribunals, the constant practice in analogous or identical points, are authority in the Argentine Republic" and to be used for the definitive interpretation of the Argentine Constitution.<sup>156</sup> He only admits the possibility of varying from U.S. practice when Argentina's Constitution specifically provides otherwise—most clearly for Argentina's recognition of Catholicism as the official religion of the national government<sup>157</sup> and for national civil, commercial, criminal, and mining codes, even though State law handles these matters in the U.S.<sup>158</sup> Otherwise, Argentines must approach the U.S. Constitution as an herbal remedy, and its practice like the package insert giving the instructions on how to produce the proper medicine.<sup>159</sup> He uses U.S. constitutionalism to inspire confidence, with U.S. constitutionalism providing needed authority given that Argentina is turning to a new path—and he simply ignores the many ways that the Constitution of 1853, based on Alberdi's draft, varies from the U.S. text.

Alberdi responds to *Comentarios* by pulverizing Sarmiento intellectually in a book that came out only three months later, *Estudios sobre la Constitución Argentina de 1853* (*Studies on the Argentine Constitution of 1853*).<sup>160</sup> No modern reader can read the two books

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152. DOMINGO FAUSTINO SARMIENTO, *COMENTARIOS DE LA CONSTITUCIÓN* (1853), reprinted in 8 *OBRAS COMPLETAS* (2001) [hereinafter SARMIENTO, *COMENTARIOS*].

153. U.S. CONST. pmbl.

154. SARMIENTO, *COMENTARIOS*, *supra* note 152, at 52.

155. *Id.* at 37.

156. *Id.* at 52.

157. *Id.* at 35.

158. *See id.* at 169–70.

159. *Id.* at 36.

160. JUAN BAUTISTA ALBERDI, *ESTUDIOS SOBRE LA CONSTITUCIÓN ARGENTINA DE 1853*

without concluding that Alberdi accurately demonstrates that there are substantial differences between Argentina's 1853 Constitution and the U.S. Constitution that Sarmiento ignores—particularly in its provisions for federal intervention to put down sedition in the Provinces and restore public order when Provincial authorities might prefer that the Federal Government stay out.<sup>161</sup> Likewise, he offers a persuasive argument citing Tocqueville that every nation's past governmental practices persist in any new Constitution it writes,<sup>162</sup> and that one would expect Argentine lawyers, long familiar with Spanish public law's strong executive control, to be guided by the same practices and by local history.<sup>163</sup> But while he may have convinced a modern reader that Sarmiento has "bastardized" the Argentine Constitution,<sup>164</sup> Argentina's governing class almost completely sided with Sarmiento over the course of the 1860s, and the process of freeing itself from U.S. constitutionalism as binding only got well underway in the 1890s.<sup>165</sup>

#### B. SARMIENTO'S IDEOLOGICAL VICTORY

Rancor between Alberdi (representing the Confederation) and Buenos Aires liberals would only increase over the course of the 1850s, with Alberdi successfully representing the Confederation diplomatically, first in the United States and then in Europe, to prevent diplomatic recognition of the Province of Buenos Aires.<sup>166</sup> However, he was in Europe when Argentine constitutionalism took a major step closer to the U.S. with reforms in 1860.<sup>167</sup> In October 1859, an army of the Argentine Confederation, under Urquiza's command, defeated the forces of the Province of Buenos Aires in the Battle of Cepeda. The defeat led to a peace agreement that provided for the incorporation of the Province of Buenos Aires into the Confederation; but the Province had sufficient military strength to insist on additional conditions.<sup>168</sup> In addition to provisions to protect the Province's economic interests, the agreement gave the Province the right to review the Constitution

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(1853), reprinted in 5 OBRAS COMPLETAS DE J.B. ALBERDI 148 (1886).

161. *Id.* at 194–96.

162. *Id.* at 150.

163. *Id.* at 151.

164. *Id.* at 148.

165. Miller, *The Authority of a Foreign Talisman*, *supra* note 10, at 1561–62.

166. See generally MAYER, 1 ALBERDI Y SU TIEMPO, *supra* note 9, at 629–748 (describing Alberdi's successful diplomacy).

167. See generally MAYER, 1 ALBERDI Y SU TIEMPO, *supra* note 9.

168. See generally JAMES R. SCOBIE, LA LUCHA POR LA CONSOLIDACIÓN DE LA NACIONALIDAD ARGENTINA, 1852–62, at 254–60 (2d ed. 1964).

of 1853 and propose changes to be reviewed by a national Constitutional Convention.<sup>169</sup> The resulting Buenos Aires Convention to review the Constitution, held from January through May 1860, resulted in the complete adoption of Sarmiento's constitutional ideology.

The most important figure in Buenos Aires politics at the time of the Convention was Bartolomé Mitre, an erudite artillery officer, who, like Sarmiento, had spent the Rosas years in exile. He had led the Buenos Aires forces in the unsuccessful Battle of Cepeda and assumed the Governorship of the Province during the final days of the Convention, as the head of a block willing to compromise and share Buenos Aires customs revenues with the national government.<sup>170</sup> His faction may have had the hope of dominating the national government, but was clearly distinct from factions that insisted on maximizing the Province's autonomy.<sup>171</sup> Mitre controlled five of the seven votes on the Examining Committee that the Convention named to propose constitutional amendments, sitting on the Committee with Sarmiento and Dalmascio Vélez Sarsfield, the Province's preeminent jurist, who were both strong allies.<sup>172</sup>

But while Mitre and Vélez Sarsfield both would have had the ability to influence the work of the Examining Committee, Mitre because of his political power and Vélez Sarsfield as an influential jurist (who would later draft Argentina's Civil Code),<sup>173</sup> the infatuation with the U.S. model seen in the Examining Committee's report almost certainly came from Sarmiento. Vélez Sarsfield, known primarily for his work in private and ecclesiastical law, had previously only dealt with constitutional issues as a Buenos Aires provincial legislator in the 1850s, and never showed special devotion or interest in the U.S. model until the Buenos Aires Convention, where he defended the Examining Committee's report.<sup>174</sup> Mitre was an established intellectual thanks to his *Historia de Belgrano*, a comprehensive four-volume history of one of the leaders of Argentina's independence

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169. See Pacto de Unión de San José de Flores (Nov. 11, 1859), in *LAS CONSTITUCIONES DE LA ARGENTINA, 1810/1972*, at 381 (1975).

170. See Rock, *supra* note 30, at 33–35 (1999).

171. *Id.*

172. SCOBIE, *supra* note 168, at 244–46.

173. See generally ABEL CHÁNETON, *HISTORIA DE VÉLEZ SARSFIELD* (1937) (a biography of Vélez Sarsfield); *id.* at 141–68 (describing Vélez Sarsfield's drafting of the Civil Code).

174. See ABELARDO LEVAGGI, *DOS ESTUDIOS SOBRE VÉLEZ SARSFIELD* 11–17 (1988) (discussing his participation in public law issues in the 1850s); *id.* at 19 (noting his vigorous adoption of the U.S. model during floor debates at the Buenos Aires Convention).

movement, General Manuel Belgrano, first published in 1857.<sup>175</sup> His book offered the most complete history of Argentina's independence period until that time. But in 1860, Mitre's reputation was not tied to the United States. In the months prior to the report, Mitre wrote extensive columns on needed constitutional reforms in *El Nacional*, a newspaper founded by Vélez Sarsfield. Those columns didn't refer to the U.S. Constitutional model in the glorified terms that Sarmiento used in *Viajes* or *Comentarios*, or as Mitre himself would subsequently. Instead, one article expressed doubt about the transferability of the U.S. federal model to Argentina's provinces,<sup>176</sup> others offered only limited references to the U.S. when useful to make a point,<sup>177</sup> and many offered no references to the U.S., even when such a reference might have helped make a point.<sup>178</sup> Further, neither *El Nacional* or *La Tribuna*, the two leading Buenos Aires newspapers, offered many references to U.S. constitutionalism generally. Buenos Aires at the start of 1860 was not yet enamored with the United States.

Sarmiento would state to the Convention that Mitre was the author of the Examining Committee's report,<sup>179</sup> but the report reads

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175. BARTOLOMÉ MITRE, *HISTORIA DE BELGRANO Y DE LA INDEPENDENCIA ARGENTINA* (Imprenta de Mayo, 1858-1859).

176. Bartolomé Mitre, *La Constitución debe ser reformada*, EL NACIONAL, Jan. 21, 1860, at 2. Mitre describes the Constitution of 1853's federalism as coming from both the United States and Switzerland and argues that U.S. and Swiss practices may not always work in Argentina because some Argentine provinces lack basic elements of municipal life. *Id.* He also notes that the U.S. and Swiss Constitutions were sometimes guided by "illegitimate interests" of their peoples in order to ensure a durable result. *Id.* at 3.

177. See, e.g., Bartolomé Mitre, *Porque debe ser Reformada la Constitución*, EL NACIONAL, Jan. 28, 1860, at 2 (offering no discussion of the U.S. at all on the critical issue of federal interventions in the provinces, instead focusing entirely on recent practice under the Confederation); Bartolomé Mitre, *Reforma de la Constitución Federal: Derechos Diferenciales*, EL NACIONAL, Jan. 31, 1860, at 2 (calling for an amendment to match U.S. practice of requiring that no port be favored over any other); Bartolomé Mitre, *Examen de la Constitución*, EL NACIONAL, Feb. 18, 1860, at 2 (in a minor aspect of the article, complaining that the Argentine Constitution allows the President to permanently appoint Ambassadors and Generals when Congress is not in session whereas the U.S. Constitution has the superior practice of only allowing temporary appointments).

178. See, e.g., Bartolomé Mitre, *La situación moral*, EL NACIONAL, Jan. 16, 1860, at 2 (a long letter on the need to reform the Constitution after a review that could require amendments, but making no reference to any need to further adapt it to the U.S. Constitution); Bartolomé Mitre, *Reforma de la Constitución Federal. La Capital*, EL NACIONAL, Feb. 4, 1860, at 3 (arguing that the Province of Buenos Aires should not have to surrender the City of Buenos Aires to be the national capital yet failing to note that the U.S. CONST., art. I, § 8, cl. 17 provides that the U.S. capital shall be on land ceded by particular States).

179. Sesiones de la Convención del Estado de Buenos Aires, encargada del examen de la Constitución federal [hereinafter Buenos Aires Convention] (Session of Apr. 27,

too much like Sarmiento's *Comentarios* for that to be true, and Sarmiento would later take credit in letters to Mary Mann.<sup>180</sup> The Examining Committee calls the U.S. Constitution "the ultimate result of human logic,"<sup>181</sup> argues that any innovation by the Committee would have been "as much presumption as ignorance,"<sup>182</sup> and claims that Argentina "does not have a single surviving antecedent in the field of national public law."<sup>183</sup> Vélez Sarsfield, who introduced the Committee's report to the floor, similarly enthused over the U.S. model, despite having no previous association with U.S. constitutionalism. He accused Alberdi and the Convention of 1853 of sacrilege whenever they departed from the U.S. Constitution. While they had often appropriately turned to the U.S. Constitution, "they did not respect its sacred text, and an ignorant hand engaged in omissions or alterations of great importance, claiming to improve it."<sup>184</sup> The Committee "has only restored" U.S. Constitutional law in the altered sections.<sup>185</sup> The 1853 framers had "lacked the knowledge and the political experience" of the U.S. framers,<sup>186</sup> and allowed themselves to get distracted with "false masters" from Europe.<sup>187</sup>

The Committee's report clearly produces a shift so that not only does the entire Convention revolve around the U.S. model, but delegates seek to gain political space based on their knowledge of the U.S. model,<sup>188</sup> with U.S. doctrine as the currency for intellectual

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1860), in 4 ASAMBLEAS CONSTITUYENTES ARGENTINAS, *supra* note 119, at 804 (statement of Sarmiento).

180. Domingo F. Sarmiento to Mary Mann (Nov. 6, 1867) in ACADEMIA ARGENTINA DE LETRAS, CARTAS DE SARMIENTO A LA SEÑORA MARÍA MANN 38, 39 (Imprenta de la Universidad 1936) (describing himself as the force on the Committee to make the amendments necessary to bring Argentine practices closer to those of the U.S.); see also *id.* at 33, 35 (Domingo F. Sarmiento to Mary Mann (Nov. 5, 1867)) (describing himself as the force at the both the Buenos Aires Convention and the National Convention that followed that had the object of bringing the Argentine Constitution closer to that of the U.S. in order to take advantage of U.S. practices, doctrine and federal judicial decisions, and that the same effectively has happened).

181. Informe de la Comisión Examinadora de la Constitución Federal (Session of Apr. 25, 1860), in 4 ASAMBLEAS CONSTITUYENTES ARGENTINAS, *supra* note 119, at 769.

182. *Id.*

183. *Id.*

184. Buenos Aires Convention (Session of Apr. 27, 1860), *supra* note 179, at 804 (statement of Sarmiento).

185. *Id.*

186. *Id.*

187. *Id.* at 792.

188. An especially humorous example is when Sarmiento insists that even though the Convention does not fully understand how federal judicial jurisdiction in the U.S. works, because the Argentine text exactly copies the U.S., it will ultimately be one of the clearest parts of the Argentine Constitution. *Id.* (Session of May 7, 1860), at 872 (statement of Sarmiento). Discussion of the U.S. was central even to the few aspects of

debate. At one point, Vélez Sarsfield describes himself as someone who prepared for the Convention with extensive study of U.S. sources and belittles those who lack his expertise.<sup>189</sup> To qualify as an able Argentine authority, “[i]t is necessary to not only study the Constitution of the United States, but to also read its history, to read the judgment of its historians in the publications of Mr. Curtis, and read the commentaries of Story and other writers who are not common.”<sup>190</sup> He concludes that “someone who has not dedicated themselves to this study cannot achieve anything in the field of constitutions.”<sup>191</sup>

The Committee and Convention exemplify a new level of hagiography. While the 1853 Constitutional Convention had proclaimed the U.S. Constitution as a model, Vélez Sarsfield was correct when he argued that almost all of the changes proffered by the Committee and adopted by the Convention followed U.S. practice.<sup>192</sup> For example, aside from a variety of changes to more closely match U.S. federalism, Sarmiento obtained a ban on federal laws affecting the Press, tracking the First Amendment of the U.S. Constitution,<sup>193</sup> and a provision incorporating unenumerated rights based on natural law, following the text of the Ninth Amendment.<sup>194</sup> He even pushed through an amendment to facilitate circuit riding by Supreme Court Judges.<sup>195</sup> Many of the changes responded to Buenos Aires’ needs in that moment, to constrain a Federal Government that it could not yet control, so a provision from the 1853 text allowing the Federal Government to intervene in a Province to reestablish public order was modified to more closely match the Republican Form of Government clause of the U.S. Constitution.<sup>196</sup> The amended text required a request

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the Constitution where the U.S. was not a model, as with Argentina’s lack of separation of Church and State. *See id.* (Session of May 11, 1860), at 916–27.

189. *Id.* (Session of May 1, 1860), at 853 (statement of Vélez Sarsfield).

190. *Id.*

191. *Id.*

192. Buenos Aires Convention (Session of Apr. 25, 1860), *supra* note 179, at 791 (statement of Vélez Sarsfield).

193. *See* Art. 32, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.) (1860); Examining Committee Report (Session of Apr. 25, 1860), *supra* note 181 at 772–73 (citing liberties granted by the First Amendment of the U.S. Constitution); *id.* (Session of May 1, 1860), at 840–41.

194. *See* Art. 33, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.) (1860); Examining Committee Report (Session of May, 7 1860), *supra* note 181, at 869 (statement of Sarmiento) (stating the clause was taken from the U.S. Constitution).

195. *Compare* Art. 91, [CONST. NAC.] (Arg. (1853), *with* Art. 94, [CONST. NAC.] (ARG.) (1860) (eliminating the requirement that the Supreme Court reside in the Federal Capital); Examining Committee Report, *supra* note 181, Session of Apr. 25, 1860, at 775; *id.*, Session of May 7, 1860, at 870–71 (statement of Sarmiento).

196. Art. 6, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.) (1860), modified to match

by Provincial authorities prior to federal intervention in a Province due to unrest.<sup>197</sup>

Some differences between the U.S. and Argentine Constitutions remained. Buenos Aires liberals were truly “Yankee” in their view of slavery and, several years ahead of the U.S. Thirteenth Amendment’s 1865 elimination of slavery, insisted on a provision providing for freedom for slaves upon their arrival in Argentina.<sup>198</sup> Perhaps the strongest difference was the delegates’ refusal to separate Church and State, even though they provided for religious freedom.<sup>199</sup> Nevertheless, the result represented a triumph for sharply increased acceptance of the U.S. as a source of authority.

A National Constitutional Convention quickly followed the Buenos Aires Convention and accepted all of the proposed changes, yet Buenos Aires continued to maneuver for control of the country. Tensions built until a final face-off in 1861 between Provincial forces under Mitre and federal forces under Urquiza that left Buenos Aires in

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U.S. CONST. art. IV, §4; *see* Examining Committee Report, *supra* note 181, Session of Apr. 25, 1860, at 777; Session of Apr. 27, 1860, at 811 (statement of Sarmiento) (on adoption of U.S. practice).

197. *See* Art. 6, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.) (1860).

198. *See* Art. 15, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.) (1860). The delegates wished to block an unratified treaty between the Confederation and Brazil to return runaway slaves. *See* Examining Committee Report, *supra* note 181, Session of Apr. 30, 1860, at 829–30.

199. The Buenos Aires Convention left untouched Art. 2 of the Constitution of 1853 requiring the Federal Government to support the Roman Catholic Church and kept a provision in Art. 37 that required that the President be a Catholic. But even discussion of Art. 2 produced an odd twist on admiration for the United States. Felix Frías, who had much closer ties to traditional Catholicism than most Argentine intellectuals, proposed amending Art. 2 so that the Federal Government would also be expected to offer “the most effective protection” to the Catholic Church and that all inhabitants would be required to show the Church “the greatest respect and the most profound veneration.” Examining Committee Report, *supra* note 181, Session of May 11, 1860, at 921 (statement of Frías). Remarkably he justified his proposal in terms of the important role that religion played in U.S. life, and that it was necessary to focus on U.S. cultural respect for religion and not just the constitutional provisions. *Id.* at 916–921. Sarmiento opposed this proposal and it was overwhelmingly rejected. *Id.* at 930; *id.* at 922–27 (debate between Sarmiento and religiously conservative delegates). Frías, who was friends with both Alberdi and Sarmiento, as well as leading political figures like Valentín Alsina, offered a vision of Catholic faith, hierarchy and social authority, with the emphasis on religious faith, that was received with indifference by most of the Argentine elite. While Argentina was overwhelmingly Roman Catholic, Frías’s work was regarded as irrelevant by his contemporaries and had little influence. TULLIO HALPERÍN DONGHI, PROYECTO Y CONSTRUCCIÓN DE UNA NACIÓN (ARGENTINA 1846–1880) xxvii–xxviii (Biblioteca Ayacucho, 1980). On his friendships, *see generally* JUAN BAUTISTA ALBERDI, CARTAS INÉDITAS A JUAN MARÍA GUTIERREZ Y A FELIX FRIAS 209–87 (Jorge M. Mayer & Ernesto A. Martínez eds., 1953); EPISTOLARIO INÉDITO SARMIENTO-FRIAS (Ana Maria Barrenechea ed., 1997); GREGORIO F. RODRÍGUEZ, 3 CONTRIBUCIÓN HISTÓRICA Y DOCUMENTAL 466–97 (1922) (correspondence with Valentín Alsina).



control of the battlefield.<sup>200</sup> Mitre and Urquiza then essentially reached an understanding where Mitre was left in control of the national government, first as *de facto* President and then as elected President from 1862 to 1868, and Urquiza was given substantial autonomy in his native Province of Entre Ríos, where he devoted himself to making immense amounts of money producing agricultural products and exporting them to the British.<sup>201</sup>

The Mitre-Urquiza accommodation also meant that every significant political figure accepted the U.S. model as authoritative. Urquiza had placed the United States on a pedestal since the 1853 Convention, his key lieutenants at that Convention, Benjamín Gorostiaga and Juan María Gutierrez, had pledged themselves to the U.S. model, and Mitre, Sarmiento, Vélez Sarsfield and their allies were running the country. While Alberdi had written a draft constitution in 1853 with substantial differences from the U.S. Constitution, and though key differences from the U.S. on Presidential powers and state of siege remained even after 1860, Alberdi found himself abandoned. He was the Confederation's ambassador to Europe at the time of the 1860 Convention, and was the one intellectual who sided with Urquiza who never reconciled with Mitre and Sarmiento during the 1860s; instead, Alberdi wrote books and articles from Europe sympathizing with Paraguay and attacking the Argentine Government as a pawn of Brazil for joining it in the war against Paraguay.<sup>202</sup> While

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200. See generally BOSCH, *supra* note 103, at 563–77 (recounting the fall of the Confederation with Urquiza essentially negotiating its demise); SCOBIE, *supra* note 168, at 356–76 (recounting the fall of the Confederation).

201. Urquiza was an entrepreneur as much as a *caudillo*. During the 1840s, he established the first commercial ranches in the Province of Entre Ríos. ANTONIO P. CASTRO, *NUEVA HISTORIA DE URQUIZA: INDUSTRIAL, COMERCIANTE, GANADERO* (4th ed. 1953). In 1848, the year that Rosas blocked the River Plate to upstream traffic and effectively blocked Urquiza's ability to export from his upstream province, Urquiza began operating Santa Cándida, his slaughterhouse and animal processing plant that ultimately became one of the largest operations of its kind in the world. *Id.* at 54. When Mitre took over the national government in 1861, Santa Cándida was processing nearly 40,000 animals a year and shearing over 80,000 sheep. *Id.* at 71–72. By 1868 his ranches held approximately 600,000 steer, 500,000 sheep, 20,000 horses, and covered 923,125 hectares. *Id.* at 71–72. He was likely the richest person in Argentina when he was assassinated in 1870. *Id.*

202. E.g. JUAN BAUTISTA ALBERDI, *LAS DISENSIONES DE LA REPÚBLICAS DEL PLATA Y LAS MAQUINACIONES DEL BRAZIL* (1865), in 6 OBRAS COMPLETAS 307; JUAN BAUTISTA ALBERDI, *LOS INTERESES ARGENTINOS EN LA GUERRA DEL PARAGUAY CON EL BRASIL* (1865), in 6 OBRAS COMPLETAS 357; JUAN BAUTISTA ALBERDI, *CRISIS PERMANENTE DE LAS REPUBLICAS DEL PLATA* (1866), in 6 OBRAS COMPLETAS 384; JUAN BAUTISTA ALBERDI, *TEXTO DEL TRATADO DE ALIANZA CONTRA EL PARAGUAY* (1866), in 6 OBRAS COMPLETAS 431; JUAN BAUTISTA ALBERDI, *LAS DOS GUERRAS DEL PLATA Y SU FILIACION EN 1867* (1867), in 7 OBRAS COMPLETAS 28; ISIDORO RUIZ MORENO, *EL PENSAMIENTO INTERNACIONAL DE ALBERDI* 105–10 (Imprenta de la Universidad 1945); see generally MAYER, *2ALBERDI Y SU TIEMPO*, *supra* note 9, at 856–

the politics became more accepting of Alberdi starting in the late 1870s, he could be thought of as an exile during the 1860s, would only return to Argentina in 1879 after having been away since 1838, and he would die in Paris in 1884. His name would be completely absent from the state of siege debates of the 1860's.<sup>203</sup>

#### IV. THE IDEOLOGY OF U.S. CONSTITUTIONALISM AND THE RANGE OF POLITICAL CHOICES

In the decades that followed the 1860 Constitutional reform, it was Sarmiento's adoration of the U.S. model that established itself as a shared ideology of Argentina's political elite and the primary rhetoric of constitutional debate. The Argentine Supreme Court treated U.S. case law as binding, but the courts were hardly alone, and essentially followed the view that already dominated Argentina's political elite. Following the 1860 Convention, the Argentine government sent a young scholar to the United States to write a report on how federal jurisdiction worked,<sup>204</sup> which was published as a book in 1863,<sup>205</sup> and both Mitre and Sarmiento's administrations paid for translations of treatises on U.S. Constitutional Law and American Government.<sup>206</sup> (Not surprisingly, translators sometimes included

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947 (describing Alberdi's opposition to the Paraguayan War, the chronology of events, and the harsh attacks that Alberdi received in Buenos Aires due to his opposition). In December 1877, Sarmiento would describe Alberdi as having suffered "forty years of deportation," which was enough punishment for his errors. Letter from Domingo Sarmiento to José Possé (Dec. 14, 1877), in ARCHIVO DEL MUSEO HISTÓRICO SARMIENTO, EPISTOLARIO ENTRE SARMIENTO Y POSSE, 1845-1888, at 437 (Ministerio de Justicia e Instrucción Pública 1946).

203. Virtually the only favorable recognition that Alberdi receives during the Mitre and Sarmiento presidencies comes from newspapers like *La Republica* that represent the interior of the country, see MAYER, ALBERDI Y SU TIEMPO, *supra* note 9, at 940-41, 957-58, and while *La Republica* supported Alberdi, it showed the same enthusiasm for the U.S. model as the rest of the Buenos Aires press, *id.*

204. Decree of Jan. 23, 1861, 4 REGISTRO NACIONAL DE LA REPUBLICA ARGENTINA 380 (1884); Héctor José Tanzi, *El nacimiento y los primeros pasos de la Corte Suprema de Justicia de la Nación (1853-1903)*, in 1 HISTORIA DE LA CORTE SUPREMA ARGENTINA 23, 44 (Alfonso Santiago ed., 2013).

205. See Manuel Rafael García, ESTUDIOS SOBRE LA APLICACION DE LA JUSTICIA FEDERAL DE NORTE AMERICA Y LA ORGANIZACION CONSTITUCIONAL ARGENTINA (Florence, 1863). García describes his book as commissioned by the Argentine Government, *id.* at 6, though oddly there was also a decree revoking his commission to write it, Decree of July 20, 1861, 4 REGISTRO NACIONAL DE LA REPUBLICA ARGENTINA 407 (1884). In 1868, President Sarmiento named García as Argentina's ambassador to the United States. Decree of October 16, 1868, 5 REGISTRO NACIONAL DE LA REPUBLICA ARGENTINA at 405 (1884).

206. During the Mitre Administration, Congress authorized the purchase of 500 copies of Story's treatise, Law of Sept. 16, 1863, 5 REGISTRO NACIONAL DE LA REPUBLICA

prefaces with Sarmiento-like language proclaiming the centrality of the U.S. model.)<sup>207</sup> Further, some central debates focused almost exclusively on U.S. law even when Argentina's Constitutional text or political situation was clearly different. The Argentine provinces debated sovereign immunity with the Federal Government in terms entirely borrowed from the United States (even though Argentina lacked the Eleventh Amendment to the U.S. Constitution).<sup>208</sup> During the Sarmiento Administration, Mitre successfully blocked the Federal Government's construction of a new port in the city of Buenos Aires, with arguments on both sides focused almost exclusively on U.S. law, even though Buenos Aires at that time acted as the seat of the national government and not as an autonomous federal capital like Washington, D.C.<sup>209</sup> However the debates over state of siege and

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ARGENTINA 73 (1884); and 350 copies of James Kent's Commentaries on American Law, Law of Oct. 1, 1864, 5 *id.* at 160; Decree of April 18, 1865, 5 *id.* at 198. The Sarmiento Administration commissioned half a dozen more translations, see Decree of March 2, 1869, 5 *id.* at 449. Among the translators commissioned who actually produced the work was Juana Manso, perhaps the best known Argentine feminist of the nineteenth century, responsible for FRANCISCO LIEBER, *SOBRE LA LIBERTAD CIVIL Y EL PROPIO GOBIERNO* (Juan Manso trans., 1869) and Luis Varela, a future Supreme Court judge, who published portions of John Norton Pomeroy's treatise as JOHN NORTON POMEROY, *PODERES EJECUTIVOS DEL GOBIERNO DE LOS ESTADOS-UNIDOS DE AMERICA: CAPÍTULO EXTRACTADO DE LA OBRA "AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES"* (Luis V. Varela trans., 1869). Marta Huertas lists seventeen 19th century Argentine translations and does not include the translations of Orlando Bump and G.W. Paschal's books. See Huertas, *supra* note 10, at 173–75. See also Garay, *supra* note 10, at 175 n. 100; Zimmerman, *supra* note 28, at 388–90. While clearly ludicrous, the Sarmiento Administration even ordered that Story's treatise become the text for teaching Argentine History and Civic Instruction in the course taught by José Manuel Estrada at the Colegio Nacional de Buenos Aires (Argentina's most prestigious high school), Decree of Feb. 23, 1869, 5 REGISTRO NACIONAL DE LA REPÚBLICA ARGENTINA 447 (1884).

207. For example, Nicolás Calvo, a political figure and intellectual linked to the Confederation, argued in the preface to a translation of Story's treatise that the only defects in the Argentine Constitution of 1853 arose where it did not copy the U.S. Nicolás A. Calvo, *Advertencia del traductor argentino*, in J. STORY, 1 COMENTARIO SOBRE LA CONSTITUCION FEDERAL DE LOS ESTADOS-UNIDOS 5 (Nicolás A. Calvo trans., 1860). He stated that the U.S. Constitution "has made the American people rich, happy, great and strong" and "would give identical results to us." *Id.* Calvo intended the translation to assist the Buenos Aires Convention. *Id.* at vi.

208. See generally JORGE M. GONDRA, JURISDICCION FEDERAL 369–80 (1944); ALBERTO B. BIANCHI COMPETENCIA ORIGINARIA DE LA CORTE SUPREMA DE JUSTICIA DE LA NACION 188–95 (1989) (reviewing the debate); Tanzi, *supra* note 204, at 45–46 (on Congressional debates on provincial sovereign immunity in 1863) and 182–83 (on early Argentine Supreme Court decisions on provincial sovereign immunity).

209. The Argentine Congress in the 1860s and 1870s faced difficult issues over the extent of the authority of the Federal Government within the City of Buenos Aires, which while the seat of the Federal Government, remained part of the Province of Buenos Aires until 1880. Construction of a modern port in the City was a vital engineering project, and approval of construction only finally occurred in 1882, Ley

federal interventions in the provinces offer the most important constitutional debates during the period, and were debates where Mitre, Sarmiento and Vélez Sarsfield all made use of the ideology of U.S. Constitutionalism, though in the case of Mitre after October 1868, from the political opposition. All three were likely limited by the wide acceptance of the ideological commitment they had earlier pushed and their own prior identification with the ideology.

#### A. THE CONSTITUTIONAL TEXT (THAT GETS IGNORED)

Debates over State of Siege during the 1860s show the participants pushing interpretations of the U.S. Constitution to the limit even though a key portion of Argentina's constitutional text did not even come from the U.S. Moreover, Sarmiento came to find his political options severely limited by an Argentine Supreme Court decision, which he could hardly evade given the centrality of judicial review to the U.S. model. Art. 23 of the Argentine Constitution provides:

In the event of internal disturbance or foreign attack which endangers the exercise of this Constitution and the authorities created by it, the province or territory in which the disturbance of order exists will be declared in state of siege, suspending all constitutional guarantees there. But during that suspension, the President of the Republic may not sentence [an individual] on his own or apply a penalty. His power with respect to persons is limited to arresting them or transferring them from one part of the Nation to another, provided that they do not prefer to leave Argentine territory.<sup>210</sup>

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1257, 1881-1888 ADLA 95, promulgated Oct. 27, 1882. In 1869, the Federal Government, under President Sarmiento, sought to grant a private concession to build and operate the port without any participation by the Province of Buenos Aires, and in the face of a competing proposal by the Province. VILLEGAS BASAVILBASO, UN DEBATE PARLAMENTARIO HISTÓRICO: MITRE VERSUS VÉLEZ SARSFIELD 16-17 (2d ed. 1959). This raised a host of constitutional issues regarding which government entity had the authority to embark on the project and under what conditions, and the debate between the Sarmiento's Administration and political opponents led by Mitre, then a senator representing the Province of Buenos Aires, took place entirely in terms of U.S. practice. See Congreso Nacional, Cámara de Senadores, *Diario de sesiones de 1869*, Sessions of Sept. 11, 14, and 16, 1869 at 668-755 (Imprenta del Orden 1869) (note: other official editions exist with different pagination).

210. Art. 23, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.) (1860) (translation by the author).

The power to declare or end a state of siege in the event of internal unrest is given to Congress, with the President only enjoying this power when Congress is not in session.<sup>211</sup> Article 23 has no single source. It comes primarily from Article 28 of Alberdi's draft Constitution, which he in turn largely borrowed from the Chilean Constitution of 1833.<sup>212</sup> It also has roots in French practice and Argentina's short-lived Constitution of 1819, which provides for the emergency suspension of the Constitution.<sup>213</sup> However, it lacks much connection to the U.S. In the U.S. Constitution, the only remotely similar provision is the Suspension Clause which provides: "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."<sup>214</sup> Yet while the text of Article 23 has little in common with the U.S. Suspension Clause, and a lot in common with the Chilean Constitution, U.S. Constitutional practice became the entire focus of discussion for determining the Executive's state of siege powers and the Chilean Constitution was not even mentioned during debates on the subject.

#### B. STATE OF SIEGE DEBATES DURING THE MITRE PRESIDENCY

The first significant debate on state of siege powers came in June 1868, during the closing months of Mitre's Presidency. Mitre was disastrous as the allies' first field commander in the war against Paraguay,<sup>215</sup> which left him politically vulnerable, and a state of siege resulting from the war and provincial uprisings was used to close some of the hostile press and detain publishers.<sup>216</sup> To protect the

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211. Art. 67, § 26, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.) (1860).

212. John Baptist Alberdi, BASES, in 3 OBRAS 565 (1886). Alberdi in a footnote recognized Art. 161 of the Chilean Constitution of 1833 as his source, but his draft differs significantly from Art. 161, especially when read with Art. 82, § 20 of the Chilean Constitution of 1833 on how a state of siege gets declared. Alberdi's draft and the Argentine Constitution both give unfettered discretion to the Executive to declare a state of siege when Congress is not in session, whereas the Chilean Constitution requires the Executive to always obtain the consent of the Council of State. Also, Alberdi's draft, as in turn included in the Argentine Constitution, provides that a person detained under a state of siege may always opt to leave the country. See SECO VILLALBA, *supra* note 118, at 157–58; Leopoldo H. Schiffrin, *Estado de sitio y Constitución real en la Argentina*, 198 EL DERECHO 632, 634–36 (2002) (reviewing Chile's relevant provisions in depth and comparing them to the U.S., Alberdi's draft and the final text).

213. Art. 122, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.) (1860).

214. U.S. CONST, art. I, § 9, cl. 2,

215. ROSA, *supra* note 29, at 241–44, 246–47, 250–52, 285–87, 289; McLynn, *supra* note 29, at 81, 82–83.

216. See MIGUEL NAVARRO VIOLA, EL DESPOTISMO DEL ESTADO DE SITIO DE LA REPÚBLICA ARGENTINA EN 1866 Y 1867 (1867) (describing the suffering and legal presentations of

Press, the Constitutional Affairs Committee of the House of Deputies sent a bill to the floor providing that the state of siege powers of Article 23 did not authorize limiting the Press.<sup>217</sup> The argument would not seem convincing given the text of Article 23, which flatly allows the suspension of constitutional guarantees in territory under a state of siege;<sup>218</sup> however the discussion does not limit itself to the constitutional text. Instead, Eduardo Costa, the Minister of Justice, opposing the bill, insists that "Lincoln, who certainly cannot be faulted for making illegitimate use of his Constitutional powers," had closed many newspapers during the Civil War.<sup>219</sup>

References to the U.S. are not limited to the Deputies who were jurists. When the debate continued a few days later, Manuel Montes de Oca, a prominent surgeon and a Deputy from the Province of Buenos Aires known for opposing the Government, sided with the Government.<sup>220</sup> He argued that not only did the bill's supporters ignore the text of Article 23, but they ignored U.S. practice, especially under Lincoln.<sup>221</sup> He analogized the situation to that of Andrew Jackson during the emergency of the Battle of New Orleans, wherein Jackson first imprisoned a citizen, then ignored a judicial order for the individual's release and got fined by the judge, but in the end enjoyed vindication because the President paid his fine.<sup>222</sup> (Anecdotes of this

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a detained journalist); Isidoro J. Ruiz Moreno, *La política entre 1862 y 1880*, in ACADEMIA NACIONAL DE HISTORIA, 4 NUEVA HISTORIA DE LA NACIÓN ARGENTINA 453, 467-68 (Planeta 2000).

217. Congreso Nacional, Cámara de Diputados, *Diario de sesiones de 1868*, Session of June 10, 1868, at 64 (text of bill submitted by the Constitutional Affairs Committee).

218. Art. 23, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.) (1860).

219. Congreso Nacional, Session of June 10, *supra* note 217, at 66 (statement of Minister of Justice, Eduardo Costa).

220. Montes de Oca's usual opposition to the Government is noted by the Minister of the Interior, Guillermo Rawson, *id.* at 77. His biography primarily describes his work as a surgeon, *see* MANUEL AUGUSTO MONTES DE OCA, EL DOCTOR MANUEL AUGUSTO MONTES DE OCA: SU VIDA Y SU MUERTE (1883).

221. Congreso Nacional, Cámara de Diputados, *Diario de sesiones de 1868*, Session of June 18, 1868, at 73-75 (statement of Montes de Oca).

222. *Id.* The actual incident was similar to Montes de Oca's recounting, though perhaps with less vindication of Andrew Jackson's conduct. Jackson, as the commanding general during the Battle of New Orleans in 1815, declared martial law and maintained it until two months after the battle, when news of peace was verified. *See* Joseph G. Tregle, Jr., *Andrew Jackson and the Continuing Battle of New Orleans*, 1 J. EARLY REPUBLIC 373, 378 (1981). In the period after the battle, Jackson ordered the arrest of a French American citizen for alleged insurrection and then ordered the arrest of the federal judge when the judge granted his writ of habeas corpus. *Id.* at 378. When martial law ended, the judge imposed a \$1,000 fine which Jackson paid, *id.* In 1844, after Jackson's presidency, at a time when Jackson was in difficult financial circumstances, Congress passed a law repaying Jackson the funds. *Id.* at 391; *see also United States v. Andrew Jackson (1815)*, THE HISTORIC NEW ORLEANS COLLECTION,

sort were very popular in the debates, with speakers modeling Argentina after a people they felt had an admirable civic culture as much as after that people's laws.) Montes de Oca naturally concludes: "Yes sir, that which they did in the United States can also be done among us, because with light variations the Constitutions are the same, the constitutional practices are the same, and those antecedents should serve us as a rule and norm for our conduct as a political body."<sup>223</sup> The Minister of the Interior, Guillermo Rawson, who was also a physician, then followed up. For Rawson, since Lincoln's war powers as commander-in-chief had allowed him to take dramatic measures like issuing the Emancipation Proclamation in the U.S., then by implication, the President may take such forceful measures in Argentina too.<sup>224</sup>

But opponents of the broad use of state of siege likewise cited the United States. The bill's author, Carlos Tejedor, a well-known jurist and future Governor of Buenos Aires, presented his arguments almost entirely in terms of U.S. practice. He asserted that Argentina's state of siege provision was defective because it came from French and Spanish law, that the U.S. only gives the President ample war powers when such powers are actually necessary to fight a war, and that President Mitre had gone too far, since the newspaper closures were unnecessary.<sup>225</sup>

The one thing that both sides agreed upon was that the French origin of the state of siege provision was a problem. Montes de Oca, though his position would have been supported by the French-based text, insisted that if the state of siege doctrine comes from Revolutionary France and is "incompatible with the doctrine of the leading Republic of the world" then it should be ignored.<sup>226</sup> Referencing President Lincoln's closure of a New York newspaper and citing the words of Joseph Story, Montes de Oca argued that the Argentine Constitution must be understood as saying the same thing as the U.S. regardless of whether the provision at hand came from the United States.<sup>227</sup> Only one Deputy from either side of the debate questioned the references to the United States, José Marmol. Marmol came from the province of Buenos Aires and was best known as a poet

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<https://www.hnoc.org/virtual/andrew-jackson/united-states-v-andrew-jackson-1815> (last visited Nov. 12, 2024) (recounting of the incident with photo documentation).

223. Congreso Nacional, Session of June 18, *supra* note 221, at 75 (statement of Montes de Oca).

224. *Id.* at 78 (statement of the Minister of the Interior, Guillermo Rawson).

225. *Id.* at 79–80 (statement of Tejedor).

226. *Id.* at 82 (statement of Montes de Oca).

227. *Id.* at 82–84.

and novelist.<sup>228</sup> But he questioned the references not because he considered the U.S. model inappropriate, but because it needed to be understood in the context of a country that sometimes acted in an unconstitutional manner under its own doctrine when faced with a crisis—which was the case with both the closing of newspapers during the Civil War and the attempt to impeach President Andrew Johnson.<sup>229</sup> Yet for Montes de Oca, and seemingly for most of the speakers, it did not matter whether U.S. practice was, in fact, the most progressive or whether the U.S. faced a unique situation during the Civil War. The United States was assumed to offer a progressive doctrine regardless of the truth of the matter. Montes de Oca proclaimed, “if I fall defending this doctrine, I fall carrying in the Argentine Congress the flag raised in the United States by Washington the good and Lincoln the honorable.”<sup>230</sup> These American statesmen were seen as heroes to be followed. In the end, the bill meant to protect the press was rejected, but the House established a special committee to consider regulation of states of siege.<sup>231</sup>

A similar debate occurred in the Argentine Senate three months later, during the final month of the Mitre Administration, focused on regulating the President’s powers under state of siege and federal interventions, and is likewise noteworthy for citations primarily to U.S. practice, with no references of any kind to Chile on state of siege<sup>232</sup>—regardless of Alberdi’s references to Chile’s state of siege provisions in *Bases*. (At this point, Alberdi, in exile and writing articles attacking Argentina’s participation in the war against Paraguay, was himself uncitable.)

### C. STATE OF SIEGE AND FEDERAL INTERVENTION DEBATES DURING SARMIENTO’S PRESIDENCY

Political division and Sarmiento’s aggressive personality gave new life to discussions of presidential powers during a state of siege once Sarmiento became President in October 1868. Mitre and Sarmiento became hostile political rivals in the weeks before Mitre handed over the presidency to Sarmiento. Until Mitre’s presidency,

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228. See generally ALBERTO BLASI BRAMBILLA, JOSÉ MARMOL Y LA SOMBRA DE ROSAS 145–238 (1970) (describing Marmol’s literary work).

229. *Id.* at 99 (statement of Marmol).

230. Congreso Nacional, Cámara de Diputados, *Diario de sesiones de 1868*, Session of June 22, 1868, at 97–98 (statement of Montes de Oca).

231. *Id.* at 109.

232. See Congreso Nacional, Cámara de Senadores, *Diario de sesiones de 1868*, Sessions of Sept. 15 and 18, 1868, at 590–615.



not only had they worked together politically—as returning exiles attacking Rosas, in splitting with Urquiza and then in passing the 1860 Constitutional reforms— but they were close personal friends.<sup>233</sup> Mitre had even acted as an intermediary in 1862 when Sarmiento had marital problems.<sup>234</sup> But they became increasingly estranged during Mitre’s presidency. Mitre, who in 1863 had placed Sarmiento in charge of putting down a revolt in the North, ended up publicly condemning the summary execution of the rebellion’s leader.<sup>235</sup> Further, Sarmiento did not follow orders well. Mitre was clearly angry the following year when Sarmiento, given a diplomatic mission in Chile and on his way to the United States as Ambassador, vocally committed Argentina to support Chile and Peru in what soon escalated into a war between those countries and Spain—at a time when Mitre was dealing with rising tensions and ultimately war with Paraguay.<sup>236</sup> Mitre subsequently supported Rufino de Elizalde, his Foreign Minister, to succeed him as President, but acted too tepidly and had lost too much political support due to the heavy losses in the Paraguayan War to succeed.<sup>237</sup> While Sarmiento offered Mitre the post of head of the Army when he assumed the Presidency, instead of accepting the offer (which may or may not have been sincere),<sup>238</sup>

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233. See DE MARCO, *supra* note 38, at 144; DIEGO VALENZUELA & MERCEDES SANGUINETI, SARMIENTO PERIODISTA: EL CAUDILLO DE LA PLUMA 59–61 (2012). In a February 1846 letter, when Sarmiento was 35 and Mitre was 24, Sarmiento begins by describing Mitre as one of the closest friends that he made when living in Montevideo. Letter from Domingo Sarmiento to Bartolomé Mitre, in MUSEO MITRE, *supra* note 148, at 5.

234. DE MARCO, *supra* note 38, at 226–29.

235. Rock, *supra* note 30, at 44. In their private correspondence, Mitre indicates that he appreciates Sarmiento’s reasoning in supporting the execution of “Chacho” Peñaloza but that he could not approve of it because their political party had always stood for respect for the law. Letter from President Bartolomé Mitre to Governor Domingo Sarmiento (Dec. 23, 1863), in MUSEO MITRE, *supra* note 148, at 153. Mitre generally supported treating gaucho rebels as bandits, not rebels. DE LA FUENTE, *supra* note 30, at 166.

236. See generally NÉSTOR TOMÁS AUZA, LA MISIÓN SARMIENTO EN CHILE Y PERÚ Y EL CONGRESO AMERICANO, 1864-1865, (Librería Histórica 2007) (showing some sympathy for Sarmiento, since his instructions, which included an unrealistic request that Chile pay Argentina a debt for its support in the War for Independence from Spain, were also somewhat contradictory when it came to how much support to show Chile and Peru against Spain in Perú’s dispute with Spain over the Chincha Islands). Sarmiento displays almost shocking nonchalance when Mitre repeatedly, harshly rebukes him for displays of excessive hostility toward Spain and acting without authorization. The correspondence is collected in MUSEO MITRE, *supra* note 148, at 171–211.

237. See Rock, *supra* note 30, at 60–61; McLynn, *supra* note 29, at 87–88. See generally José S. Campobassi, MITRE Y SU ÉPOCA 216–225 (1980).

238. See Letter by Sarmiento to Mitre (Oct. 22, 1868), in MUSEO MITRE, *supra* note 148, at 376.

Mitre led a ferocious opposition to Sarmiento in both his newspaper, *La Nacion Argentina*, and in the Senate. Moreover, Sarmiento gave him ammunition when he made it clear from the start of his presidency that he would act more harshly than Mitre had in extinguishing provincial rebellions. Mitre took advantage of what were likely real fears that Sarmiento would be too repressive.<sup>239</sup>

### 1. Reining in Sarmiento

Mitre initiated his campaign against Sarmiento with a series of articles in *La Nacion Argentina* that were often headlined “Jurisprudencia de Sangre” (Jurisprudence of Blood) or “La Horca” (The Gallows). Almost as soon as Sarmiento succeeded Mitre, *La Nacion Argentina* began to remind readers of Sarmiento’s conduct as Governor of San Juan from 1862 to 1864 and his excessive invocation there of martial law.<sup>240</sup> Sarmiento had acted very aggressively when Mitre, taking advantage of his presence in San Juan in 1863, entrusted him to command operations against a rebellion in neighboring provinces led by an old Argentine *caudillo*, “El Chacho” Peñaloza.<sup>241</sup> First, Sarmiento, invoking his authority as Governor of San Juan, declared a state of siege suspending Constitutional rights in order to respond to the rebellion<sup>242</sup>—something not provided for under the

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239. See ACADEMIA NACIONAL DE LA HISTORIA, 1 HISTORIA ARGENTINA CONTEMPORANEA, 1862-1930, HISTORIA DE LAS PRESIDENCIAS 109–11 (1965). Sarmiento described himself as planning to exercise greater authority in combating lawlessness than Mitre. SOMMARIVA, *supra* note 32, at 356.

240. *La Nacion Argentina*’s attacks on Sarmiento begin in September 1868 with mockery, emphasizing his self-centered, bombastic style. *E.g.*, *El discurso del Dr. Sarmiento*, LA NACION ARGENTINA, Sept. 2, 1868, at 1; *Sarmiento y Velez contra Sarmiento*, LA NACION ARGENTINA, Sept. 19, 1868, at 1; *see also Sarmiento y las señoras*, LA NACION ARGENTINA, Mar. 12, 1869, at 2 (accusing Sarmiento of being a misogynist). At their peak, the publications became very sharp parodies about Sarmiento. *See El mensaje del Ejecutivo Nacional*, LA NACION ARGENTINA, May 4–5, 1869, at 1 and *El mensaje del Ejecutivo Nacional*, LA NACION ARGENTINA, May 5, 1869, at 1 (offering a viciously funny parody of Sarmiento’s speech opening Congress on May 1 based on self-references to his publications and language borrowed from or very close to his past remarks). But by late November, the newspaper began to emphasize Sarmiento’s insistence that the executions in San Juan were legal, even though he claims not to have ordered them, with Sarmiento improperly invoking the example of Lincoln during the Civil War. *Una calumnia para revelar una gloria*, LA NACION ARGENTINA, Nov. 28, 1868, at 1; *Una calumnia para revelar una gloria*, LA NACION ARGENTINA, Nov. 29, 1868, at 2. The newspaper warned that Sarmiento could repeat the executions with the argument that he was simply mirroring the practice of the United States, *Ejecuciones militares*, LA NACION ARGENTINA, Dec. 6, 1868, at 1.

241. SOMMARIVA, *supra* note 32, at 196–97.

242. See Domingo F. Sarmiento, *Contestación del Gobierno de San Juan á la circular del Ministerio del Interior sobre estado de sitio* (June 26, 1863), in EL ESTADO DE SITIO

national constitution as a power of a Governor, though justified by Sarmiento under a vague interpretation of martial law under U.S. practice.<sup>243</sup> But more seriously, after losing a battle and fleeing with a small group of men, Peñaloza was captured, quickly executed, and had his head displayed on a stake.<sup>244</sup> Sarmiento claimed he never ordered the execution, but he vigorously defended both the execution and the display of the head.<sup>245</sup> Mitre publicly condemned the execution,<sup>246</sup> though it is likely what he had hoped for.<sup>247</sup> Further, with Mitre's approval, Guillermo Rawson, the Minister of the Interior, challenged Sarmiento's State of Siege declaration as unconstitutional in a circular that he had sent to all the Governors.<sup>248</sup> Sarmiento's departure from Argentina in 1864 to become Ambassador to the United States may have been to quiet the controversy.<sup>249</sup> However, the 1863 execution of Peñaloza provided a perfect wedge for *La Nación Argentina* to attack Sarmiento at the start of his presidency in 1869, and proved prescient. In April of 1869, *La Nación Argentina* began to report on executions by General José Miguel Arredondo in putting down an uprising in the Province of San Luis, on the execution of a number of Army deserters from Entre Ríos, on claims by Sarmiento's Government that executions of rebels could be justified under martial

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SEGUN LA CONSTITUCION ARGENTINA: DOCUMENTOS OFICIALES 7, 7, 10, 12, 14–15; Letter from Domingo F. Sarmiento to Mary Mann (May 12, 1866), in *CARTAS DE SARMIENTO A LA SEÑORA MARÍA MANN* 13 (1936).

243. See Domingo F. Sarmiento, *Contestación del Gobierno de San Juan á la circular del Ministerio del Interior sobre estado de sitio* (June 26, 1863), in *EL ESTADO DE SITIO SEGUN LA CONSTITUCION ARGENTINA: DOCUMENTOS OFICIALES* 7, 7, 10, 12, 14–15 (1863); Letter from Domingo F. Sarmiento to Mary Mann (May 12, 1866), in *CARTAS DE SARMIENTO A LA SEÑORA MARÍA MANN* 13 (1936).

244. See SOMMARIVA, *supra* note 32, at 211–12.

245. *Id.* at 194–214 (describing the rebellion, Sarmiento's role in repressing it, and Peñaloza's execution); Sarmiento offers his version of Peñaloza's uprising, depredations and execution in *EL CHACHO* (1868), in *7 OBRAS COMPLETAS* at 245–302 (2001), and his legal defense of Peñaloza's execution, exclusively in terms of U.S. practice during and after the Civil War, *id.* at 275, 300, 303–307; see also Letter from Domingo F. Sarmiento to Mary Mann (May 12, 1866), *supra* note 243, at 13 (defending his conduct). El Chacho was executed on Nov. 12, 1863.

246. SOMMARIVA, *supra* note 32, at 212.

247. In 1869, Sarmiento would publish a note from Mitre from March 28, 1863 in which Mitre told Sarmiento to not treat the operation as a military campaign, but as an operation against bandits, and concluded with the mafia-like guidance, “lo que hay que hacer es muy sencillo” (“what has to be done is very simple”), Letter from Bartolome Mitre to Domingo F. Sarmiento (March 28, 1863), in *Carta del Presidente de la República*, *EL NACIONAL*, at 1 (July 1, 1869).

248. Guillermo Rawson, Circular (May 13, 1863), in *EL ESTADO DE SITIO SEGUN LA CONSTITUCION ARGENTINA: DOCUMENTOS OFICIALES* 5, 5–6 (1863) (indicating that it is being sent by order of President Mitre and to the Governors of all of the Provinces).

249. ALLISON WILLIAMS BUNKLEY, *THE LIFE OF SARMIENTO* 411–12 (Princeton Univ. Press, 1952).

law, and on a declaration of martial law in Sarmiento's native Province of San Juan, where Sarmiento favored his allies in the Legislature in a dispute between the Legislature and the Governor.<sup>250</sup>

*El Nacional* and *La Tribuna*, the two newspapers closely allied with Sarmiento, defended the President with a common line of argument: that Sarmiento had never ordered an execution, that rebel attacks necessitated strong measures, and that the "political sea chart" of the U.S. Constitution and the many translations Argentines had made of U.S. authors gave Argentina a huge advantage over other Spanish American countries, an advantage that included U.S. doctrine on martial law.<sup>251</sup> To support their U.S. law argument, both papers even provide a 6,500 word extract from John Pomeroy's 1864 treatise, *An Introduction to Municipal Law*, which had just been translated by Florencio Gonzalez, the Chair in Constitutional Law at the University of Buenos Aires.<sup>252</sup> That extract describes the President's Commander-in-Chief authority as including all of the traditional authority of a military commander, including declaring martial law as

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250. According to LA NACION ARGENTINA, the execution of deserters involved making an example of a portion of a group of 80 peons from Entre Ríos who had been irregularly conscripted and attempted escape, *La mancha de sangre*, LA NACION ARGENTINA, Apr. 7, 1869, at 2; *Jurisprudencia de sangre*, LA NACION ARGENTINA, Apr. 10, 1869, at 1; SOMMARIVA, *supra* note 32, at 357-362, describes the political split in San Juan and Sarmiento's announcement that supporters of the rebellious Governor would be tried by military commission under martial law.

251. *La Tribuna's* extended defense of Sarmiento's past and future conduct under martial law begins with a response to LA NACION ARGENTINA's *Jurisprudencia de sangre* article, adopting that same headline for each of its own pieces in all of the following articles. *Jurisprudencia de sangre*, LA TRIBUNA, Apr. 20, 1869, at 1; *Jurisprudencia de sangre*, LA TRIBUNA, Apr. 21, 1869, at 1 (emphasizing that Sarmiento never ordered executions, unlike Mitre); *Jurisprudencia de sangre*, LA TRIBUNA, Apr. 22, 1869, at 1; *Jurisprudencia de sangre*, LA TRIBUNA, Apr. 23, 1869, at 1 (using the term "almanaque náutico de la política" ("political sea chart") to refer to Pomeroy, and including the long extract from Pomeroy described in the text); *Jurisprudencia de sangre*, LA TRIBUNA, Apr. 26, 1869, at 1 and *Jurisprudencia de sangre*, LA TRIBUNA, Apr. 27, 1869, at 1 (both articles focusing entirely on the U.S. and on the decision to use a military tribunal to try those who conspired to kill Lincoln); *Jurisprudencia de sangre*, LA TRIBUNA, Apr. 28, 1869, at 1 (offering a summing up, with references to the U.S. and with an emphasis on the present threat posed by the *caudillo*/bandit Felipe Varela in the Province of San Juan). The *Jurisprudencia de sangre* articles in *La Tribuna* all appeared verbatim first in *El Nacional*, a newspaper originally founded by Vélez Sarsfield and that *La Nacion Argentina* would mock as the "official press." *Jurisprudencia de sangre*, LA NACION ARGENTINA, Apr. 21, 1869, at 2. The *El Nacional* *Jurisprudencia de sangre* articles appear on April 13, 1869, at 1 (matching *La Tribuna* on Apr. 20); April 14, 1869 (matching *La Tribuna* on April 21); April 15, 1869 at 2 (matching April 22); April 16, 1869 at 1 (matching April 23); April 21, 1869 at 1 (matching April 28). Most likely an article also appeared on April 20, 1869 at 1, which was missing from the microfilm consulted.

252. *Jurisprudencia de sangre*, LA TRIBUNA, Apr. 23, 1869, at 1.

necessary in a zone of military conflict.<sup>253</sup> Other articles emphasized that the conspirators behind Lincoln's assassination were tried by military tribunal under martial law, by order of the U.S. President.<sup>254</sup>

The response of *La Nación Argentina* in opposition was to insist on a contextual understanding of U.S. precedents.<sup>255</sup> Sarmiento, blindly copying U.S. examples to suit his position of the moment, was a partisan fighter lacking the spirit of George Washington, who "had the glory of triumphing when he governed and to afterwards even make possible the triumph of his adversaries."<sup>256</sup> Washington was a model for Argentina because of his forbearance, in recognizing the need to accept dissent, while Sarmiento lacked basic respect for individual rights.<sup>257</sup> Moreover, for *La Nación Argentina*, not only was U.S. doctrine divided, as shown by recent constitutional debates in the United States on the legality of imposing military law in the South after the Civil War,<sup>258</sup> but the U.S. Civil War generated destruction far exceeding the threats in Argentina's provinces.<sup>259</sup> According to the paper, Sarmiento offered a biased understanding of U.S. law, only translating the U.S. scholarship most supportive of his position,<sup>260</sup> and improperly applied the U.S. doctrine he invoked, since, as Pomeroy's book explains, martial law can only apply in wartime, and only when there is no civil authority.<sup>261</sup> Further, the dispute in San Juan in particular, which was between the Provincial Governor and the Legislature, never involved a lack of civil authority, even though military forces were mobilized.<sup>262</sup>

Three events then occurred in quick succession that placed

253. *Id.*

254. *Jurisprudencia de sangre*, LA TRIBUNA, Apr. 26, 1869; *Jurisprudencia de sangre*, LA TRIBUNA, Apr. 27, 1869 at 1.

255. *La ley marcial en San Juan*, LA NACION ARGENTINA, Mar. 11, 1869, at 1. While there is occasionally a reference to special limits that Argentina's Constitution places on the President that go beyond the U.S. Constitution, see *Ley marcial*, LA NACION ARGENTINA, Apr. 20, 1869, at 1, referring to articles 18 and 29, even references to Argentine legislation usually appear together with references to U.S. precedent. See *La ley marcial en San Juan*, LA NACION ARGENTINA, Mar. 1, 1869, at 1 (noting specific acceptance of U.S. case law and historical precedent and Argentina's law of Feb. 14, 1863, art. 19, establishing sedition as a federal crime and therefore providing for federal judicial jurisdiction).

256. *La ley marcial en San Juan*, LA NACION ARGENTINA, Mar. 11, 1869, at 1.

257. *Id.* at 1; *La ley marcial en San Juan*, LA NACION ARGENTINA, May 15, 1869, at 1.

258. *Gobierno contra la Constitución*, LA NACION ARGENTINA, Mar. 5, 1869, at 1.

259. *La ley marcial en San Juan*, LA NACION ARGENTINA, Mar. 11, 1869, at 1; *La ley marcial*, LA NACION ARGENTINA, May 12, 1869, at 1.

260. *Gobierno contra la Constitución*, LA NACION ARGENTINA, Mar. 5, 1869, at 1.

261. *Ley marcial*, LA NACION ARGENTINA, Apr. 20, 1869, at 1; JOHN NORTON POMEROY, INTRODUCTION TO MUNICIPAL LAW, 416–17 (1864).

262. *Ley marcial*, *supra* note 261.

Sarmiento's Government on the defensive with much of the upper class. First, on May 13, 1869, the Argentine Supreme Court handed down a decision protecting rebels in the Province of Salta.<sup>263</sup> The Court held that only the federal courts could exercise jurisdiction and that rebels could not be tried by military tribunals.<sup>264</sup> Second, José Manuel Zavalla, the Governor of San Juan, arrived in Buenos Aires in June to lobby Congress.<sup>265</sup> The Governor complained that as a result of a Federal Intervention the previous December to protect the Sarmiento-aligned Legislature of the Province, the emboldened Legislature had now wrongfully suspended him in impeachment proceedings.<sup>266</sup> Zavalla argued that the Legislature's action required a new federal intervention, initiated by Congress (where he had some allies), in order to restore his own authority.<sup>267</sup> Third, and the most important politically, news arrived in Buenos Aires that the military had executed a member of the upper class.<sup>268</sup> General José Miguel Arredondo, following instructions from Buenos Aires on how to deal with bandits, had ordered the military trial of Zacarías Segura, an educated member of an elite San Juan family.<sup>269</sup> Segura was executed on May 21st after his capture with a group of rebels in the neighboring Province of San Luis, whom General Arredondo had classified as bandits.<sup>270</sup> (Notably, the Government would maintain that General Arredondo did not know of the Supreme Court's decision against military jurisdiction in the Salta case at the time of Segura's execution,<sup>271</sup> which is possible given the very poor roads and the 800

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263. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 13/5/1869, "Competencia Entre el Juez Nacional de Salta y el General en Jefe del Ejército del Norte D. Ignacio Rivas," 7 FALLOS 205, 217–18 (1869) [hereafter Rivas].

264. *Id.*

265. SOMMARIVA, *supra* note 32, at 365.

266. *Id.* at 364–65; *see also* *Cuestion San Juan*, LA NACION ARGENTINA, June 27, 1869, at 1 (giving a historical overview).

267. SOMMARIVA, *supra* note 32, at 366–69.

268. *Ley marcial*, LA NACION ARGENTINA, June 9, 1869, at 1.

269. Congreso Nacional, Cámara de Senadores, *Diario de sesiones de 1869*, Session of June 17, 1869, at 139 (statement of Minister of War—Martin de Gainza) (recognizing the orders given by the Sarmiento Government) (Imprenta del Orden, 1869) (note: other official editions exist with different pagination).

270. *Id.*; *Ley Marcial*, LA NACION ARGENTINA, June 9, 1869, at 1 (giving the initial report on the execution). *See also* Lucas Codesido, *Zacarías Segura, "Salteador y Montonero"*. *El Caso "Segura"*, CUADERNOS DE MARTE, July 2012, at 223 (relating the basic events as recounted in the Senate debates and the Press).

271. *See* Congreso Nacional, Cámara de Senadores, *Diario de sesiones de 1869*, Session of June 17, 1869, at 146 (statement of Minister of Foreign Relations—Mariano Varela) (speaking for the Government and taking the position that news of the Supreme Court's decision on the Salta rebels had not yet arrived in San Luis). Not surprisingly, the opposition claimed that General Arredondo had known of the

kilometer distance from the City of Buenos Aires to San Luis.)

The Supreme Court's decision in the Salta case directly challenged Sarmiento. Acting on instructions from the Government to try rebels by military commission,<sup>272</sup> Ignacio Rivas, the general in command of the Army in Salta and other northern provinces, demanded that the federal judge hand over nine individuals who had joined a rebellion led by the *caudillo* Felipe Varela, who had been captured by a local militia.<sup>273</sup> The General insisted that the nine prisoners be tried by the military for having violated the law of war,<sup>274</sup> maintaining that they were bandits who had engaged in armed robbery (essentially illegal combatants) and that therefore military ordinances on bandits going back to the Spanish Crown could apply.<sup>275</sup> (Sarmiento typically considered the forces accompanying rebel *caudillos* to be bandits, and admittedly the line between banditry and some groups of rebels who lived off of what they could plunder was pretty thin.) The federal judge, however, insisted on trial in the regular federal court.<sup>276</sup> Since the relevant crimes, including sedition and rebellion, were already established under federal criminal law, the judge held that these crimes fell within federal judicial jurisdiction.<sup>277</sup> The case came before the Supreme Court to rule on the jurisdictional conflict between the general and the judge,<sup>278</sup> and the Court ruled unequivocally that only the federal judge in Salta had jurisdiction.<sup>279</sup>

All of the legal arguments in the Salta case focused on U.S. practice. The Supreme Court's decisions in the 1860s, unlike just a few years later, offered minimal reasoning, but would still implicitly or explicitly reference the arguments presented to the lower court or before the Supreme Court itself. The Court would then publish at least a summary of those arguments and essentially adopt the reasoning of one of the sides. In this case, the Supreme Court adopted the reasoning of the lower federal court, including its use of U.S. practice.<sup>280</sup>

Notably, the precedent that the federal judge and the prosecutor

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Supreme Court decision when Segura was executed. See Congreso Nacional, Cámara de Senadores, *Diario de sesiones de 1869*, Session of June 17, 1869, at 138 (statement of Zavalia).

272. Rivas, *supra* note 263, at 206.

273. *Id.* at 205–06.

274. *Id.* at 206.

275. *Id.*

276. *Id.* at 207–08.

277. *Id.* at 207–08, 215.

278. *Id.* at 217.

279. *Id.* at 217–18 (the Court emphasizes that the federal judge is the “only” judge with jurisdiction in a case like the one presented).

280. *Id.* at 207, 217–18.

seemed to feel that they most needed to deal with in the Salta case was the legal opinion issued by U.S. Attorney General James Speed recommending trial by military commission for those accused of participating in President Lincoln's assassination,<sup>281</sup> a recommendation that President Andrew Johnson accepted.<sup>282</sup> The Buenos Aires Press had already discussed the Speed opinion, since it formed part of the Sarmiento Administration's argument for trial of rebel "bandits" by military commission;<sup>283</sup> but the federal prosecutor and the judge, in arguing for civilian jurisdiction, both turned the opinion against General Rivas and cited U.S. authority to oppose General Rivas' position.<sup>284</sup> The Speed opinion argued that military commissions are an accepted part of the Law of Nations (international law) for trying violations of the law of war, such as acts of banditry or assassinations committed by persons not in military uniform,<sup>285</sup> and that the U.S. Constitution incorporates the Law of Nations as part of federal law except when Congress has legislated differently in minor ways,<sup>286</sup> and that under the Law of Nations, the role of a military commander grows or diminishes according to the intensity of the military operations.<sup>287</sup> On the question of intensity, Speed then concluded that in a context like that of the U.S. Civil War, where the City of Washington, D.C. was placed under martial law, a military commission was the most appropriate manner for trying those who conspired to kill the sitting U.S. president.<sup>288</sup> This reasoning allowed the federal judge in the Province of Salta and the acting federal prosecutor to first note that the Province of Salta was already fully pacified at the time General Rivas demanded surrender of the prisoners, and that Attorney General Speed's opinion specifically assumed a zone of active military operations.<sup>289</sup> Then they made an

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281. JAMES SPEED, OPINION ON THE CONSTITUTIONAL POWER OF THE MILITARY TO TRY AND EXECUTE THE ASSASSINS OF THE PRESIDENT, 3-16 (1865).

282. Andrew Johnson, Executive Order for the Trial of the Alleged Assassins of President Lincoln, in THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE PERIOD OF RECONSTRUCTION 7, 7 (1871).

283. See *Tribunales Militares*, EL NACIONAL, Dec. 21, 1868, at 1.

284. Rivas, *supra* note 263, at 207-12.

285. SPEED, *supra* note 281, at 9, 10, 14.

286. *Id.* at 4.

287. *Id.* at 5.

288. *Id.* at 3 (the City of Washington was under martial law during the Civil War and was policed by Union soldiers at the time of Abraham Lincoln's assassination), 4 (military commissions are part of the Law of Nations and, therefore, part of federal law), 4-5 (Congress may define, but not abrogate, the Law of Nations), 5 (powers under the law of war increase and decrease as necessity demands), 6 (criminalization of brigands and assassins).

289. Rivas, *supra* note 263, at 209.



argument based on the Fifth Amendment of the U.S. Constitution. The Fifth Amendment explicitly bans trials for militia members absent presentment to a judge, or a grand jury indictment, except “when in actual service in time of War or public danger.”<sup>290</sup> According to the prosecutor and the judge, if militia members could not be subjected to military jurisdiction once public danger had passed, *a fortiori* enemy forces could not be subjected to military jurisdiction once the conflict has ended.<sup>291</sup> Moreover, the Salta case did not involve rebel forces that had ever been part of the National Army and hence thereby subject to the Army’s jurisdiction.<sup>292</sup> According to the judge and the prosecutor, Speed’s opinion recognized that the purpose of war is to reestablish social normality as quickly as possible, which requires a speedy recognition of when the abnormal period of conflict has passed.<sup>293</sup>

The prosecutor and judge also questioned the Speed opinion as a matter of U.S. law. They argued that Speed’s position that the Law of Nations required military commissions for illegal combatants was refuted by George Ticknor Curtis’ *Constitutional History of the United States*. Curtis argued that Congress had the power to establish completely new rules to define offenses against the Law of Nations, and hence could provide for a civilian trial if it wished.<sup>294</sup> Knowing whom they were dealing with, the prosecutor and judge also note that at the Buenos Aires Convention, Sarmiento had described Curtis as equally distinguished an author as Joseph Story.<sup>295</sup>

Of course the Speed opinion itself was outrageous; Washington, D.C. could not reasonably have been called a war zone at the time of Abraham Lincoln’s assassination since Confederate General Robert E. Lee had surrendered his army at Appomattox, Virginia five days before. The Speed opinion was therefore also seen as unrepresentative of U.S. constitutionalism because of its unique circumstances. The federalism-oriented newspaper, *La República*, which, likely because of Sarmiento’s treatment of rebels, had become increasingly vociferous in its opposition to Sarmiento’s administration,<sup>296</sup> referred to the Speed opinion as “breathing more

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290. *Id.*

291. *Id.* at 209–10.

292. *Id.* at 216.

293. *Id.* at 210–11.

294. *Id.* at 210–11. They also note, separately, that Argentina’s Constitution simply lacks reference to the Law of Nations, unlike the U.S. Constitution. *Id.*

295. *Id.* at 211–12.

296. *La Republica* comes to clearly identify itself as part of the opposition to Sarmiento’s Government but distinguishes itself from Mitre’s opposition because it has opposed the war against Paraguay and Mitre’s attacks on freedom of the Press. *Oposicion y oposicion*, LA REPUBLICA, May 18, 1869, at 1.

anger and partisan spirit than reason," and expressed disbelief that it could represent the position of the then sitting Argentine President.<sup>297</sup>

Once handed down, the Sarmiento Administration had no choice but to respect the Argentine Supreme Court decision as part of the U.S. institutions that Argentina had adopted. The Court's decision was certainly part of what forced Sarmiento's government to adopt a softer tone towards rebels starting around when it appeared. *La República* would publish the text of the Court's decision on two separate occasions, once when issued and once during the Senate debates on the Segura execution, invoking it as authority to teach the President the error of his ways.<sup>298</sup> *La Nación Argentina* introduced the text of the Supreme Court decision with the bold, upper-case headline "VERY IMPORTANT. First defeat of Sarmiento. Judgment of the Supreme Court."<sup>299</sup> It had already published the text of the lower court decision a few days before and it complemented the Supreme Court's decision the next day with an article providing extensive analysis of how the constitutional treatises of James Kent, John Norton Pomeroy and George W. Paschal all contradicted Sarmiento's approach towards martial law and military jurisdiction.<sup>300</sup> According to *La Nación Argentina*, not only did the Government recognize that it needed to abide by the decision, but it recognized that it overreacted, though the Government was still making the face-saving argument that the Salta situation had not involved a formal declaration of martial law, making it different from where martial law might be declared.<sup>301</sup> It would

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297. *Opinión de un extranjero sobre algunos actos del gobierno del Sr. Sarmiento*, LA REPÚBLICA, May 5, 1869, at 1.

298. *Triunfo constitucional*, LA REPUBLICA, May 15, 1869, at 1 (giving the text of the Supreme Court decision against General Rivas and explaining the dispute); *Garantía de la vida*, LA REPUBLICA, June 20, 1869 (giving the text of the Supreme Court decision again, in the context of attacks on the Government's execution of Segura and its legal arguments).

299. **MUY IMPORTANTE. Primer derrota de Sarmiento. Sentencia de la Corte Suprema.** LA NACION ARGENTINA, May 14, 1869, at 2 (upper case and bold in original; giving the text of the Supreme Court decision).

300. See *La ley marcial*, LA NACION ARGENTINA, May 12, 1869, at 1 (giving the text of the lower court decision in Salta with the arguments of each side); See also *La ley marcial en San Juan*, LA NACION ARGENTINA, May 15, 1869 (discussing Sarmiento's arguments for military jurisdiction and refuting them with citations to Kent, Pomeroy and Paschal).

301. *Retiradas, marchas y contra-marchas*, LA NACION ARGENTINA, May 18, 1869, at 1 (noting a general recognition by the Sarmiento Government that it had over-reacted to the uprisings in the North and Northwest); *La sentencia de la Corte Suprema*, LA NACION ARGENTINA, May 18, 1869, at 1 (noting Sarmiento's recognition of his loss but distinguishing a case where martial law is declared). The government-linked newspaper, *El Nacional*, also immediately recognized that the Supreme Court's decision must be respected but that the case would have been different with a formal declaration in Salta of martial law, *No hay tal decisión sobre ley marcial*, EL NACIONAL,

have been ideologically inconceivable for Sarmiento to defy the Supreme Court's decision given the centrality of the federal courts to the U.S. model and Sarmiento's own past insistence on that centrality.<sup>302</sup> Only three days before the Supreme Court's May 13 decision, Sarmiento's Minister of Justice, Religion and Public Instruction, Nicolas Avellaneda, who would later succeed Sarmiento as President, signed a report that celebrated the success of the Argentine judiciary for properly assuming its authority under the U.S. model.<sup>303</sup> That report, announcing the growing number of decisions of the federal courts and a high level of compliance with their decisions, was republished by the pro-Government press a few weeks after the Supreme Court's decision.<sup>304</sup> In typical fashion for the times, the report proclaimed that "the Judicial Department assumes among us, as in the United States, a high political character, is a true branch of the Government, because it is not only called upon to decide questions that arise from the private sphere, but to uphold the Constitution and the national laws with its decisions."<sup>305</sup> The report recognized the "transcendental" importance of the Supreme Court's decisions in judicial review of both provincial and federal laws.<sup>306</sup> Sarmiento was bound by his own support of the U.S. model.

As a practical matter, no Argentine Government would again openly engage in the execution of civilians or rebels until a military coup in 1930.<sup>307</sup> (There are important examples of uninvestigated and unauthorized massacres in the post-World War I period,<sup>308</sup> and

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May 14, 1869, at 2. Foreign Minister Mariano Varela noted during a Senate debate that the Sarmiento Government had complied with the "Rivas" decision and claimed that the "Rivas" case was different because the rebels were not captured during combat, Congreso Nacional, Cámara de Senadores, *Diario de sesiones de 1869*, Session of June 17, 1869 at 146 (statement of the Foreign Minister).

302. See *supra* notes 190–202 and accompanying text; see also *El Nacional supra* notes 252–53.

303. *Memoria del Ministro de Justicia, Culto e Instrucción Pública*, EL NACIONAL, July 27, 1869, at 1. Also appears in *La Tribuna* on July 25, 1869. (The first two sections of the report appear in *El Nacional* on July 24 and July 26 at 1).

304. *Id.*

305. *Id.*

306. *Id.*

307. A month after the coup on Sept. 6, 1930, the military government issued a *Bando* (proclamation) authorizing the summary execution of persons captured in the act of crimes against public authority, see *Bando*, Oct. 8, 1930, art. 1, B.O. Oct. 8, 1930, 233–34. Several anarchists were subsequently captured and executed. ROBERT A. POTASH, *THE ARMY & POLITICS IN ARGENTINA, 1928–1945*, at 58 (1969).

308. The two most important examples are the repression of a strike by miners in the Province of Santa Cruz in 1921–1922 by the military that involved the execution of hundreds of strikers, see generally OSVALDO BAYER, *LA PATAGONIA REBELDE* (Hispanoamérica ed. 1985) (1972, 1974) (a classic history of repression of the miners'

against indigenous peoples in the 1870's and 1880's.<sup>309</sup>) The debate over the Sarmiento Administration's conduct soon reached a high pitch during discussion in the Senate of Zacarías Segura's execution. In an approach that in practice allowed Mitre to keep the Segura execution in the public eye, the discussion did not occur in a single, narrowly focused debate. Instead, it was combined with discussions of whether Congress should order the federal intervention of the Province of San Juan to return suspended Governor Manuel Zavalla to power and whether Congress should pass a law restricting the President's power to intervene in a province to restore the Republican Form of Government. (The power of the Federal Government to intervene in a Province to restore order is conferred on the Federal Government by Art. 6 of the Argentine Constitution, which after the 1860 reforms was similar to Art. IV, Section 4, of the U.S. Constitution,<sup>310</sup> and neither the U.S. nor Argentine Constitutions clarify the Branch of Government to exercise the power to intervene.) The debates represent an important moment in the process of Argentina's institutionalization, with extensive discussion of the limits of Executive power compared to the power of Congress in the U.S. model, in a country less than twenty years removed from Rosas.<sup>311</sup> By the end of the debate, the opposition recognized that the Executive had quietly committed itself to not repeat conduct such as the Segura execution in the future.<sup>312</sup>

One cannot exaggerate the centrality of the U.S. model in the Congressional debates provoked by the Segura execution, with Sarmiento ultimately even pulling in the recent U.S. Ambassador for support. The most important discussion of the execution occurred on June 17 and June 19, 1869. Four Cabinet Ministers came before the Senate on June 17 to explain and defend Segura's execution,<sup>313</sup> at least

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strike) and *Semana Trágica* (Tragic Week), a labor conflict in the City of Buenos Aires in January 1919 that ended with hundreds of deaths in what became a pogrom against Jews and leftists by right wing paramilitary groups and some police; see generally RODOLFO PERDÍA & HORACIO RICARDO SILVA, TRIENIO EN ROJO (2017).

309. ANDRÉS BONATTI & JAVIER VALDEZ, UNA GUERRA ÍNFAME: LA VERDADERA HISTORIA DE LA CONQUISTA DEL DESIERTO 50–51 (2015); Carolyne R. Larson, *Introduction: Tracing the Battle for History*, in THE CONQUEST OF THE DESERT: ARGENTINA'S INDIGENOUS PEOPLES AND THE BATTLE FOR HISTORY 9–10 (Carolyne R. Larson ed. 2020).

310. Art. 6, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.) (1860).

311. See Codesido, *supra* note 270, at 229, 246; Cucchi & Romero *supra* note 28, at 618.

312. Congreso Nacional, Cámara de Diputados, *Diario de sesiones de 1869*, Session of Aug. 9, 1869, at 230 (statement of Quintana).

313. Congreso Nacional, Cámara de Senadores, *Diario de sesiones de 1869*, Session of June 17, 1869, at 137 (noting the presence of the Ministers of the Interior, Foreign Relations, War, and Justice, Religion and Public Instruction).

implicitly because this involved the execution of a member of the educated elite and therefore required special explanation. Yet the Minister of War affirmed that General Arredondo acted under specific instructions from the Government (almost certainly from Sarmiento himself) when he ordered rebels tried by military commission.<sup>314</sup> The opposition focused above all on the Supreme Court's decisions establishing civilian jurisdiction, especially the recent decision on the Salta rebels, and that the rebellions under President Mitre had not been dealt with through military executions.<sup>315</sup> The opposition's argument received a predictable response. First, Vélez Sarsfield, the Minister of the Interior, argued that Segura had not been a rebel but a bandit using his presence in a rebel force to engage in pillage (for which no proof was offered) and accordingly, the Government had acted no differently from Lincoln immediately after the Civil War when dealing with guerillas who robbed and killed.<sup>316</sup> Second, Vélez Sarsfield emphasized that those who participated in Lincoln's assassination were likewise tried by military commission.<sup>317</sup> This initial debate ended inconclusively, with a bill introduced that died in committee that called for the Executive to gather information and forward it to the Senate so that General Arredondo and others responsible for the execution could be prosecuted.<sup>318</sup>

However two days later, Mitre offered the most politically powerful attack. Nominally, the debate concerned whether Congress should order the federal intervention of San Juan to restore Governor Zavalla to power, but Mitre, recently elected to the Senate, hijacked the debate to talk about Segura.<sup>319</sup> He had two different legal points that he needed to establish. First, he needed to convince defenders of provincial autonomy that the Federal Government had the power to intervene in San Juan to halt the Governor's impeachment. That required convincing the Senate that the clause in Art. 6 providing for

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314. *Id.* at 139, 147 (statement of the Minister of War—Martin de Gainza).

315. *Id.* at 138-39 (statement of Zavalia) (on past practice under Mitre compared to the bloodletting under Rosas and by Sarmiento); *id.*, at 138, 144-45 (emphasizing the Supreme Court's case law, especially in "Rivas").

316. *See id.* at 140 (statement of the Minister of the Interior Dalmacio Vélez Sarsfield).

317. *Id.* at 140-41 (statement of the Minister of the Interior) (the government also repeating the argument that failed in the "Rivas" case that the military authorities could act under the old Spanish military ordinances that remained in effect for the Army); *Id.* at 142-43 (referencing the statement of the Min. of Foreign Relations).

318. *Id.* at 148 (statement of Zavalia); Codesido, *supra* note 270, at 239 (notes that the proposed bill never returns to the Senate floor from Committee).

319. *See* Congreso Nacional, Cámara de Diputados, *Diario de sesiones de 1869*, Session of June 19, 1868, at 164 (statement of Mitre); Codesido, *supra* note 270, at 239 (noting that Mitre strongly questioned Segura's execution during the June 19 debate).

federal intervention to protect the Republican Form of Government could include a usurpation by a provincial legislature of excessive power, a difficult proposition, since defenders of provincial autonomy would not have wished the Republican Form of Government clause applied against a provincial legislature. The newspaper *La Republica*, as one would expect of a paper especially protective of Provincial autonomy, had already argued that according to *The Federalist* No. 43 (Madison) the Republican Form of Government clause only existed to prevent States from returning to Monarchical as opposed to Republican forms of government.<sup>320</sup> Mitre responds to this problem by emphasizing that U.S. practice had evolved since the Federalist Papers. While the Guarantee Clause may once have been designed to prevent a return to monarchy and to protect the Southern States from slave uprisings, today, the Federal Government “has used it as the instrument that has broken the irons of the slaves” and restored the U.S. to true popular sovereignty.<sup>321</sup> His allusion is to Reconstruction as then occurring during the Grant Administration.

Second, Mitre needed to establish that Congress had the power to order a federal intervention and did not need to leave it to the Executive. Mitre does this with an extensive discussion of *Luther v. Borden*,<sup>322</sup> to describe how Chief Justice Taney ruled that it was up to Congress to determine which of two competing governments in Rhode Island was to be recognized. According to Mitre, invoking Taney, if Congress was silent, the Executive could make a determination, but Congress always retained the possibility of a final decision.<sup>323</sup> But more centrally, the federal intervention issue let Mitre return to the execution of Segura.

Mitre describes Segura’s death as an assassination,<sup>324</sup> comparable to the execution during the Confederation of a close friend of Sarmiento’s, Antonio Aberastain,<sup>325</sup> and lacking support in U.S. law.<sup>326</sup>

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320. *La intervención sin derecho*, LA REPÚBLICA, May 18, 1869, at 1.

321. Session of June 19, 1868, *supra* note 319, at 154 (statement of Mitre).

322. *Luther v. Borden*, 48 U.S. 1, 39–40, 42–43 (1849) (holding that the political branches of government have the power to decide constitutional and governmental issues, that it rests with Congress to decide what government is in power in a state, and that the President can intervene if an exigency arises).

323. Session of June 19, 1868, *supra* note 319, at 157–58 (statement of Mitre).

324. *Id.*, at 164 (statement of Mitre).

325. *Id.* at 153 (discussing Aberastain’s execution—referring to the victims of Pocito); Bunkley, *supra* note 249, at 113, 205, 386–88, 395 (covering Sarmiento’s friendship with Aberastain and Aberastain’s execution in spite of Sarmiento’s attempts to solve the 1861 conflict in San Juan).

326. Session of June 19, 1868, *supra* note 319, at 153 (statement of Mitre) (condemning the execution under both U.S. law and under the history of the Aberastain execution that led Argentina, like the U.S., to bar such executions).

Then, after essentially calling Sarmiento an assassin, Mitre returns to the legal plane, which requires reference to the United States. The U.S., according to Mitre, received the doctrine of martial law from England, which had only applied it in moments when law is truly absent,<sup>327</sup> Lincoln was severely criticized for invoking martial law,<sup>328</sup> and most importantly, the U.S. Supreme Court had now ruled that martial law could not be applied when the courts are open, even when the location is part of the theater of war.<sup>329</sup> Mitre was possibly hobbled in his attacks by a lack of information, or he could have made Sarmiento look even worse. When the record of the Military Commission that tried Segura appeared in the Press in September, it showed that the Military Commission had received extensive testimony that Zacarias Segura had initially been taken prisoner by the rebel leader José Santos Guayama and was forced against his will to accept his position as Guayama's secretary once Guayama learned that he was literate.<sup>330</sup> While Segura confessed to having received thirty Bolivian silver pesos from Guayama, to having witnessed and heard about killings and to having been present at a battle, many witnesses testified that Segura never directly participated in a killing or in a battle himself but instead remained at Guayama's side as a member of his staff.<sup>331</sup> Regardless of these legal doubts, a stamp of "Approved" on the Military Commission's record gave a strong indication that Sarmiento had formally approved of General Arredondo's decision to carry out the execution, though after the fact.<sup>332</sup>

On July 1, Mitre lost the Senate vote for federal intervention to restore Zavalla as governor.<sup>333</sup> But that vote did not end the debate. Sarmiento himself published a newspaper article the next day affirming the Executive's authority to unilaterally intervene in a Province not just to put down sedition, but to maintain the Republican Form of Government,<sup>334</sup> and in response, on July 3rd, Sarmiento's opponents proposed a bill specifically providing that an intervention

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327. *Id.* at 164, 166-67.

328. *Id.* at 167 (covering how Lincoln's opinion was contrary to the Legislature and public opinion, and that he overstepped his bounds).

329. *Id.* at 166-67 (alluding to the U.S. Supreme Court decision of *Ex parte Milligan*); *Ex parte Milligan*, 71 U.S. 2 (1866).

330. *El proceso contra Zacarias Segura*, LA REPÚBLICA, Sept. 24, 1869, at 1.

331. *Id.*

332. *Id.* and continued on Sept. 25 and 26 (giving the full record of the Military Commission proceedings); *Zacarias Segura asesinado*, LA REPUBLICA, Sept. 28, 1869, at 1 (recapping Segura's role merely as a secretary and Sarmiento's approval of his execution).

333. SOMMARIVA, *supra* note 32, at 375.

334. See SOMMARIVA, *supra* note 32, at 378; DOMINGO F. SARMIENTO, *Las intervenciones in 32 OBRAS COMPLETAS* 65 (2001).

to guarantee the Republican Form of Government in a Province could only take place after a bill was passed by both houses of Congress—unlike a federal intervention to deal with an invasion or revolt, which the Executive could order on its own.<sup>335</sup>

Sarmiento ultimately fought the issue of limits on the President's federal intervention powers to a draw.<sup>336</sup> Congress passed a variant of the opposition's bill but was not able to muster the votes to overturn Sarmiento's veto.<sup>337</sup> At the same time, Congress never passed the bill Sarmiento introduced on July 30<sup>th</sup> as a counter-attack, that was an exact translation of the U.S. Militia Act of 1795 on the calling out of the militia.<sup>338</sup> Most of the debate around both Zavalia and Sarmiento's bills involved discussions of federal intervention, military jurisdiction in the event of rebellions, and martial law, using dueling U.S. authorities mixed with references to Argentine experiences.<sup>339</sup> However, Sarmiento also went too far when he presented a short report on U.S. law written by the recently replaced U.S. Ambassador to Argentina.<sup>340</sup> That move went too far even in the context of Argentina's yankee-mania and produced a unique backlash.<sup>341</sup>

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335. SOMMARIVA, *supra* note 32, at 375–78 (describing the Senate vote and Sarmiento's article); *id.* at 379–89 (describing Zavalia's bill to limit Presidential powers to order a federal intervention); *La Republica*, as the Buenos Aires newspaper most concerned with provincial autonomy and connected to Provincial elites, offered the strongest push for limits on unilateral federal interventions by the Executive, *see A los Sres. Avellaneda y Varela sobre la forma republicana*, LA REPUBLICA, July 2, 1869, at 1. The article is signed "O," almost certainly for Senator Nicasio Oroño from the Province of Santa Fé, since there is an accompanying article asserting that he does not own the newspaper. *El Nacional* describes *La Republica* as representing the Provincial interests that had opposed the Paraguayan War, and claimed the paper was owned by Oroño. *Oposicion racional de la 'Republica' (diario)*, EL NACIONAL, June 30, 1869, at 2.

336. Laura Cucchi, *La Construcción de una oposición a Sarmiento en el Congreso Nacional, Disidencias constitucionales y disputas políticas en el Senado de 1869*, 48 FOLIA HISTÓRICA DEL NORDESTE 97, 111 (2023).

337. *Id.* at 112.

338. *Mensaje del Poder Ejecutivo*, July 30, 1869, in Congreso Nacional, Cámara de Senadores, *Diario de sesiones de 1869*, Session of Aug. 21, 1869, at 591–97 [hereinafter *Mensaje del Poder Ejecutivo*]. *See also* Militia Act of 1795, ch. 36, § 1, 1 Stat. 424, 424 (1795) (repealed in part 1861 and current version at 10 U.S.C. § 331-335 (2000)). SOMMARIVA, *supra* note 32, at 381–396 (discussing the competing bills and Sarmiento's veto).

339. Even though the Ambassador's report provoked unique questioning of the U.S. as a model, *infra* notes 311–21 and accompanying text, the bulk of the debate continued to focus on the U.S. *See generally* Congreso Nacional, Cámara de Diputados, *Diario de sesiones de 1869*, Sessions of Aug. 6, 9, 10, 11 & 12, 1869, at 221–87.

340. *See infra* notes 283–22 and accompanying text.

341. *See infra* notes 323–26 and accompanying text.



## 2. The Ambassador's Letter

President Sarmiento's July 30th message to Congress, presenting the translation of the U.S. Militia Act of 1795 for adoption,<sup>342</sup> testifies both to Sarmiento's obstinance and the degree to which he thought he could capitalize on the U.S. model. His support in Congress from the interior of the country, which was never strong, suffered as a result of the Segura execution and assaults on provincial autonomy,<sup>343</sup> and Mitre had the loyalty of a significant sector of the City and Province of Buenos Aires. However Sarmiento's July 30th message, co-signed by Vélez Sarsfield, took an extraordinarily presidentialist approach with its reliance on the Militia Act of 1795.<sup>344</sup> That Act, passed by the U.S. Congress in response to the Whiskey Rebellion of 1794 in Western Pennsylvania, not only authorized the President to call out the militia under Federal command to put down an insurrection against state authorities and to protect the nation from invasion,<sup>345</sup> but broadly allowed the President to call out the militia to defeat resistance to the execution of federal law.<sup>346</sup> Sarmiento's bill was a translation of the U.S. law, and his message attached translations of the U.S. Militia Acts of 1792 and 1795.<sup>347</sup> He justified the measure entirely in terms of U.S. practice and history—focused on the manner in which Washington and Lincoln called out the militia to enforce federal law—and included an offer to have Argentina's ambassador in Washington obtain legal opinions from leading U.S. Constitutional Law scholars.<sup>348</sup> However, most controversial is the inclusion as well of a legal opinion signed by Henry G. Worthington,<sup>349</sup> who had just completed his service as U.S.

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342. See *supra* note 338 and accompanying text.

343. See, e.g., *Falsa base y falsa deducción*, LA REPUBLICA, Aug. 15, 1869, at 1 (accusing Sarmiento of not having moved beyond his narrow attitudes of thirty years before in *Facundo* of regarding Buenos Aires unitarians as "civilization" and provincial defenders of federalism as "barbarians"); *Salvemos la paz*, LA REPUBLICA, Aug. 27, 1869, at 1 (describing Sarmiento as vetoing the law on federal interventions because he is an absolutist at heart who wants to subdue the provinces in turn, even those he presently is friendly with); *Resistencias al absolutismo*, Aug. 28, 1869, at 1 (arguing that federalism for Sarmiento is about obtaining absolute presidential power).

344. See *Mensaje del Poder Ejecutivo*, *supra* note 338, at 591–97. See also Militia Act of 1795, 1 Stat. at 424.

345. Militia Act of 1795, ch. 36, § 1.

346. *Id.* § 2.

347. *Mensaje del Poder Ejecutivo*, *supra* note 338, at 591–97. The translations were by future Supreme Court Judge Luís Varela.

348. *Id.*

349. *Letter by H.G. Worthington to Minister of Foreign Relations Mariano Varela*, in Congreso Nacional, Cámara de Senadores, *Diario de sesiones de 1869*, Session of Aug. 21, 1869, at 596–97.

ambassador to Argentina a few weeks before and whom Sarmiento should have realized had little to offer as authority.

Henry Chew Gaither Worthington (1828–1909) came from a very prominent Maryland family<sup>350</sup> that likely provided him with a lifetime of connections, but he was hardly a Constitutional Law scholar. The *Sacramento Daily Union* called him a “small-beer” (insignificant) politician in noting his presence as the United States Minister to Argentina and Uruguay.<sup>351</sup> He served less than a year, presenting his credentials on August 31, 1868 and handing over his position to his successor on July 6, 1869.<sup>352</sup> Worthington and Sarmiento first met on the ship both took from New York to Buenos Aires, Sarmiento learning of his election to the Presidency when they stopped in Bahia, Brazil.<sup>353</sup> Worthington wrote to Secretary of State Seward that on the trip “[w]e cultivated with and for each other a most friendly feeling, and it gave me pleasure to find him so imbued with the spirit of our institutions.”<sup>354</sup> (Sarmiento would also recognize that they became friendly on the trip,<sup>355</sup> though there is no record of their having

350. See HARRY WRIGHT NEWMAN, ANNE ARUNDEL GENTRY: A GENEALOGICAL HISTORY OF TWENTY-TWO PIONEERS OF ANNE ARUNDEL COUNTY, MD., AND THEIR DESCENDANTS 192, 218–219, 243, 313, 31, 322, 342 (1933), [https://archive.org/details/annearundelgentr00newm\\_0/page/n3/mode/2up](https://archive.org/details/annearundelgentr00newm_0/page/n3/mode/2up) (tracing Henry Chew Gaither Worthington’s paternal family tree to John Hammond (1643-1709)). For a file on Worthington’s genealogy, contact the author. Worthington is named after Henry Chew Gaither, his father’s brother-in-law’s uncle, who was a hero in Washington’s army during the Battle of Brooklyn Heights. Worthington was also a direct descendant of the Dukes of Norfolk.

351. *Paraguay—Our Ministers*, SACRAMENTO DAILY UNION, Nov. 13, 1869, at 4, <https://cdnc.ucr.edu/?a=d&d=SDU18691113.2.20&srpos=1&e=-----en--20-SDU-1--txt-txIN-Paraguay%252DOur+Ministers-----> (last visited Nov. 12, 2024).

352. Despatch No. 2 from H.G. (Henry Gaither) Worthington, to William H. Seward, Secretary of State, (Sept. 11, 1868) *microformed on 16 & 17 Despatches From the United States Ministers to Argentina, 1817–1906 (1866–1869)* (Nat’l Archives Microfilm Publ’ns) [hereinafter Despatch No.2] (indicating presentation of credentials to the Argentine Government); Despatch No. 29 from H.G. Worthington, to Hamilton Fish, Secretary of State, (July 10, 1869) *microformed on 16 & 17 Despatches From the United States Ministers to Argentina, 1817–1906, (1866–1869)* (Nat’l Archives Microfilm Publ’ns) [hereinafter Despatch No.29] (indicating presentation of his recall).

353. Despatch No.2, *supra* note 352.

354. *Id.*

355. Letter by Domingo Sarmiento, President of Argentina, to Henry C. Worthington, (July 8, 1869) in DOMINGO SARMIENTO, 50 OBRAS COMPLETAS, PAPELES DEL PRESIDENTE (1868–1874), at 156, 157 (Universidad Nacional de La Matanza 2001). An undated copy of the letter also appears, together with an English translation, as an appendix to Despatch No.29, *supra* note 352. The letter, which thanks Worthington for his services as Minister, also includes a statement by Sarmiento linking Argentina’s use of the U.S. as a model with Argentine-U.S. relations. He says that because the United States is “our sister and our guide,” and because of the model it offers, “[a] difference with the United States seems impossible, for we would, as if involuntarily, find on

socialized much subsequently.<sup>356</sup>) Worthington grew up in Cumberland, Maryland, studied law there under his brother-in-law in the late 1840s and started practicing law in California from 1852 until the early 1860s, also entering politics.<sup>357</sup> He joined the California Assembly in 1862<sup>358</sup> and in 1864 was elected to Congress as the new state of Nevada's first representative.<sup>359</sup> His politics were never the clearest. He was a Democrat in the 1850s,<sup>360</sup> spoke in favor of William Walker's 1853–54 filibustering expedition to Baja California,<sup>361</sup> and was elected to Congress as a "Union man" (probably meaning Republican).<sup>362</sup> Then, while he would participate in Reconstruction after his short stay in Argentina, spending several years in the 1870s as the Collector of Customs at Charleston, South Carolina,<sup>363</sup> and

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which side the error lay, believing it out of the question that a hostile spirit could exist." (Translation taken from the Despatch.) After their trip together on the ship from the U.S. to Argentina, Sarmiento also describes Worthington as having "personal affection" towards him. Letter from President Domingo Sarmiento to Manuel Garcia, Argentine Ambassador to the United States (Oct. 28, 1868), in *CARTAS CONFIDENCIALES DE SARMIENTO A M.R. GARCÍA (1866–1872)* 24 (Manuel R. García-Mansilla ed. 1917).

356. Sarmiento and Worthington do seem to have roamed the streets of Buenos Aires together during Carnival. See Domingo F. Sarmiento to Mary Mann, (Feb. 12, 1869), in *ACADEMIA ARGENTINA DE LETRAS, CARTAS DE SARMIENTO A LA SEÑORA MARÍA MANN* 74, 75 (Imprenta de la Universidad 1936).

357. *BIOGRAPHICAL DIRECTORY OF THE AMERICAN CONGRESS, 1774–1996*, at 2092 (Joel D. Treese ed., CQ Staff Directories Inc. 1997) (noting his place of birth, Bar admission, practice and political posts); *Member of Congress from Nevada*, *CIVILIAN & TELEGRAPH*, Nov. 24, 1864, at 2 (noting his legal studies with George A. Pearre, moving to California after admission to the Bar and election to Congress).

358. *The Journal of the Assembly*, 13th Sess., Leg. of the State of Cal., 1862, at 178.

359. See NEWMAN, *supra* note 350, at 321.

360. See *Proceedings of the Democratic County Convention Held at Jamestown, Tuolumne County, June 17, 1854*, *COLUMBIA GAZETTE* (Tuolumne County, CA), June 24, 1854, at 2 (Worthington spoke to the Convention and unsuccessfully sought its nomination to the California Assembly); *Democratic County Convention*, *MARIPOSA DEMOCRAT* (Mariposa County, CA), June 18, 1857, at 2 (describing him as participating at the County party convention).

361. *From California*, *STAUNTON SPECTATOR* (Staunton, VA), Mar. 1, 1854, at 2 (listing Worthington as a speaker at a Jan. 17th event in Sonora, California, that sought to gather support for William Walker's attempt to create a new republic in Baja California and Sonora, Mexico).

362. *Member of Congress from Nevada*, *CIVILIAN & TELEGRAPH*, Nov. 24, 1864, at 2 (calling him a "Union man"). The *BIOGRAPHICAL DIRECTORY OF THE AMERICAN CONGRESS*, *supra* note 357, at 2092, calls him a Republican member of Congress, which is likely accurate, since in the Presidential election of 1864 the Republican Party called itself the National Union Party for the Lincoln-Johnson ticket, which also embraced some non-Republican elements. The *New York Times* describes him as part of the "Union ticket." *The Election*, *N. Y. TIMES*, Nov. 21, 1864, at 8.

363. *BIOGRAPHICAL DIRECTORY OF THE AMERICAN CONGRESS*, *supra* note 357, at 2092; *New Collector of Customs at Charleston, S.C.*, *N. Y. HERALD*, July 8, 1872, at 7; *Personal Mention*, *EUREKA DAILY SENTINEL* (Eureka, Nevada), May 4, 1876, at 2 (noting that Worthington thinks his position is in danger).

actively participating in the South Carolina Republican Party,<sup>364</sup> Worthington would support the Democrats in the Presidential election of 1880.<sup>365</sup> His enduring claim to fame was of having served as one of Abraham Lincoln's pall bearers,<sup>366</sup> and in his old age, he seems to have hung out at the U.S. Capitol.<sup>367</sup> In 1902, he testified before a Senate Committee on his knowledge of Central America, stating he had traveled there twice as a friend of William Walker during Walker's 1850s filibustering—going to Nicaragua once for several months and once for a year and a half.<sup>368</sup> In December 1908, he collapsed from a stroke during a visit to the House floor and passed away seven months later at the age of 81.<sup>369</sup>

Worthington's legal opinion, written in a private capacity as a letter to Foreign Minister Mariano Varela, notes that it is written at Varela's request,<sup>370</sup> and gives Sarmiento exactly the position he would have wanted.<sup>371</sup> First, he notes that the Government's repression in San Juan, including presumably the execution of Segura, would have "been considered without controversy or opposition in the United States by any author" and that "we would not have considered it in any respect as a violation of the Constitution."<sup>372</sup> According to Worthington, the power of the President to intervene in the states under certain circumstances is so clear that "I freely affirm that almost all of the Presidents, from Washington to Grant, have exercised this

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364. See *Reform in the Republican Party*, NEWBERRY HERALD (Newberry, S.C.), June 28, 1876, at 2.

365. *One More Hancock Supporter*, SALT LAKE DAILY HERALD, Aug. 25, 1880, at 1 (quoting the NEW YORK WORLD as writing that Worthington felt he could support Hancock for President over Garfield without severing his ties to the Republican Party on other questions).

366. *E.g.*, *General Worthington Stricken*, N.Y. TIMES, Dec. 11, 1908, at 2 (describing his stroke in the House the day before and that he was the only living pall bearer from Abraham Lincoln's funeral); *Lincoln's Pallbearers*, SACRAMENTO RECORD-UNION, Feb. 11, 1898, at 2. By the 1880s, Worthington's political career seems basically over. In 1886, when he got into a fight in a Washington, D.C. restaurant, he is described as spending his time helping a member of Congress from South Carolina with his clerical work. *Fighting in a Restaurant*, N.Y. TIMES, Aug. 31, 1886, at 1.

367. See *Gen. H.C. Worthington Dead*, N.Y. TIMES, July 30, 1909, at 7.

368. *Hearings Before the Senate Committee on Interoceanic Canals on H.R. 3110*, 57th Cong. 927 (1902) (statement of Henry G. Worthington).

369. *General Worthington Stricken*, N.Y. TIMES, Dec. 11, 1908, at 1 (describing his stroke); *Falls Unconscious on the Floor of the House*, WASH. TIMES, Dec. 10, 1908, at 2; *Gen. H.C. Worthington Dead*, N.Y. TIMES, July 30, 1909, at 7 (obituary).

370. *Letter by W.G. Worthington to Minister of Foreign Relations Mariano Varela*, Buenos Aires, (July 25, 1869), in Congreso Nacional, Cámara de Senadores, *Diario de sesiones de 1869*, Session of Aug. 21, 1869, at 596. There is no record of the letter in either Worthington or his successor's correspondence with the Secretary of State.

371. *Id.*

372. *Id.* (author's translation from the published Spanish version).

unquestionable right.”<sup>373</sup> He follows this with the example of George Washington during the Whisky Rebellion, states (falsely) that the President intervened in the 1842 Dorr Rebellion in Rhode Island, and refers vaguely to a recent insurrection in California.<sup>374</sup> He describes President Lincoln as having ordered the arrest of the entire Maryland legislature during the Civil War, imprisoning them in a federal fort (partially true, approximately a third of the legislature was arrested),<sup>375</sup> cites the court martial of John Yates Beall in New York as an example of federal intervention<sup>376</sup> (it was the trial of a confederate accused of leading guerilla raids from Canada, with no effect on New York institutions), and generally offers stream of consciousness-like examples far inferior to the typical quality of Argentine debates about U.S. law.<sup>377</sup> In fact, the letter was so inaccurate that no one from the Government responded when one Deputy commented: “It is good that it be known: Not everyone from North America knows about North America,”<sup>378</sup> and another noted that he was going to cite Madison, instead of Mr. Worthington.<sup>379</sup> It was too weak a piece of work for the Government to return to mention during the legislative debates.

Still, the subsequent legislative debate shows that Sarmiento had pushed invocation of the U.S. as a model beyond its limit. Manuel Quintana, a young lawyer who was President of the House of Deputies and a future President, led the opposition against the Government bill and advocated for an alternative bill that blocked federal interventions in provincial governments without Congressional authorization. Quintana distinguishes between U.S. presidential action to enforce federal law from federal intervention to protect the Republican Form of Government or restore deposed local authorities, something Worthington did not understand.<sup>380</sup> Only the unique circumstances of post-Civil War Reconstruction of the Confederate States offered an example of a true federal intervention. He presents an extraordinarily sophisticated analysis of U.S. practice, with a careful reading of *Luther v. Borden*<sup>381</sup>—the U.S. Supreme Court

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373. *Id.* at 596-97 (author’s translation from the published Spanish version).

374. *Id.* at 597.

375. *Id.* at 705.

376. *Id.*

377. *See id.*

378. Congreso Nacional, Cámara de Diputados, *Diario de sesiones de 1869*, Session of Aug. 10, 1869, at 249 (statement of Marmol).

379. Congreso Nacional, Cámara de Diputados, *Diario de sesiones de 1869*, Session of Aug. 12, 1869, at 275 (statement of Castellanos).

380. Congreso Nacional, Cámara de Diputados, *Diario de sesiones de 1869*, Session of Aug. 10, 1869, at 250 (statement of Quintana).

381. *Id.* at 252-55.

decision dealing with the Dorr Rebellion. Quintana describes President Tyler's unwillingness to intervene, and notes that the U.S. Supreme Court, in treating the question of which were the lawful governing authorities in Rhode Island, had viewed Congress, and not the President, as having the final word.<sup>382</sup> He also examines The Federalist 43 (Madison) and a variety of U.S. treatises and cases to conclude that the United States gives primacy to Congress on decisions involving federal interventions in the states to maintain political peace.<sup>383</sup> He and his allies also adopt a mocking tone—that the government, with its mindless copying, cannot even get its copying right.<sup>384</sup> He cites Switzerland and its cantons as having also been a model in 1853 for article 6 of the Argentine Constitution,<sup>385</sup> and he concludes that “[i]f studying the institutions of others to mold them to one's own conditions is to proceed as a statesman, copying them without discernment and applying them without criteria is to convert oneself into a servile imitator.”<sup>386</sup> Sarmiento's use of a departing Ambassador to sustain propositions contrary to the model of decentralized power and liberty that dominated visions of the U.S. pushed his ideological advantage past the breaking point. That the Ambassador was a “small-beer” politician and lawyer likely did not help.<sup>387</sup>

Perhaps most fascinating is the attitude of the newspaper *La Republica*, the major newspaper in Buenos Aires that supported the interests of the interior provinces, and hence a newspaper strongly opposed to federal interventions by the President on his own authority, and severely distressed by Segura's execution.<sup>388</sup> Usually a

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382. *Id.* at 241, 243–47, 254–55.

383. *Id.* at 255–57.

384. *Id.* at 265.

385. *Id.* at 238.

386. *Id.* at 266. Debate in the Senate was less extensive than in the House of Deputies, where the bill originated. Senator Nicasio Oroño, as the reporting member of the Constitutional Affairs Committee, deferred to the House of Deputies debate, and in arguing for limiting the President's power of military intervention in the Provinces, both turns to the United States for authority and argues against transplanting U.S. legislation to Argentina without considering the cultural and social differences between the two countries and Argentina's own history. Congreso Nacional, Cámara de Senadores, *Diario de Sesiones de 1869*, Session of Aug. 21, 1869, at 600, 602, 604 (statement of Oroño).

387. *Paraguay—Our Ministers*, *supra* note 351, at 4 (describing Worthington as a “small-beer” politician).

388. Even months later, *La Republica* followed up with articles attacking Segura's execution. See *Zacarias Segura asesinado*, LA REPUBLICA, Sept. 28, 1869, at 1. The newspaper published the complete record of the military commission that tried Segura. *El proceso contra Zacarias Segura*, LA REPUBLICA, Sept. 24, 1869, at 1 (continuing on Sept. 25 and 26).

strong proponent of the U.S. constitutional model, the paper responded to Sarmiento's July 30<sup>th</sup> message to Congress writing:

Just because in the United States they order hangings in the streets without a trial, doesn't mean we must imitate them; that would subvert justice and proclaim us absurd automatons.<sup>389</sup>

The paper was clearly horrified by the possibility of an Argentine President like Sarmiento employing the sort of power enjoyed by Lincoln during the Civil War against Argentina's provinces. If the U.S. model could let a President send troops on his own authority whenever he felt that provincial institutions or federal authority were threatened, nothing would remain of Argentine federalism.<sup>390</sup> Sarmiento's invocation of the U.S. model here undermined the core interests of the provinces, and even if Sarmiento were somehow correct, the paper argued that the U.S. model needed to be understood in terms of the much greater respect the U.S. historically showed to federalism.<sup>391</sup>

## V. CONCLUSION

Every ideology has its limits. However, as one would often expect with a deeply held belief, *La Republica's* rupture with the U.S. model was short-lived and limited. By the middle of August, *La Republica* was celebrating the appearance of a Constitutional Law text by Florentino Gonzalez whose primary attribute, according to the newspaper, was its explanation of federalism as practiced in the United States.<sup>392</sup> But the best example of its return to yankee-mania is a paean to U.S. constitutionalism that it published on October 2 under the headline, "The Yankee-mania and the European-mania."<sup>393</sup>

*La Republica* begins its celebration of "yankee-mania" by arguing that even Europe has recognized the need to turn to free institutions like those of the U.S. and that "[t]he United States are the model that all the illustrated men and liberals of Europe take as the ideal for the best government, and their efforts tend to transplant American institutions in all parts of the old world."<sup>394</sup> According to *La Republica*, "eighty years of experience have established those institutions as the

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389. *Proyecto federal sobre intervenciones*, LA REPUBLICA, Aug. 5, 1869, at 1.

390. *Id.*

391. *Id.*

392. *Lecciones de derecho constitucional, por D. Florentino Gonzalez*, LA REPUBLICA, Aug. 17, 1869, at 1.

393. *La yankee-mania y la europa-mania*, LA REPUBLICA, Oct. 2, 1869, at 1.

394. *Id.*

most in line with the nature and aspirations of man.”<sup>395</sup> Then, while congratulating Sarmiento for having had Francis Lieber’s book, *On Civil Liberty and Self-Government* translated, *La Republica* engages in a bit of yankee-mania one-upmanship:

We expected that Mr. Sarmiento would arrive possessed of that progressive spirit that they have baptized here with the name yankee-mania, and we rejoiced for that because that is how one would propose to effectively acclimatize in this country a republic. We remain confident that it will still be that way, and that it was only through error that he endeavored to pass certain laws that certainly had nothing in common with the spirit of yankee politics, which is what must prevail in these countries if they are to really and truthfully become republican.<sup>396</sup>

All major forces in Argentina in the 1860s accepted the primacy of the U.S. model. That ideology, that copying U.S. constitutionalism is the best path toward the shared goal of becoming a liberal republic, governed hundreds of hours of key legislative debates and reams of newspaper articles. The debates focused on state of siege and federal intervention were not unique. For instance, Legislators showed exactly the same focus on U.S. practice in the other major debate of 1869, on whether the Federal Government had the legal authority to build a new port for the City of Buenos Aires, a debate that Sarmiento lost.<sup>397</sup> Like any ideology, yankee-mania had its limits. Perhaps in response to Sarmiento’s excesses, debates from 1870–1872 at a Convention for a Provincial Constitution for the Province of Buenos Aires used U.S. constitutionalism much less than national constitutionalism did,<sup>398</sup> and certainly by the late 1890s, a stabilized political system and a new perception of the U.S. as an international competitor due to its regional ambitions corresponded with moves

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395. *Id.*

396. *Id.*

397. *Supra* note 206.

398. Debates at the Province of Buenos Aires’ Convention for a new Provincial Constitution, from 1870–1873, involved some delegates that resisted application of U.S. practices in ways that never occurred at the national Constitutional Conventions in 1853 and 1860, though in a context where the concerns were much more local and much less important for political stability than the constitutional agreements at the national level. *See, e.g.* DEBATES DE LA CONVENCION CONSTITUYENTE DE BUENOS AIRES 1870–1873, 42, 45 Session of June 7, 1870 (statement of José Guido) (questioning Mitre’s insistence that the Convention form multiple committees as in U.S. practice).



away from treating U.S. case law and doctrine as binding.<sup>399</sup> Nevertheless, especially from the 1860s through the 1890s, yankee-mania was the political ideology that governed not just Argentina's courts, but the political elite broadly. Argentine courts, in their insistence on treating U.S. constitutional case law as binding, may have reinforced the general attitude of Argentina's educated elites, but they did not initiate the trend.

Other members of Argentina's elite wrapped themselves in the U.S. model, but tracing Sarmiento's rise as the most influential entrepreneur of the U.S. model illustrates many characteristics that one would expect to flow from prestigious constitutional transplants. Sarmiento shows how a successful ideological entrepreneur can leverage their reputation as the exponent of a shared ideology into political success. As his relationship with Mary Mann and Worthington shows, he also offers an early example of an ideological entrepreneur trying to leverage foreign relationships to increase their authority as an ideological exponent—albeit more successfully with Mary Mann than with Worthington. But perhaps most important, Sarmiento vividly illustrates how a foreign model can help achieve constitutional commitments. In crucial debates, Sarmiento finds himself bound by the ideology that brought him to power—and bound not just by legal rules, but by the Argentine elite's understanding of what U.S. constitutionalism involves. From the 1860s until 1930, Argentina's new constitutionalism would bring a functioning system of judicial review, end the execution of rebels after trial by military commission, and broadly protect property rights, freedom of the press, and other basic liberties sufficiently to attract massive immigration and investment, which in turn facilitated sustained economic growth.<sup>400</sup> When one compares Argentina under Rosas's domination to the Argentina of Mitre and Sarmiento, the basic lesson

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399. The first case in which the Argentine Supreme Court would openly vary from U.S. practice, though admittedly on a federalism issue with textual differences, was in 1897, in *Ferrocarril Central Argentino c/Provincia de Santa Fé*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 3/7/1897, 68 FALLOS 227 (1897).

400. This author has already discussed the protection of individual rights in this period in Jonathan M. Miller, *Judicial Review and Constitutional Stability: A Sociology of the U.S. Model and its Collapse in Argentina*, 21 HASTINGS INT'L & COMP. L. REV. 77, 113-142 (1997-98), and analyzed how the Supreme Court helped block excessive repression of rebels in Jonathan M. Miller, *Courts and the Creation of a Spirit of Moderation: Judicial Protection of Revolutionaries in Argentina*, 20 HASTINGS INT'L & COMP. L. REV. 231 (1996-97). Argentina had a real GDP growth rate of over 5 percent a year in the 50 years before World War I, and its population grew at 3.4 percent a year, thanks primarily to immigration from Europe, CARLOS FEDERICO DÍAZ ALEJANDRO, *ESSAYS ON THE ECONOMIC HISTORY OF THE ARGENTINE REPUBLIC* 421 (1967).

is clear. Constitutional transplants, while not without their drawbacks, can form the basis of a shared ideology that establishes enforceable constitutional commitments.